IN THE SUPREME COURT IN JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CLW 371 OF 1997

BETWEEN	WINSTON WRIGHT	PLAINTIFF
AND	NUTRITION PRODUCTS LTD.	DEFENDANT

Heard: October 8, 10, 2003

Ms. Camille Royes instructed by Mr .A. Hines for the Plaintiff

Mrs. Andrea Bickhoff-Benjamin instructed by Grant, Stewart & Co. for the Defendant

Straw, J. (Ag.)

This is an application made by the defendant, Nutrition Products Limited, seeking an order that the action be dismissed for Want of Prosecution. The application is supported by an affidavit of Mr. Albert Carty, dated 08.10.03 and filed 08.10.03.

Both attorneys presented submissions in writing.

Background

The Plaintiff filed a Writ of Summons against the defendant on the 17.10.97 claiming damages for personal injury caused by reason of the negligence of the defendant and or by reason of the defendant's breach of statutory duty by failing to provide the plaintiff with a safe system of work. The plaintiff, who was a machine operator employed to the defendant at Hague, Falmouth, Trelawny, suffered the amputation of parts of the 3rd, and 4th fingers of his right hand on the 10.11.91 while operating a machine.

A review of the pleadings subsequently filed revealed the following :

1. A statement of claim filed on 06.04.98
2. Entry of Appearance filed on 02.06.98 by Grant, Stewart, Phillips & Company on behalf of the defendant.
3. Interlocutory Judgement in Default of Defence filed on 18.05.99 and granted on 13.07.99.
4. Summons for Leave to proceed to Assessment of Damages filed on 18.05.99 and set for hearing on the 28.09.99.
5. Summons to set aside Judgment and for leave to file Defence filed on 27.08.99 and set for hearing on 28.09.99.
6. The Minute Sheet for 28.09.99 showed that there was no appearance on behalf of the plaintiff. The Order in terms of the

Summons to set aside and for leave to file defence granted. The matter adjourned Sine Die.

7. Defence filed 30.09.99.

Since the 30.09.99, no other date has been set or documents filed in relation to this matter until this present application which was filed on 27.03.03. The matter was then set for hearing on 26.06.03 when it was adjourned to 08.10.03 and leave granted for the plaintiff's attorney to file affidavit in response.

Arguments

Mrs. Bickhoff-Benjamin, on behalf of the defendant, submitted that the failure of the plaintiff since the 30.09.99 to bring the matter to trial is inordinate delay. That this delay has also prejudiced the defendant in his ability to advance the defence at any future trial as the defendant is unable to locate an important witness. That as a result of the considerable delay, there cannot now be a fair trial of the issues. Reference was made to the affidavit of Mr. Albert Carty and especially paragraphs 8 to 12.

Mrs. Benjamin also submitted that, although the application is now to be considered under the CPR of 2002, consideration should still be given to the pre CPR requirements of inordinate delay and prejudice as

relevant factors in determining whether it is just to accede to the defendant's application. Reference was made to the following cases:

Nasser v United Bank of Kuwait (2001) EWCA Civ. 1454

Birkett v James 1977 2 AEL at 801

Biguzzi v Rank Leisure Plc 1999 1WLR 1926

UCB Corporate Services Ltd v Halifax (S W) Court of Appeal 6th December, 1999.

Ms. Royes, on behalf of the plaintiff, referred to the affidavit of Mr. A. Hines, the instructing attorney.

In that affidavit Mr. Hines admits the delay and gives reasons which I summarize as follows:

1. The plaintiff is off the island
2. His situation overseas has not yet been formalized.
3 The above resulted in a break down of communication between counsel and client.
4 However, communication having been re-established, the plaintiff wishes to proceed and will take all necessary steps to
5 obtain an early trial date.

REASONS FOR JUDGMENT

This cause of action arose on the 10.11.91. A writ of summons was filed on the 17.10.97, almost six (6) years later, near the expiration of the relevant limitation period for bringing the action.

After the writ of summons was filed and appearance entered there was a delay of almost one (1) year between 02.06.98 and the 18.05.99 when the application was made for interlocutory judgment.

After a defence was filed on 30.09.99, the plaintiff did nothing to bring this matter to trial. Some 3 ½ years later, the defendant is now applying for the action to be dismissed for want of prosecution. This delay of 3 1/2 years is caused solely by the plaintiff.

In considering the merits of the application, I have directed my mind to the overriding objectives of the CPR of 2002 which is reflected in Rule 1.1 and especially Rule 1.1 (1) and (2) (d)

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. ------

b. ------

c. ------

d. ensuring that it is dealt with expeditiously and fairly.

In 1999, the rules were not in existence. However, the application to dismiss is now being made at a time when the above rules are now in force.

I therefore, consider the option available under the CPR rules to achieve the overriding objective (per Biguzzi v Rank Leisure 1999 1 WLR page 1926).

Under the CPR 2002, the matter could be set immediately for a Case Management Conference and orders given in relation to written statements, disclosure of documents, etc.

The earliest dates available for this would be in March 2004. Thereafter, a trial date could be set. The earliest date available for trial as of October 2003 would be in the month of July 2004. It is unlikely that in March 2004, that would still be available.

It is highly possible therefore that the matter would not be reached until October - November 2004, about 7 years after the statement of claim filed and some 13 years after the cause of action arose.

I also consider the case of UCB Corporate Services Limited v Halifax (S W) Court of Appeal, 6th December, 1999 where Lord Lloyd made the following remarks (per paragraph 20):

> "It would indeed be ironic if as a result of the new rules coming into force, and the judgment of this court in the Biguzzi case, judges were required to treat cases of delay with greater leniency than they would have done under the old procedure. I feel sure

> that that cannot have been the intention of the Master of the Rolls in giving judgment in the Biguzzi case. What he was concerned to point out was that there are now additional powers which the Court may and should use in the less serious cases. But in the more serious cases, striking out remains the appropriate remedy where justice requires."

In Nasser v United Bank of Kuwait (2001) EWCA Civ Div. 1454, Sir Christopher Slade commented on the Biguzzi case as follows (per paragraph 27):

> "I am, however, sure that in saying this, Lord Woolf MR was not intending to suggest that the factors regarded by the court in Birkett v James as crucial, namely the length of relevant delay, the culpability for it, the resulting prejudice to the defendant and the prospects of a fair trial are no longer relevant considerations when the court has to deal with an application for dismissal for want of prosecution."

In the present case, there were two periods of delay. The first, for one year between 02.06.98 and 18.05.99. The defendant had failed to file a defence but the plaintiff only filed for interlocutory judgment almost one year later.

The second period was for 31/2 years, from 30.09.99 to the date of the present application.

The culpability for a substantial part of the first delay belongs to the plaintiff.

The culpability for the second delay is caused solely by the plaintiff.

Is there any substantive risk of an unfair trial or prejudice to the defendant as a result of this inordinate delay?

This is an action for personal injury which occurred in 1991. The Plaintiff is alleging that he suffered injury while lawfully operating the defendant's machine because of the negligence of the defendant and a breach of the duty of care.

The defence is alleging that the plaintiff suffered the injury because he was using a piece of cloth to clean the machine while the said machine was 'on' which was a direct violation of the orders and procedures of the defendant.

The affidavit of Mr.Albert Carty speaks to the difficulties that the defendant would have at this time if the matter were to proceed to trial (per paragraphs 8, 9, 10, 11).

He states that the eye witnesses would have to be relied on to give evidence 12 ½ years after the event; that in particular, the witness Mr. Gilbert Porter, who at the material time was the plaintiff's supervisor would be integral and he had not been in their employment for over 8 years, Furthermore, they have no contact with him.

Mr. Carty also pointed out that between 1991 and 1995 there were several redundancy exercises where staff were made redundant; that these include persons who had worked in the department where the plaintiff was

based and no contact had been kept with those potential witnesses as a law suit was not anticipated at the time.

I can give no consideration to that aspect of Mr. Hines affidavit which purports to suggest that the defence 'would have prepared written reports and made its own investigations,' and that they could rely on documentary evidence as opposed to oral testimony.

These are not issues which Mr. Hines can properly swear to as being within his knowledge (per Jamaica Record Ltd. v Western Storage Ltd. (1990) JLR page 55).

The incident occurred in 1991. The writ of summons was only filed in 1997. By that time, according to Mr. Carty's affidavit, potential witnesses would have already ceased to work at the factory.

Since the defence was filed, the plaintiff did absolutely nothing to bring the matter to trial for 31/2 years. I am of the view that there has been an inordinate and inexcusable delay on the part of the plaintiff.

The earliest possible date for trial maybe in December 2004. The defendant would have to make efforts to locate Mr. Gilbert Porter and, possibly, other potential witnesses. Even if they succeeded, there would be a great burden on these witnesses to remember circumstances which occurred long before 1997 when the writ was issued.

I am of the view that the nature of the delay has exposed the defendant to the possibility of an unfair trial.

The application for the action to be dismissed for want of prosecution is therefore granted.

Order in terms of paragraphs 1 and 2 of the Notice of Application for Court Orders filed on 27.03.03 granted.