



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. C.L. 1981/AO80

BETWEEN	ARAWAK WOODWORKING ESTABLISHMENT LTD.	CLAIMANT/ RESPONDENT
AND	JAMAICA DEVELOPMENT BANK	DEFENDANT/ APPLICANT

**Miss Anna Gracie for the Claimant/Respondent instructed by Rattray Patterson
Rattray**

Mr. Courtney A. Bailey for the Defendant/Applicant instructed by DunnCox

Heard: June 3, 2009 and July 20, 2009

Master Simmons (Acting)

This is an application by the Defendant to strike out the Claimant's Statement of Case pursuant to Rule 26.3 (1) b of the Civil Procedure Rules 2002 (CPR) or alternatively to dismiss the claim for want of prosecution. The application is supported by three Affidavits of Sheron Henry dated the 8th December 2008, the 15th April 2009 and the 18th May 2009 respectively.

In order to determine whether the application ought to be granted, the procedural history leading up to this application must be examined. It is as follows:-

September 1, 1981	-	Writ of Summons filed
January 19, 1982	-	Statement of Claim filed
June 16, 1982	-	Amended Statement of Claim filed

- May 30, 1983 - Interlocutory judgment set aside
- June 13, 1983 - Defence and counterclaim filed
- July 22, 1983 - Reply and Defence to counterclaim filed
- June 3, 1987 - Order on Summons for Directions made
- October 29, 1990 - Order to extend time in which to set the matter down for Trial made
- October 30, 1990 - Claimant applied to have the matter set down on the Cause List
- February 11, 1991 - Amended Statement of Claim filed
- February 6, 1992 - Certificate of Readiness filed
- August 17, 1992 - Notice of Intention to Proceed filed
- October 15, 1992 - Amended Defence filed
- October 26, 1992 - Trial adjourned by consent no bundle having been filed
- June 4, 1997 - Claimant filed a Notice of Change of Attorney-at-law
- June 7, 2000 - Notice of Intention to Proceed filed
- April 1, 2003 - Notice of Intention to Proceed filed
- May 7, 2003 - Application made to the Registrar for a Case Management Conference.
- October 1, 2008 - Order granted permitting the Claimant's Attorneys to remove their name from the record.

Mr. Bailey on behalf of the applicant submitted that the action ought to be struck out or dismissed for want of prosecution. He based his submissions on Rule 26.3 (1) b of the CPR, 2002 as well as the inherent jurisdiction of the Court to do so where the circumstances warrant such action. Rule 26.3 (1) b states:-

“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)
- (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;”

He also sought to buttress his argument by reference to Rule 1.1 of the CPR, which states:-

- “(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) saving expense;
 - (c) ensuring that it is dealt with expeditiously and fairly; ...”

Mr. Bailey further submitted that the delay of the claimant in proceeding with this matter amounts an abuse of the process of the court and was contrary to the overriding objective. In the alternative, it was stated that in addition to the provisions of any Rules of Court, the Court has an inherent jurisdiction to strike out or dismiss any proceedings for want of prosecution or which are an abuse of the process of the Court. In support of this argument he referred to the dictum of Lord Diplock in **Birkett v. James** [1977] 2 All E.R. 801. In that case Lord Diplock stated that the power to dismiss for want of prosecution should only be exercised where the court is satisfied that “there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and that such delay will give

rise to a substantial risk that it is not possible to have a fair trial of the issues or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff ...” He also referred to **Trill and another v. Sacher and others** [1993] 1 All E. R. 961 in which the Court cited with approval the dictum of Lord Diplock in **Birkett v. James**. The Court also laid down certain guidelines which may assist the Court in determining whether there has been inordinate delay. Neill L.J. stated:-

- “(2) The general burden of proof on an application to strike out for want of prosecution is on the defendant.
- (3) ‘Inordinate’ delay cannot be precisely defined. ‘What is or is not inordinate delay must depend on the facts of each particular case’ (see Allen’s case [1968] 1 All E.R. 543 at 561.) It is clear, however, (a) that for delay to be inordinate it must exceed, and probably by a substantial margin, the times prescribed by the rules of court for the taking of steps in the action...
- (4) Delay which is inordinate is prima facie inexcusable. It is for the plaintiff to make out a credible excuse...
- (6) A defendant cannot rely on a period of delay for which he has himself been responsible...
- (11) Prejudice to the defendant may take many 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.”

The view was also expressed that when considering whether the delay has prejudiced the defendant and if there is a substantial risk that the trial will not be fair, the court must examine the entire circumstances of the case. This view was accepted by Slade LJ in **Rath v. C S Lawrence & Partners (a firm)** [1991] 3 All E.R. 679 at 688 who also stated that “...a causal link must be proved between the delay and the inability to have a fair trial or other prejudice, as the case may be.”

It was also submitted, that in cases such as this where there is a long period of delay, the court may strike out proceedings without any proof of prejudice, if the delay was so lengthy, that it could be concluded that the plaintiff had no intention to finalize the proceedings. The case of **Grovit & others v. Doctor & others** [1997] 2 All E. R. 417, was cited in support of this point. In that case, proceedings were commenced in 1989 and in 1992 were struck out on the basis of inordinate and inexcusable delay. The plaintiff appealed to the Court of Appeal and then the House of Lords. It was held that the court has an inherent jurisdiction to strike out actions on the grounds of abuse of process “irrespective of whether the test for dismissal for want of prosecution was satisfied.” In that case, the court stated that where a plaintiff since the commencement and continuation of proceedings had no intention of bringing them to a conclusion that by itself was sufficient to amount to an abuse of process which entitled the court to dismiss the action. In such circumstances, it was not strictly necessary to establish want of prosecution by showing that that the defendant had been prejudiced by the plaintiff’s inordinate and inexcusable delay.

Counsel then went on to deal with the position in law after the introduction of the English Civil Procedure Rules, 1998. These rules are in some respects similar to the CPR.

Reference was also made to **Biguzzi v. Rank Leisure plc** [1999] 4 All E. R. 934, in which it was stated that the cases prior to 1998 were generally, no longer relevant. In **Purdy v. Cambran** (1999) unreported 17 December, the English Court of Appeal stated that “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.” It was also emphasized that in doing so the court must bear in mind the overriding objective. Mr. Bailey further submitted that in considering whether or not to strike out or dismiss an action although the overall justice of the case must be considered, the factors considered by the courts prior to the CPR may be relevant. In support of his argument, counsel cited the case of **Anodeus Ltd. and others v. Gibson and others** 2000 The Times, 3 March. In that case the court set out some of the factors which are relevant in determining whether a case should be dismissed for want of prosecution. They are:-

- i. length of the delay;
- ii. excuses for the delay;
- iii. the degree to which the claimant has failed to observe the rules ;
- iv. the prejudice to the defendant;
- v. the effect of the delay on the trial;
- vi. the effect of the delay on the other litigants;
- vii. the extent to which the defendant contributed to the delay;
- viii. the conduct of the parties;
- ix. any other special factors.

Mr. Bailey submitted that having regard to the CPR and the relevant case law, the overall justice of the case requires the court to dismiss the action for want of prosecution. He referred to the eleven (11) years delay between the filing of the amended defence and the application for a Case Management Conference and the further delay of six (6) years before a Case Management Conference was scheduled. He also pointed out that the action was commenced some twenty eight (28) years ago and has become statute barred.

Mr. Bailey also argued that the claimant has not provided any evidence to the court to explain the delay. In this regard, he referred to the affidavit of Vivette Miller-Thwaites dated the 21st May 2008 in support of an application by the claimant's former Attorneys to remove their name from the record. That affidavit indicates that the claimant had failed to provide its Attorneys with the necessary instructions to proceed with the matter.

In addition, it was submitted that the defendant's ability to defend the matter has been prejudiced by the claimant's delay and cannot be remedied by an award of costs. Mr. Bailey referred to paragraph 28 and 29 of the affidavit of Sheron Henry dated the 8th December 2008 in which it was stated that the witnesses on whom the defendant intended to rely are no longer available as they have either retired from the company or have died. He also referred to paragraph 6 in which it was stated that the defendant had ceased operating in 1982 and none of the witnesses were offered employment with the Agricultural Credit Bank which succeeded that institution. Reference was also made to the supplemental affidavit of Sheron Henry dated the 15th April 2009 in which it was stated that of the thirteen (13) witnesses mentioned in the previous affidavit, the deponent could only state that two were retired and one had died. With respect to the remaining witnesses, the deponent states that she has no knowledge of their whereabouts and would

not know where to begin looking for them. She also stated that in her opinion, even if the witnesses could be located a fair trial would not be possible as they may not be able to recall the details of the matter, given the passage of time.

Miss Gracie, on behalf of the claimant submitted that the delay could be explained and was not inordinate or inexcusable in the circumstances. She relied on the affidavit of Violet Taylor, the Managing Director of the claimant, dated the 21st April 2009 which states that in or about 1976 the claimant was placed in receivership and is impecunious. It is also stated in the same affidavit that the claimant had suffered losses as a result of the action and/or inaction of the defendant. At paragraphs 6 and 7 the deponent states that its inability to finance the litigation resulted in its changing attorneys on three occasions and that this caused some delay in the progress of the matter. At paragraph 8 it is stated that the adjournment of the trial on the 26th October 1992 was to facilitate settlement discussions between the parties. Miss Gracie also indicated that during this period Miss Taylor who is now eighty (80) years old was hospitalized and this caused further delay. She also stated that based on her instructions, Miss Taylor believed that the issue of settlement was still a live one throughout the years. She asserted that the claimant's witnesses can be located as paragraph 17 of Miss Taylor's affidavit indicates that four of them are in Jamaica and one of them is listed in the telephone directory. In closing, Miss Gracie asked the court to find that there was reasonable excuse for the delay and asked that Miss Taylor's age and the fact that the claimant is impecunious be taken into account in deciding whether or not to dismiss or strike out the claim.

With respect to the reasons advanced by the Claimant for the delay, Mr. Bailey referred to the Third Affidavit of Sheron Henry dated the 18th May 2009. He referred specifically

to paragraph 9 and exhibit “**SH 1**”. That exhibit is a copy of a letter from Messrs Rattray Patterson Rattray dated the 22nd October 1992 in which an agreement to adjourn the trial was sought on the basis that after the receipt of the amended defence there were certain matters which needed to be addressed before the matter could proceed.

Where the issue of settlement is concerned, Mr. Bailey referred to certain letters between counsel for the claimant and counsel for the defendant. Miss Gracie objected to those letters being considered by the court on the basis that they were privileged. Mr. Bailey referred to paragraph 21-15 (b) of **Phipson on Evidence 15th ed.** which states that without prejudice negotiations may be relevant to explain delay where there is an application to strike out for want of prosecution. He also referred to **Rush & Tompkins Ltd. v. Greater London Council** [1989] AC. 1280 and submitted that the letters could be used to establish the time frame within which the parties were negotiating. Miss Gracie withdrew her objection.

Mr. Bailey submitted that based on the affidavit evidence the first attempt at settlement was in July 1993. This ended on 11th November 1993 when the claimant’s attorneys indicated by letter that they were awaiting instructions from their client. Reference was made to exhibits “**SH2, SH3, SH4**” which are annexed to the Third Affidavit of Sheron Henry. There was no further communication between the parties until the 9th December 1997 when the issue of settlement was broached by Messrs. Crafton S. Miller & Co. This was followed by three letters from the said attorneys dated the 9th December 1997, the 29th January and the 25th March 1998 proposing the settlement of the matter.

Rule 26.3 (1) b

I am not convinced that this section applies to circumstances in which the complaint is one of delay. This rule refers to the statement of case itself as being the thing likely to amount to an abuse of process or obstruct the just disposal of the proceedings. This rule is similar to Rule 3.4 (2) b of the English Rules which was examined by the Court in **Western Trust and Savings Ltd. v. Acland and Lenson (a firm)** 2000 L.T.L June 19, QBD. In that case the view was expressed that the Rule is not strictly applicable where the complaint is one of delay but instead the applied to cases where there was a complaint in respect of the form or content of the statement of case.

The term "abuse of process" was interpreted by Lord Diplock in **Hunter v. Chief Constable of West Midlands Police** [1982] AC 529 at 536. In that case it was stated, that the Court must have the power to prevent a "misuse of its procedure" in a manner which although not inconsistent with procedural rules would be "manifestly unfair to a party or would otherwise bring the administration of justice into disrepute ...". This principle is said to apply to claims issued after the limitation period has expired or those brought in respect of matters which have already been litigated or settled.

The words "obstructing the just disposal of proceedings" have been construed to apply to vexatious or ill-founded proceedings.

In this case the claim itself is not one in which there has been a misuse of the court's procedure and as such, does not amount to an abuse of the court's process within the context of this rule. In addition, it cannot be described as being vexatious or ill-founded.

Accordingly, the claim is not one which falls within the operation of this Rule.

Inexcusable and inordinate delay

The court in the exercise of its powers under Rule 26.1 (2) (v) of the CPR and its inherent jurisdiction may however, dismiss a claim for want of prosecution if there has been inexcusable and inordinate delay which will either cause prejudice to the defendant or put a fair trial at risk. Rule 26.1 (2) (v) states:-

“Except where these rules provide otherwise, the court may -

take any step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.”

It is established that in these matters, the burden of proof is on the defendant to establish inordinate and inexcusable delay. In this regard I have accepted the submissions of counsel that there has been inordinate delay in proceeding with this claim.

The defendant having discharged its burden of proof it is now for the claimant to seek to provide a reasonable excuse for the delay. Various reasons have been advanced by the claimant's Attorneys to both explain and justify, the length time it has taken for the case to proceed. It is apparent, on an examination of the file that the road travelled by the claimant has not been somewhat circuitous as it has changed its legal representatives three times since the filing of the suit. This fact appears to have also contributed to the delay. The issue of whether this explanation excuses the delay must be considered in light of the impact of the delay on the justice of the case.

I have accepted the submissions for Counsel for the Defendant that the parties negotiated for approximately four months in 1993. In addition even if the additional four months between December 1997 and March 1998 is included as a period during which settlement was being contemplated that does not give a satisfactory account for eleven years of delay.

It is my view that the claimant after the 11th November 1993 should have proceeded with the matter with some amount of dispatch. Sadly, the only activity on the file between October 26 1992, when the trial was adjourned and the 7th May 2003 was the filing a Notice of Change of Attorney and two Notices of Intention to Proceed. None of these filings represent the taking of a further step in the matter. Even if one were to accept that negotiations were still ongoing between December 1997 and March 1998 the question arises as to whether the pursuit of negotiations excuses a claimant from proceeding with the matter. In **Anodeus Ltd. and others v. Gibson and others** Neuberger J. stated that the existence of negotiations does not in the absence of express agreement serve to justify a delay. In that case, it was argued that the fact that the parties were negotiating was a mitigating factor and stated that the defendant's agreement to extend time on numerous occasions supported the claimant's contention that they were not "manifesting a desire that the claimants proceed speedily with the action." In the present case after the 11th November, 1993 there was nothing left for the defendant to do. The ball was in the claimant's court. In addition, the claimant has not provided the court with any evidence that negotiations were in progress during the eleven years period following that date, save and except for the four months period previously mentioned. In addition, there was no understanding between the parties that the suit would be in abeyance whilst negotiations were in progress. It is also to be noted, that although the claimant changed its Attorneys on the 4th June 1997, no further step was taken in the matter until six years later when an application for a Case Management Conference was made. This represents a further delay. By October 2008, the claimant's relationship with that attorney came to an end based on affidavit evidence that it had failed to provide its Attorneys with instructions.

It is my view, that the claimant having brought the defendant to court has a duty to proceed with the matter in a businesslike manner. In this matter, this was not done.

In the circumstances, I find that the claimant has failed to provide a sufficient excuse for the delay and as such the delay is both inordinate and inexcusable.

Abuse of process

It was held in **Grovit and others v. Doctors and others** that the commencement and continuation of proceedings with no intention of bringing them to a conclusion was sufficient to amount to an abuse of process. In such a case the court could dismiss the action without any proof inordinate and inexcusable delay which resulted in prejudice to the defendant. In **Grovit** the plaintiff commenced proceedings for libel in 1989. In July 1990 an application to strike out the action was dismissed and the court ordered that the issue of whether the words were defamatory be dealt with as a preliminary issue. The plaintiff did nothing and in October 1990 the matter was struck out on the basis that there was inordinate and inexcusable delay which had caused the defendants enough prejudice to justify the making of such an order. The plaintiff appealed to the Court of Appeal and then to the House of Lords where it was submitted that a defendant seeking to strike out an action needed to show either “intentional and contumelious” default amounting to an abuse of process or inordinate and inexcusable delay which caused prejudice or put a fair trial at risk. The court held that it had an inherent jurisdiction to strike out actions on the grounds of abuse of process whether or not the criteria for dismissal for want of prosecution were met. The court concluded that the claimant had no interest in having the matter heard and that the commencement and continuation of proceedings with no intention to bring them to a conclusion was sufficient to establish abuse of process.

The claimant in this case after securing the services of new attorneys secured a date for a Case Management Conference and in fact attended Court on the 19th January 2009. This is a preparatory step towards trial and as such it is my view that the claimant by this action appears to be interested in concluding the matter. There is therefore no basis on which to find that the Claimant has no intention of concluding the matter.

Prejudice to the defendant or put a fair trial at risk

It must now be determined whether the delay is likely to prejudice the defendant or put a fair trial at risk. It is accepted that in order to prove prejudice "...a causal link must be proved between the delay and the inability to have a fair trial..."

Prejudice may arise due to the unavailability of witnesses as well as the inability of witnesses to recall the events in the matter with sufficient clarity.

This matter was filed in 1981 and arose out of certain business transactions which took place in or about the second half of the 1970s. Counsel for the defendant has submitted that it is unable to find the witnesses in this matter. I have already referred to the affidavit of Sheron Henry in this regard. It was also submitted that given the antiquity of this matter, even if they were located it is likely their memories would most likely be impaired by the lapse of time.

It is clear, that in these matters the court must look at all the circumstances of the particular case and determine whether in spite of the delay, the case can be disposed of justly. According to May L.J. in **Purdy v. Cambran** it is "necessary to concentrate on the intrinsic justice of a particular case in light of the overriding objective." The "intrinsic justice" of this case, requires that both parties be given an equal opportunity to present their case to the court. The overriding objective as stated in the CPR requires the Court to

deal “justly” with cases which arise for its consideration. Among the factors which determine whether a case is being dealt with “justly” is whether it can be conducted “expeditiously and fairly”. It is therefore required that key witnesses, if not all witnesses, be available to give evidence on behalf of the claimant and the defendant. In this matter, I have accepted that the defendant is unable to find its witnesses. I have also accepted that even if they are located it is likely that their memories would be impaired by the lapse of time, as nearly thirty years have passed since this matter commenced. The defendant in the circumstances, has discharged its burden of proof and has satisfied the court, that for the reasons stated above it will be prejudiced if the matter were to proceed to trial and a fair trial would be at risk.

The claim is dismissed for want of prosecution with costs to the defendant to be taxed if not agreed.

Leave to appeal granted.