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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO C. L. M-023 OF 1996

BETWEEN	MOBAY UNDERSEA TOURS LIMITED	1ST PLAINTIFF
A N D	FIREMAN'S FUND INSURANCE COMPANY	2ND PLAINTIFF
A ND	PORT SERVICES LIMITED	DEFENDANT

Mr. Dennis Goffe, Q.C. and Mrs. M. Champagne, Attorneys-at-Law for the plaintiff instructed by Messrs. Myers Fletcher & Gordon.

Mr. Gordon Robinson for the defendant instructed by Mrs. Winsome Marsh of Nunes, Scholefield, Deleon & Co.

HEARD 10th and 11th May, 2000
13th July, 2000
~~11th~~ 12th September, 2000
7th February, 2001

RECKORD, J

On the 26th of January, 1996, the plaintiffs through their attorneys-at-law filed an action in the Supreme Court claiming damages against the defendant for breach of duty and or negligence and or breach of duty as bailees of the cargo, by themselves, through their servants and or agents, on the 27th of January, 1995, while discharging the said cargo from the motor vessel INAGUA TANIA at berth 2, Western Terminals in Kingston, the defendant and or their servants and or agents so negligently handled the said cargo that they severely damaged same causing the plaintiffs to suffer loss and damage and incur expenses.

Arising from the filing of this action are two summonses. The first by defendant

filed on the 17th of March, 2000, applying for an order, that "The action filed against the defendant be dismissed for want of prosecution. The second one by the plaintiffs filed on the 14th of April, 2000, applying for an order pursuant to section 192 of the Judicature (Civil Procedure Code) Law that " the plaintiffs be granted leave to file their statement of claim herein out of time within 7 days of the date hereof."

Following arguments by attorneys on both sides, I decided that both summonses would be heard together.

The plaintiff owned a semi- submersible vessel named the Coral See which was shipped to Jamaica from the United States of America. While it was being unloaded in Jamaica by the defendant, it fell on the deck and was badly damaged. Hence, the plaintiff's action.

In support of the defendant's summons to dismiss the action Mr. Philip Henry managing director of the defendant company at all relevant times in an affidavit sworn to on the 10th of February, 2000 and filed herein, has stated –

(a) That one of the defendant's employees who witnessed the incident complained of by the plaintiffs has died and the others have left the defendant's employ.

(b) That the past employees are Mr. Louis Deer, deceased, 9th September, 1996, operations manager at the time, Mr Freddie Hooke -

Super-cargo Mr. Noel Carr – operations manager both of whom have migrated and exact whereabouts are not personally known to the defendant.
Mr. Hugh Gordon, retired – his address is known.

That the plaintiffs' delay in prosecuting this matter has prejudiced the defendant's chance of effectively defending this matter.

Mr. Henry was cross-examined on his affidavit. Although he knew of the damage, he was not present - his operations manager had taken statement from

employees and others who were there. They all gave written statements dated the 31st of January, 1995 i.e. within 4 days of the incident. He admitted that general manager Mr. Alva Wood, who also gave written statement, is still employed to the company. He is not certain he witnessed the incident.

In support of he plaintiff's summons for extension of time, Mrs. Champagne, attorney-a-t-Law, said in her affidavit of the 10th of January, 2000, that the delay in filing the statement of claim arose because her firm did not have complete instructions from the plaintiff in relation to the details of the claim being made. Because the suit relates to causes of action in relation to negligence and breach of contract, those would not be statute barred until January 26, 2001. The defendants would not be prejudiced if the court grants the order in terms of the summons. She submitted a copy of the proposed statement of claim in a further affidavit dated 24th January, 2000.

Mr. Goffe, Q.C. submitted that only in exceptional circumstances that a court will strike out an action for want of prosecution where the limitation period has not expired. Mr. Goffe further submitted that there were unprecedented features not found in other cases.

(a) Issue is joined as to what is the limitation period.

(b) That the applicable law is American

(c) That there are two contradicting opinions placed before the court by two United States legal experts

(d) If the court finds that the contradictions cannot be resolved by comparing the affidavits, it would be fair and reasonable that the United States Lawyers be required to attend for cross-examination.

On the question of prejudice, counsel questioned whether the ability to defend has been significantly impaired. Have the events causing the impairment occurred within the limitation period. It was not the delay of the plaintiff which caused the defendant to be without its witness through the death of Mr. Deer. No prejudice was caused by virtue of Mr. Deer's death. Also Mr. Carr's unavailability was not caused by the delay.

The defendant was still in contact with one of its witness Mr. Hugh Gordon. Further, the defendant has written statements from other witnesses taken contemporaneously with the damage. The Evidence Act has been amended and provides for reception of evidence when the witness is unavailable. This means the statement will be received without cross-examination. Far from being prejudicial to the defendant it would place it in a preferred position. It would place unchallenged evidence of the incident before the court. Counsel submitted. that the defendant would be in a position to defend the case and therefore a fair trial is still possible.

Mr. Goffe made further submissions on the question of whether the limitation period had expired. In respect to the second plaintiff, the insurer, which has had to indemnify the 1st plaintiff in respect of the loss and damage sustained by it, which on the plaintiff's case was due to the negligence of the defendant. It was his submission that actions for indemnity was not subject to the statute of Limitation Act.

In summary, counsel for the plaintiff submitted that while there was an undoubted delay, a fair trial was still possible which is the classic criteria which a

court applies in deciding where there has been inordinate delay whether the case should be dismissed for want of prosecution.

Mr. Robinson, for the defendant, responded that two gigantic myth's were perpetrated by the plaintiffs.

Myth number 1. Assuming that a new suit can be filed tomorrow if this suit could be struck out, all our time spent was without merit – he referred to the endorsement on the writ. This case is about a plaintiff who over 4 years ago filed a writ, gives a general endorsement and done. absolutely nothing since. Since then a draft statement of claim was filed 4 years later – **(see West Indies Sugar v Stanley Minnell S.C.C.A. No 91/92.)** He urged that this judgment is binding on the Supreme Court. There is more concrete evidence of prejudice here than there was in the West Indies Sugar case.

See Also Vashti Wood vs. H.S. Liquors Ltd. and others S.C.C.A. No. 23/93

Myth No. 2. Somehow the issue of limitation is at the foundation of this action. Most of the myths were based on the House of Lords case of **Birkett v James (supra).** In this case there was no dispute as to limitation.

There was an order made for the action to set down for trial. Nothing was done for years – hence an application was made to strike out the action. See Judgment of Lord Diplock at page 806.

In the instant case, four years after the cause of action arose, the defendant got the information that suit filed in relation to negligence and breach of contract.

The submission that the limitation period was 6 years was made out of desperation not supported by their own expert witness Mr. Miller.

Mr. Robinson, in summerising the defendant's case submitted that the Minnel and Vashti Wood cases have put paid to the question of prejudice. Further common sense dictates. that a statement taken in vacuum although helpful cannot be as much assistance as the viva voce evidence at time of trial. So that availability to the defendant of the statement puts the defendant in a better position than if there were no statements, but in a worse position than if they had the live witness. So to move from live witness to statement is prejudicial.

Despite counsel's undertaking, there is no guarantee that the statements would be admitted at trial. There is no guarantee that Mr. Goffe would be leading counsel for the plaintiff when the trial date arrives. In the situation where the witnesses are available there is the issue of the time and dimming memories. These two cases make it beyond question that in a consideration of a limitation period, this case must be struck out. With regard to the limitation issue, where as here, there is dispute as to the limitation period, it is not for this court to resolve that dispute but to leave it for resolution if a second suit is filed.

Finally, on the evidence before this court, counsel submitted that the only real dispute as to limitation is one whereby the defendant is saying that in accordance with the bill of lading the aggrieved party should file and serve his action within a year and the plaintiff's expert is saying that in accordance with the U. S. COGSA, the limitation period is one year to file he suit alone.

These plaintiffs have done nothing more than to file a generally endorsed writ and sat on it for over four years. They have severely prejudiced the defendants ability to defend the claim. The justice of the situation cries out for this case to be struck out and the need for the administration of a local system of justice cries out for a clear message to be sent to litigants that this type of conduct will not be tolerated.

Mr. Goffe, in reply, mentioned that when these two cases were dealt with in the Court of Appeal the amendments to the Evidence Act had yet been made. This is of considerable importance when considering the question of prejudice and the passage of time.

From the decided cases there is proposition of law, to the effect that inordinate delay, automatically entitles the defendant to have the matter struck out for want of prosecution. He commended to the court such parts of Lord Diplock's judgment in Allen v McAlpine. What the court has power to do in an attempt to give justice to both sides is to impose conditions upon the plaintiff's as regard the further conduct of this case, e.g. a time table. Court has power to make orders for costs thrown away.

Counsel referred to the case of **Hopkins et al v Tapper ([1997] C/A** referred to by counsel for the defendant. The court did not have the benefit of a written judgment. It was a two judge Court of Appeal. There was little information as to the nature of the prejudice.

The defendant's proposal to leave the question of limitation may have surface appeal. Once the court is satisfied that the issue of the limitation period is

important, then the court ought to decide the issue because if court does not, it is merely insuring that it will have to be decided at a later stage. All the cases treat with the question of the limitation period as relevant, except where no dispute. The court should dismiss the defendant's summons and grant the plaintiffs time to file their statement of claim. The court should also decide the preliminary issue of the limitation period which is of importance to both sides, they having filed affidavits concerning that issue.

Mr. Goffe referred to the Vashti Wood's case where Mr., Justice Gordon said at page 17 that inordinate and inexcusable delay on the part of the plaintiff or his attorney is the primary ground for dismissal of an action for want of prosecution. Mr. Justice Wolfe in the same case said at page 26 that inordinate delay, by itself make a fair trial impossible. If the court accepts the plaintiffs view, the delay will not cause a disability to defend the case.

FINDINGS

In her affidavit in support of summons for extension of time dated and filed on the 10th of January, 2000. Mrs. Champagne states that the suit was filed on the 26th of January, 1996 and that the delay in filing the statement of claim arose because her firm did not have complete instructions from the plaintiff in relation to the details of the claim being made. Four years later in January, 2000, she states that her firm "has received the instructions which were outstanding and we are now ready to file the statement of claim and proceed with the action."

Not a word has been said of the reason for this inordinate delay of four years. The plaintiffs are not foreigners, they are local entities. Even if they did

not have 'complete instructions' as stated by Mrs. Champagne, surely they could have filed what they had and reserved the right to apply to amend the statement of claim on the receipt of further instructions. They did not do this – No justifiable excuse has been established for this delay. It is apparent that they have allowed this action to take this leisurely course as it "would not be statute barred until January 26, 2001". Be it known that that date has now passed. In the circumstances and notwithstanding demands by Mr. Goffe for the court to decide the preliminary issue of the limitation period, I respectfully decline to do so.

On the issue before the court, based on the decided cases, this action ought to be struck out for want of prosecution. Counsel for the plaintiff's has not denied that the delay in filing their statement of claim is inordinate and inexcusable. Notwithstanding, he says the delay is not so prejudicial as to prevent a fair trial.

There. is one distinguishing feature in the instant case. Within days of the incident the defendant, possibly in keeping with company policy, had taken statements from all those who were present, employees and others. Fortunately, these statements have been preserved and can be admitted in evidence under the recently amended Evidence Act. Can the defendant, in light of this, complain about passage of time and dimming memories? Those who are available will have their statements from which they can refresh their memories. There should not be any difficulty in having the statements of others admitted. Mr. Hugh Gordon, who was the crane operator when the cargo fell, and who should be the key witness for the defendant, has not migrated and his address is known.

Mr. Robinson's complaint that only after 4 years after the cause of

action arose that the defendant got information that suit filed in relation to negligence and breach of contract, cannot be justified as the endorsement on the writ clearly states that the plaintiffs were claiming damages for negligence and breach of duty. The only justifiable complaint is that the amount of nearly ½ million U. S dollars was being claimed.

In view of the above I am constrained to exercise my discretion in favour of the plaintiff. Accordingly, there shall be an order in terms of the plaintiffs' summons for extension of time dated 10th January, 2000.

The defendant's application to dismiss the action for want of prosecution is refused and the summons is dismissed

Mr. Robinson's call on the court to send a strong message to litigants that this type of delay should not be tolerated has not gone without notice. However, I will direct such message to attorneys-at-law in general and in particular to the plaintiff's attorneys-at-law in this case at whose feet this long delay should lay.

On the question of costs, although the plaintiffs have succeeded on their summons, it is observed that they did not apply for any costs, so on their summons there will be no order as to costs. However, the defendant justifiably took out its summons to dismiss and although, not successful, it is hereby ordered that the defendant's costs to be agreed or taxed to be paid by the plaintiffs' attorneys-at-law.

Court grants certificate for defence counsel .

Leave to appeal granted:-

Plaintiffs' application for order for speedy trial refused.