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Civil Procedure II

JAMAICA

IN THE COURT OF APPEAL

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SUPREME COURT CIVIL APPEAL NO. 23/93

COR: THE HON MR JUSTICE CAREY JA
THE HON MR JUSTICE GORDON JA
THE HON MR JUSTICE WOLFE JA

BETWEEN VASHTI WOOD APPELLANT
(On behalf of the near relations of
DALTON ROY BOX (deceased)

A N D H. G. LIQUORS LIMITED 1ST RESPONDENT

A N D CRAWFORD PARKINS
o/c EXFORD PARKINS 2ND RESPONDENT

Gordon Robinson & Lowell Morgan for appellant

Christopher Honeywell for 1st respondent

2nd 3rd March & 7th April 1995

CAREY JA (Dissenting)

This is an appeal against two orders of the Master, the first of which dismissed the appellant's action for want of prosecution and the second refused the appellant's application to set aside the earlier order of dismissal.

On 9th February 1987 the appellant filed a writ in the Supreme Court against the respondents under the Law Reform (Miscellaneous Provision) Act and the Fatal Accidents Act. On 25th February 1988 the first respondent entered a conditional appearance which became unconditional on 25th May 1988. On 6th June 1988 the 1st respondent consented to the appellant's statement of claim being filed out of time and within thirty days thereof. Thus the matters remained in quiet somnolence until 26th February 1992 when the first respondent filed a summons to dismiss the action for

want of prosecution. In the affidavit to support the application, the material paragraph states as follows:

> "8. That the Plaintiff's inordinate and inexcusable delay has and will continue to prejudice the 1st Defendant herein as since the 1st Defendant is a limited liability company it relies entirely on the evidence of its servants and officers at the time of the incident in order to indicate its case but that said servants or officers are likely to either leave the company or become otherwise unavailable to give evidence herein."

One other fact which I should mention, is that the date of the accrual of the cause of action was 26th February 1981. The action was filed seventeen days before the action would become statute barred.

Mr. Gordon Robinson, although conceding that the appellants were guilty of inordinate and inexcusable delay, argued in his accustomed economic and incisive style, that the onus was on the respondent to establish specific prejudice but it had failed to lead any such evidence and had therefore failed in point of proof. He relied on ***Department of Transport v Chris Smaller (Transport) Ltd.*** [1989] 1 All ER 897 and ***Hornagold v Fairclough Building Ltd*** [1993] 137 Sol Jo. With respect to his challenge of the Master's refusal to set aside the dismissal for want of prosecution, Mr. Robinson submitted that her refusal was based on a view that she had no jurisdiction to vary her own order except under section 269 of the Civil Procedure Code Law commonly referred to as the "slip rule."

Mr. Honeywell on behalf of the first respondent, argued that it was not correct that additional proof of prejudice was required. Delay of itself which was inordinate and inexcusable, was proof of prejudice or of the likelihood of an unfair trial. The proof of prejudice was not to be found in paragraph 8 of the affidavit but in the history

of the matter. There has been a matter of thirteen years delay. He relied on ***West Indies Sugar v Minnell (Unreported)*** SCCA 91/92 delivered 20th December 1993. To date, no statement of claim had been filed. Even if leave to file the statement of claim out of time were granted, how long he asked, would it take before the matter came to court - two years?

I begin with ***Birkett v James*** [1977] 2 WLR 38 in which Lord Diplock reminded that the principles governing the jurisdiction to dismiss for want of prosecution were settled in three cases which were heard together and usually referred to as ***Allen v McAlpine*** [1968] 2 QB 229. Those principles, he stated in this way at p. 46:

> "... 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 the present appeal, the respondent relies on the principle (2) noted above. In considering the period of delay, any period before the issue of the writ is irrelevant: only delay after the issue of the writ is relevant. It may also be said that time which has elapsed before the expiry of the period of limitation is not to be taken into reckoning.

> "To justify dismissal of an action for want of prosecution the delay relied upon must relate to time which the plaintiff allows to lapse unnecessarily after the writ has been issued. A late start makes it the more incumbent upon the plaintiff to prove with all due speed and pace which might have been excusable if the action had been started sooner may be

> inexcusable in the light of the time that has already passed before the writ was issued."

per Lord Diplock in Birkett v James (supra) at p. 50.

In the context of this case, from the fact that the appellant made a late start (the writ having been filed a matter of days before the action became statute barred) there was a higher duty on her to prosecute it with diligence. Mr. Gordon Robinson has frankly conceded that the delay is both inordinate and inexcusable.

The fact that there is proof that the delay is inordinate and inexcusable does not, in my view, justify the exercise of the power to dismiss for want of prosecution. This must be so because the power is exercisable only where there is delay and there is prejudice. No one can doubt that the delay may well cause prejudice to the defendant for any one of many reasons, the fading of memory, the inability to locate or the death of witnesses or a defendant may be prejudiced by having an action hanging over his head like the sword of Damocles indefinitely or to the defendant's business interests. ***Biss v Lambeth Southwork and Lewisham Health Authority (Teaching)*** [1978] 2 All ER 125. ***Department of Transport v Chris Smaller (Transport) Ltd*** [1978] 1 All ER 847. But the defendant has the burden of proving prejudice. This was at the heart of the submissions of learned counsel for the appellants. Lord Diplock made it clear beyond any peradventure. ***Birkett v James*** (supra) at p. 51.

> "...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."

Again this was reinforced by Lord Griffiths in ***Department of Transport v Chris Smaller (Transport) Ltd*** (supra) at p. 900:

> ".. The plaintiff must have been guilty of inordinate and inexcusable delay in the prosecution of the action after the issue of the writ and the defendant must show prejudice flowing directly from the post-writ delay which must be additional to any prejudice suffered because the plaintiff did not commence his action as soon as he could have done."

Later in his speech at p. 903 he expressed himself in these terms:

> " The principles 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."

One of the arguments deployed before the House of Lords which was really the argument advanced by Mr. Honeywell, required the House to depart from ***Birkett v James*** and to hold that inordinate and inexcusable delay occurring after the expiration of the limitation period should be a sufficient ground to strike out an action even if there can still be a fair trial of the issues and even if the defendant has suffered no prejudice as a result of the delay. But this their Lordships have declined to do and the law is as I have endeavoured to show. The defendant must prove prejudice. In ***Hornagold v Fairclough Building Ltd*** 137 Sol Jo LB 153 Roch LJ is reported as saying that:

> "to succeed in an application to strike out a defendant must produce some evidence that there had been a significant addition to the substantial risk that there could not be a fair trial caused by the post commencement of proceedings or by periods of

> inordinate and inexcusable delay or that there had been a significant addition to the prejudice to a defendant either as between the defendant and the plaintiff or as between the defendant and another party to the action caused by such delays. In the present case what was contained in the affidavits was insufficient as the defendants had neither identified the particular witnesses nor the particular respects in which their evidence had been impaired. It was always incumbent on the defendants to do so or to show a particular reason why they said there was a substantial risk that there could no longer be a fair trial of the issues. Were the mere assertion of prejudice to be sufficient, then that would in effect transfer the burden of proof on that issue to the plaintiff, a submission that was expressly rejected by the House of Lords in ***Department of Transport v Chris Smaller Ltd [1989] AC 1197."***

The authorities are all one way and the principles are now settled.

Nevertheless Mr. Honeywell does not agree that there is any need to prove prejudice. He pointed to ***Clough v Clough*** [1968] 1 All ER 1179 as supporting his contention. But I do not think it does. Lord Denning MR who gave a judgment with which Danckwerts and Widgery LJJ, agreed considered both limbs of the principle which had been enunciated in ***Allen v McAlpine*** [1967] 2 QB 229 . Thus at p. 1181 he said this:

> "... we have to consider the nature of the delay. We were told by counsel that there had been negotiations and that that might account for the delay; but no affidavit has been put before us. 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. ..."

Learned counsel for the first respondent cited ***West Indies Sugar v Minnell*** (Unreported) 20th December 1993 and ***Valentine v Lumsden*** (unreported) 6th December 1993. I refer first to the latter of these cases. I am quite unable to see what comfort or aid Mr. Honeywell can derive from that case. Patterson JA (Ag) said this at p. 7:

> " The appellant did not only prove that there was inordinate and inexcusable delay on the part of the respondent's attorney-at-law, but also that the delay resulted in severe prejudice to him, and had given rise to the possibility that a fair trial was no longer possible. That evidence was uncontroverted, and in my view, it satisfied the principles laid down in ***Allen v McAlpine*** [1968] 1 All ER 543 for the exercise of the court's discretion."

Downer JA who delivered the main judgment pointed out at p. 3 that the defendant proved not only inordinate delay but prejudice.

With respect to the former case referred to above, this court was concerned with an application on behalf of the plaintiff to extend time for filing statement of claim and an application on behalf of the defendant to dismiss the action for want of prosecution. The principles governing such applications are not the same and the approach of a judge in resolving the problems created by such joint applications cannot be "a rigid mechanistic approach" (per Sir Thomas Bingham MR in ***Costellow v Somerset CC*** [1993] 1 All ER 952 at p. 959. In the West Indies Sugar case, there was evidence that this was a running down case where witnesses would need to be called to recount facts. In those circumstances, the possibility of memories fading was real. It seems to me that both prejudice and the risk of an unfair trial were shown. Nothing was said in that case or in the judgment of any member of the court which

challenges the obligation of a defendant to prove prejudice or the impossibility of a fair trial at that distance of time.

It follows from what I have said that I must reject the submissions of Mr. Honeywell that no proof of prejudice was necessary. Paragraph 8 of his affidavit does not speak to the nature of the prejudice which it asserts. It has not been said that the witnesses are unavailable but that the possibility exists. In my view, that falls far short of proof of more than minimal prejudice.

This Court can only interfere where we are satisfied that the Master 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. See the judgment of Lord Denning MR in ***Ward v James*** [1966] 1 QB 273 at p. 293 where he said:

> " ' This court can and will, interfere if it is satisfied that the judge was wrong. Thus it will interfere if it can see that the judge has given no weight (or no sufficient weight) to those considerations which ought to have weighed with him ... Conversely it will interfere if it can see that he has been influenced by other considerations which ought not to have weighed with him, or not weighed so much with him ... It sometimes happens that the judge has given reasons which enable this court to know the considerations which have weighed with him; but even if he has given no reasons, the court may infer, simply from the way he has decided, that the judge must have gone wrong in one respect or the other, and will thereupon reverse his decision:...' "

In my judgment, the learned Master was wrong in her determination of the application to dismiss the action for want of prosecution because she did not appreciate that the respondent had not provided any evidence of prejudice. The only evidence which the

affidavit contained spoke to the likelihood of witnesses being unavailable. The judgment of the Master stated as follows:

> "... Further, in cases such as the matter under consideration, where the evidence of witnesses is wholly or substantially dependent on a witness's recollection of facts relating to what he had seen, his memory will be affected by the passage of time."

But we understand from Mr. Robinson and an affidavit from Mr. Honeywell himself confirmed that the issue would be whether the second respondent was acting in the course of his employment at the material time. It was not a case involving the recollection of facts in which memories fading by the passage of time could result in the risk of an unfair trial. The Master therefore took into consideration matters which ought not to have weighed with her.

I pass now to deal with the Master's refusal to set aside her order dismissing the action for want of prosecution. She said this in refusing the application at p. 46:

> " A variation of the order made on the 14th January 1993 can only be entertained within the constraints of the Judicature Civil Procedure Code - S 269 which provides:-
>
> > 'Clerical mistakes in Judgments or orders, or, errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a Judge on motion, or summons, without appeal.'
>
> There are no circumstances satisfying the requirements of the section which would permit me to vary the order dismissing the action for want of prosecution. This Court has no power to interfere with the order, for want of jurisdiction."

Mr Honeywell conceded that the Master did have jurisdiction to vary the order in the circumstances of the case.

The law is correctly stated in Halsbury (4th Edition) Vol. 26 paragraph 555 where it is stated:

> "...Until a judgment or order has been entered there is inherent in every court the power to withdraw, alter or modify it, either on the application of one of the parties or on the initiative of the judge himself, although an oral judgment cannot be reopened save in most exceptional circumstances. In the meantime the judgment or order is provisionally effective and may be treated as a subsisting judgment or order in cases where the justice of the case requires it, and the right of withdrawal would not be thereby prevented or prejudiced."

For completeness I should point out that the application was founded on additional evidence presented to the Master, the nature of which it is not necessary to detail. It is manifest that the Master fell into error when she determined that she lacked jurisdiction to entertain that application.

In the result, I would allow the appeal, set aside the orders made in the court below and grant leave to file and deliver a statement of claim within fourteen days hereof. I would order that there be no order as to costs.

GORDON, J.A.:

By writ of summons filed February 9, 1987 the plaintiff claimed damages under the Fatal Accidents Act for the near relatives and under the Law Reform (Miscellaneous Provisions) Act for and on behalf of the estate of Dalton Roy Box, deceased, who died on January 18, 1985. The endorsement on the writ averred that Dalton Box succumbed from injuries he sustained on February 26, 1981 when the motor vehicle in which he travelled as a passenger, owned by the firstnamed defendant and driven by the secondnamed defendant, collided into the rear of a stationary trailer.

The pleadings indicate that conditional appearance was entered by the first defendant on February 25, 1988 this appearance became unconditional on May 25, 1988. On June 6, 1988 the defendant consented to the plaintiff having an extension of thirty (30) days within which to file a statement of claim out of time. The plaintiff took no further steps to prosecute the action and on February 26, 1992 the defendants filed a summons seeking the dismissal of the action for want of prosecution. The summons was returnable on March 17, 1992. The summons was not heard on that date and was subsequently reissued, returnable on January 14, 1993. It was served on the plaintiff's attorneys-at-law on January 5, 1993. On the return day the plaintiff's attorney attended the hearing when the Master by order dismissed the action for want of prosecution. Costs were awarded to the first defendant.

The plaintiff by summons filed on January 28, 1993 sought an order that:

"1. The Order made by the Master on 14th day of January, 1993 in terms of paragraphs 1 and 2 of a Summons dated February 26, 1992 be varied to read:

i. The Action against the First Defendant herein be dismissed for want of prosecution unless the Plaintiff files a Statement of Claim within seven (7) days of the date hereof

ii. Cost of and incidental to this application be the First defendant's to be agreed or taxed.'

2. Alternatively, leave to appeal against the said Order by the Master be granted.

3. The costs of and occasioned by this application be the First Defendant's to be agreed or taxed."

Returnable on February 15 1993 the summons was heard on March 9, 1993 and the Master ordered that:

"1. Order made on January 14, 1993 to stand

2. The Plaintiff be and is hereby granted leave to Appeal against this Order and against the Order made on January 14, 1993."

In his affidavit in support of the summons to dismiss for want of prosecution Mr. Honeywell deposed:

"8. That the plaintiff's inordinate and inexcusable delay has and will continue to

> prejudice the 1st Defendant herein as since the 1st Defendant is a limited liability company it relies entirely on the evidence of its servants and officers at the time of the incident in order to indicate its case but that said servants or officers are likely to either leave the company or become otherwise unavailable to give evidence herein."

The main ground of appeal relied on by the appellant runs thus:

> "3. At no stage did the evidence adduced by the First Defendant/Respondent disclose any real prejudice and accordingly, the learned Master erred in striking out the Plaintiff's claim and subsequently refusing to vary her Order."

On this ground Mr. Robinson in his written submissions said:

> "2. The onus has always been on the Applicant, Defendant, in these matters to establish a specific prejudice separate and apart from the delay (See **DEPARTMENT OF TRANSPORT v. CHRIS SMALLER LTD.) [1989] 1 All E.R. 897). In HORNAGOLD v. FAIRCLOUGH BUILDING LTD. (Solicitor's Journal 27/5/93)** an Affidavit similar to the present one was rejected as insufficient. These recent authorities follow the principles in the earlier decisions of **BIRKETT v. JAMES [1978] A.C. 297 AND ALLEN v. SIR ALFRED McALPINE (1968) 2 Q.B. 299."**

The evidence before the court shows that five (5) years after the writ was filed no statement of claim was filed by the plaintiff. The summons to dismiss for want of prosecution provoked:

> (a) a notice of intention to proceed within one month filed on March 16, 1992; and

(b) a summons filed on July 23, 1992 seeking leave to file a statement of claim out of time.

These processes obviously caused the considerate defendant to stay proceedings on its pending summons but yet again the plaintiff failed to respond to the courtesy extended and did not take any further action. The plaintiff's attorney-at-law attended the hearing of the summons to dismiss for want of prosecution, nearly six (6) years after the writ. Two weeks after the order of the Master dismissing the writ for want of prosecution the plaintiff sought by summons to have the order of the Master varied to permit the plaintiff to file a statement of claim. The reasons for the display of lack of due diligence on the part of the plaintiff are detailed in the affidavit filed in support of the summons thus:

> "4. That the fault in not preparing, filing and serving a Statement of Claim herein was entirely the fault of the Plaintiff's Attorneys due to an administrative error in the firm and the plaintiff is still desirous of pursuing its action against both Defendants."

> "8. That the failure of the Plaintiff to resist the Firstnamed Defendant's application to dismiss by way of Affidavit was due to the inadvertence of the Plaintiff's Attorneys and not to any failure of the Plaintiff to pursue her claim against the Defendants."

The Master having given the submissions of Counsel full consideration said in her judgment:

> "There had been, undoubtedly, an inordinate delay on the part of the

> plaintiff's attorney-at-law from the outset and no justifiable excuse has been established for this delay. The delay will operate against the interest of the defendants. The first defendant has shown that his witnesses are likely to leave its employ giving rise to the possibility of their unavailability to testify on that defendant's behalf. Further, in cases such as the matter under consideration, where the evidence of witnesses is wholly or substantially dependent on a witness's recollection of facts relating to what he had seen his memory will be affected by the passage of time. It would therefore be difficult for him to accurately recall what had transpired at the material time. Consequently, it would not be possible for the defendant to obtain a fair trial and would thus be prejudiced.
>
> It is of paramount importance that actions of this nature be brought to trial with reasonable expedition. The plaintiff's attorneys-at-law have failed in their duty to prosecute this case with reasonable promptness. Further the inordinate delay is likely to cause injustice to the defendant. Consequently, the action must be dismissed for want of prosecution with costs to the 1st defendant."

Section 192(b) of the Judicature (Civil Procedure Code) Law gives the time for filing of the statement of claim as:

> "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 Judge."

Non-compliance with any of the provisions of this Law may lead to the proceedings being set aside. By section 244 failure of the plaintiff to file a statement of claim within the prescribed time can lead to the action being dismissed for want of prosecution. In **Clough vs. Clough** (1968) 1 All E.R. 1179 Lord Denning, M. R. observed:

> "...if a plaintiff fails to deliver a statement of claim within the specified time there is a discretion to dismiss for want of prosecution."

The filing of the statement of claim is the second of a number of steps in prosecution of a case.

The principles by which the court should be guided in deciding on the exercise of its discretion were stated by Denning, M.R. in **Allen vs. Sir Clifford McAlpine & Sons** (1968) 1 All E.R. 543 at page 547:

> "...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."

Lord Diplock in **Birkett vs. James** (1977) 2 All E.R. 801 restated the principles thus:

> "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."[Emphasis added]

and at page 51:

> "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."

From the above extracts it is discerned that while it is desirable that the defendant should:

> "show that they would suffer more than minimal prejudice as a result of the post writ delay"

(Department of Transport vs. Chris Smaller (Transport) Ltd. (1989) 1 All E. R. 897); inordinate and inexcusable delay on the part of the plaintiff or his attorneys-at-law is the primary ground for dismissal of an action for want of prosecution.

In **West Indies Sugar vs. Stanley Minnell** S.C.C.A. No. 91/92 (unreported) delivered December 20, 1992 failure of the plaintiff to file a statement of claim eight (8) years after the accident and four (4) years after the writ was filed resulted in the action being dismissed for want of prosecution. In **Patrick Valentine vs. Nicole Lumsden (An infant) and Lascelles Lumsden (Next friend)** S.C.C.A. No. 106/92 (unreported) delivered December 6, 1993 the incident which gave rise to the action

was on March 13, 1986 and the summons to dismiss was filed on April 22, 1992. The decision of the Master dismissing the summons was reversed on appeal.

The appellant urged that the defendant had failed to show that the delay had been or would be to his disadvantage and operate unfairly against him. This being so the appellant was entitled to judgment and the orders prayed in his summons. The respondent replied that the inexcusable and inordinate delay operated unfairly against him. The delay could lead to a substantial risk of injustice.

The courts have been particularly anxious to ensure that cases are dealt with expeditiously, especially accident cases. In these cases witnesses have to depend largely on their memories to recollect details of events which occurred in the past and with the passage of time recollection fails. If this court should accept and act on the submissions of the appellant could it be said that the court acted fairly? Fairness is an overriding consideration in the contemplation of proceedings in our civil and criminal courts. To act as the appellant urged would result in this court ratifying a delay of eight years in the filing of the statement of claim and further delay in bringing to a close the pleadings in the writ filed on February 9, 1987. At best a very optimistic estimate of the time that would elapse before this writ comes up for hearing is eighteen months from today. Witnesses would therefore be required to testify to events which occurred in 1981 some sixteen (16) years afterwards. This factor was not so expressed by the respondents in the affidavit filed in support of the application to strike out the writ but was a consideration entertained by the Master when she contemplated the exercise of her discretion. The time factor then was perhaps eighteen months less but for this court to reverse the decision of the Master we must

be satisfied that her discretion was not properly exercised. To accede to the submissions of the appellant would operate unfairly against the respondents.

The appellant in this case seeks two (2) reliefs:

> (a) a reversal of the Master's order dismissing the writ for want of prosecution; and
>
> (b) leave to file a statement of claim eight years after the writ was filed.

We have a duty to see that the business of the court is conducted with despatch. We have held that delays of four (4) and six (6) years were in the particular circumstances unacceptable - see **West Indies Sugar vs. Stanley Minnell** and **Valentine vs. Lumsden** (supra). I find that the delay in this case is inordinate and inexcusable and moreover the reasons proffered therefor unacceptable. It would be grossly unfair to the respondent to grant the latter relief as there is a substantial risk that justice would not be done and as to the former it has not been shown that there was a wrong exercise of the Master's discretion.

In **Bremer v. South Indian Shipping Corporation Ltd.** (1981) 2 W.L.R. 141, H.L. the source of the jurisdiction to dismiss an action for want of prosecution was analysed by Lord Diplock when he said:

> "The High Court's power to dismiss a pending action for want of prosecution is but an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. Every civilised system of government requires that the state should make

available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff's choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory. So, it would stultify the constitutional role of the High Court as court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute.

The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an "inherent power" the exercise of which is in the "inherent jurisdiction" of the High Court. It would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice."

The plaintiff's attorneys-at-law have admitted that matters have advanced to this state as a result of their inadvertence yet they seek to benefit therefrom. This certainly in my view is "conduct amounting to an abuse of the process of the court" - see **Birkett vs. James** (1977) 1 All E.R. 801 (supra).

The Master erred in concluding that she lacked jurisdiction to entertain the application to vary her previous order, however for the reasons already stated, I would dismiss the appeals with costs to the respondents to be taxed if not agreed. The costs are to be paid by the plaintiff's attorneys-at-law.

> "of the matter when there was no evidence suggesting that this was the case.
>
> 3. At no stage did the evidence adduced by the First Defendant/Respondent disclose any real prejudice and accordingly, the Learned Master erred in striking out the Plaintiff's claim and subsequently refusing to vary her Order.
>
> 4. That the Learned Master erred in finding prejudice against the Firstnamed Defendant by reason of the delay since the Affidavit relied upon in support thereof failed to establish any such prejudice.
>
> 5. That the decision was unreasonable in light of the evidence."

The allegations require me to set out the history of the action. The Writ of Summons and Endorsement was filed on January 9, 1987. The first defendant entered a conditional appearance on February 21, 1988, on which date the first defendant filed a summons to strike out the Writ of Summons. This summons was withdrawn on May 25, 1988, and it was then ordered that the conditional appearance entered on February 21, 1988, should stand unconditional. On June 6, 1988, the first defendant consented to the plaintiff filing a statement of claim within thirty days. Notwithstanding, the plaintiff failed so to do. The matter remained dormant until February 27, 1992, when a summons was issued to dismiss the action for want of prosecution. On March 16, 1992, the plaintiff filed a Notice of Intention to Proceed within a month of the expiry of the notice. The expiry date passed without the plaintiff taking steps to regularize the proceedings.

On July 23, 1992, the plaintiff filed a summons seeking leave to file a statement of claim out of time. This summons was never heard as the plaintiff's attorneys-at-law failed to obtain a date of hearing.

Up to the time of the hearing of the summons to dismiss on January 14, 1993, the plaintiff had failed to take any serious steps to proceed with the action.

In the light of what was undoubtedly inordinate delay, the learned Master quite rightly, in my view, ordered the action dismissed for want of prosecution on January 14, 1993.

Mr. Jeffrey Mordecai in an affidavit dated 28th January, 1993, at paragraphs 4 and 8 respectively states as follows:

> "4. That the fault in not preparing, filing and serving a Statement of Claim herein was entirely the fault of the Plaintiff's Attorneys due to an administrative error in the firm and the Plaintiff is still desirous of pursuing its action against both Defendants.
>
> 8. That the failure of the Plaintiff to resist the Firstnamed Defendant's application to dismiss by way of Affidavit was due to the inadvertence of the Plaintiff's Attorneys and not to any failure of the Plaintiff to pursue her claim against the Defendants."

Accepting the above paragraphs as true, I need only remind the attorneys-at-law of the dicta of Lord Denning, M.R. in ***Reggentine v. Bechalme Bakeries Ltd.*** [1967] 111 Sol. Jo. 116:

> "It is the duty of the Plaintiff's advisor to get on with the case. Public policy demands that the business of the courts should be conducted with expedition."

The plaintiff cannot hide behind the ineptitude of the attorneys-at-law. The attorneys-at-law's failure to act promptly cannot be a basis on which to deprive a party of his right to have the action dismissed for inordinate delay. The plaintiff's remedy in such a case lies against the defaulting attorney-at-law, see ***Allen v. Sir Alfred McAlpine & Sons*** [1968] 1 All E.R. 543 at page 547.

Mr. Robinson for the appellant urged that inordinate delay by itself was not enough to result in the action being struck out. Says he, the defendant must prove specific prejudice to him. In support of this submission, he relied on dictum from ***Birkett v. James*** [1977] 2 All E.R. 801 which was approved in ***Department of Transport v. Chris Smaller (Transport) Ltd.*** 1 All E.R. 897 at page 900 per Lord Griffiths:

> "The plaintiff must have been guilty of inordinate and inexcusable delay in the prosecution of the action after the issue of the writ and the defendant must show prejudice flowing directly from the post writ delay which must be additional to any prejudice suffered because the Plaintiff did not commence his action as soon as he could have done."

In a judgment of this court in S.C.C.A. 91/92 ***West Indies Sugar Ltd. v. Stanley Minnell*** (unreported) delivered 20/12/93, Forte, J.A., said:

> "In those circumstances, I would conclude that 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."

Clearly Forte, J.A. is making the point that the substantial risk that there cannot be a fair trial because of the inordinate delay and prejudice are two separate entities and that the proof of one or the other entitles a party to have the matter dismissed for want of prosecution. Once there is evidence that the nature of the delay exposes a party to the possibility of an unfair trial he is entitled to the favourable exercise of the court's discretion, prejudice apart. Inordinate delay, by itself, may make a fair trial impossible. Prejudice, in my view, includes not only actual prejudice but potential prejudice which in the instant case would be the possibility of not being able to obtain a fair trial because of the passage of time.

In any event, where a party fails to deliver a statement of claim within the specified time, there is a discretion to dismiss for want of prosecution. See *Clough v. Clough* [1968] 1 All E.R. 1179 at 1181.

Coupled with the inordinate delay, no reasonable excuse has been proffered for the delay. The fact that the delay was occasioned by the failure of the attorneys-at-law to act expeditiously is not in my view a sufficient explanation for the delay. They had several opportunities to right the wrong but failed to seize those opportunities.

The respondent has established inordinate delay which could give rise to the denial of a fair trial in the circumstances I hold that the appellant has failed to show that the Master's discretion was wrongly exercised.

In so far as the application to vary the order of dismissal for want of prosecution is concerned, I am satisfied that the Master was correct in dismissing

the application. The reasons stated for the dismissal may be dubious but the decision itself is unimpeachable. I have come to this view because any variation of that order would only serve to exacerbate the inordinate delay which already exists. The incident giving rise to the action occurred in February 1981. The deceased Dalton Box died in January 1986. So a period of fourteen years has elapsed since the date of the accident and nine years since the death of the deceased. To further extend the period would mean that the matter is likely to come up for trial some seventeen years after the date of the accident or twelve years after the death of the deceased. The court ought not to sanction this kind of delay.

All the cases relied on by counsel for the appellant are cases decided by the House of Lords and the Court of Appeal in England. Those cases were decided to meet the English situation. I make bold to say, plagued as our courts are with inordinate delays, this court must develop a jurisprudence which addresses our peculiar situation. Such is the delay in our jurisdiction that it has been mooted that rule 32(1A) of the Court of Appeal Rules 1962, be made to apply to the Supreme Court.

Rule 32(1A) states:

> "It shall be the duty of the Registrar to see that an appellant complies with the provisions of rule 30 and before the conclusion of each term he shall report to the court any failure on the part of an appellant so to comply and the court of its own motion may, after three months notice to the parties to the appeal make any such order as it might make upon an application by the respondent under paragraph (1) of this rule."

I would, therefore, order that the appeal be dismissed with costs of the appeal to the respondent to be taxed if not agreed.

The attorneys-at-law per the affidavit of Mr. Mordecai have averred that the delay was entirely the fault of the lawyers. In accordance with the decision in ***Patrick Valentine v. Lumsden & Lumsden*** (unreported) delivered 6/12/93 S.C.C.A. 106/92, I would order that the appellant's attorneys-at-law pay the costs of the appeal.

Further, the Registrar of the Court ought to take steps to inform the plaintiffs of this decision and the reasons giving rise to the decision. See ***Allen v. Sir Alfred McAlpine & Sons Ltd.*** (supra) at page 562.

CAREY, J.A.:

I have the misfortune to differ from my Lords.

In the result, the appeal is dismissed. The order of the Master is affirmed and the appellant's attorneys-at-law are required to pay the costs of the appeal.