IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1999/P-159

BETWEEN	JAMILLAH PARKINSON	CLAIMANT
A N D	VENTURE ENTERPRISES LTD.	1ST DEFENDANT
A N D	COURTLEIGH HOTEL	2ND DEFENDANT

IN CHAMBERS

Miss Carol Vassall instructed by C.M. Vassall & Co. for Claimant

Miss Camille Wignall instructed by Messrs. Nunes, Scholefield, DeLeon & Co. for 1st Defendant.

Heard: March 17, and April 1, 2004

Daye, J.

History

Some nine (9) years ago on the 16th March, 1995 the complainant fell while walking on the floor of the seminar room at Courtleigh Hotel where she was attending a function connected to her work. The Courtleigh Hotel was then managed and operated by Venture Enterprises Limited, the 1st defendant. She complained of personal injuries arising from this fall.

Four and one-half years (4½) after the initial complaint, on December 22, 1999, Attorney-at-Law on behalf of the claimant filed a Writ of Summons with special endorsement against the 1st and 2nd defendants and two other parties against whom proceedings were subsequently discontinued. On January 20, 2000 the firm of Myers, Fletcher and Gordon entered a conditional appearance for the 1st defendant. On February 19, 2003 the firm of Nunes, Scholefield and DeLeon became attorney for 1st Defendant. Between the date of incident and the date the writ was filed the following developments occurred:

(a) In March 1995 the Financial Controller of Courtleigh Hotel arranged for the claimant to be treated by a physiotherapist.

(b) In March 1995 the Financial Controller of Courtleigh Hotel paid the same physiotherapist for treating the claimant.

(c) On the 10th May and June 7th, 1996 attorney for the claimant obtained two medical reports from consultant Orthopedic Surgeon , Dr. Christopher Rose on the extent of the injuries of the complainant.

(d) Complainant's accident was reported to Caribbean Home Insurance company about March 30, 1995 who were insurers of 1st defendant, presumably by the 1st defendant.

(e) Jamaica International Insurance Company Limited took over business of Caribbean Insurance Company. The precise date is not disclosed.

(f) Jamaica International Insurance Company Limited assumed conduct of the report of the accident prior to suit being filed against 1st defendant.

(g) Around April 28, 1997 claimant's attorney initiated negotiation of a settlement of a claim with brokers of the insurers of 1st defendant.

Subsequently to the filing of this writ in 1999 the following events transpired:

(a) On October 6, 2000 the Attorney General on behalf of the other parties, who are no longer defendants engaged the claimant in proceedings to strike out the Writ of Summons against them.

(b) On January 26, 2001 the claimant filed Notice of Intention to Proceed against the Attorney General.

(c) On February 16, 2001 the Attorney General re issue summons to strike out claimant's action against them.

(d) On April 17, 2001, the proceedings came to an end as the claimant filed Notice of Discontinuance against the Attorney General.

(e) Thereafter on the 7th November, 2002 the claimant filed a summons for Order to file Statement of Claim out of time.

(f) Also, following on the latter, on December 20, 2002 the claimant filed a Notice of Intention to proceed against the 1st Defendant.

It is the summons to file statement of claim out of time that has been re-issued and is now for hearing. It is consolidated with the defendant's application to dismiss the claim for want of prosecution. Although the claimant's application is first in time I will deal with the defendant's application first. This is so because the result of the defendant's application will be decisive as to the fate of the claimant's application.

All civil proceedings are governed by the new Civil Procedure Code as of January 1, 2003 (Part 73 Rule 73.3) (CPR 2002). This is the position for the two applications in question even though the original Writ was filed in 1999 and under the old Civil Procedure Rule regime (CPC)

Affidavit Evidence

Leona Remekie, claims manager of Jamaica International Insurance Company Limited, insurers for the 1st Defendant deponed to two affidavits. July 15, 2003 and November 28, 2003, respectively, in support of the 1st defendant's application that the claim against them be dismissed for want of prosecution.

The grounds on which the 1st defendant rely on may be summarized thus:

1. The claimant's delay in filing her Statement of Claim is inordinate and inexcusable.
2. The delay has reduce the likelihood that the 1st defendant will have a fair trial.
3. The delay has prejudicial the defendant's case.

The 1st defendant amplified their contention by alleging that:

4. Around August 1995 the Courtleigh Hotel was closed down.
5. The potential witnesses, who were employees of the Courtleigh Hotel, at the time of incident ceased working at the hotel when it was closed down.
6. The whereabouts of these witnesses are unknown and they are unable to make contact with them.

7. They have in their possession two medical reports prepared by Dr. Christopher Rose, consultant orthopedic surgeon in respect of claimant.

Attorney-at-Law for the claimant responded to the affidavits on December 1, 2003 and contended that shortly after the incident the 1st defendant took responsibility for injuries of the claimant. Their action she claim amounts to an acceptance of liability. She also contend there is no issue of liability which require a witness for trial. She say the issue between the claimant and the 1st defendant is the extent of her injuries and that is matter of an hearing for assessment of damages. The defendant would not be prejudicial on this issue as they had the claimant's medical report from 1997. The 1st defendant has no defence to claim and have not claim any defence.

Submissions of Claimant's Attorney

Miss Carol Vassall submitted the court has a discretion and jurisdiction to extend and enlarge time (**Rose Dunscombe v. York Page Seaton)**

In **Finnegan v. Parkside Health Authority** it was held the court has the widest measure of discretion when considering an application for

extension of time for complying with procedural requirement under O.r. 3 r 5.

Rule 676 of the CPC confer on the court power to enlarge or abridge time, so too does **Stewart v. Rose.**

At the end of the day the overriding principle to apply to the application is fairness and justice.

The defendant makes no mention of a defence in their application and has shown no prejudice.

Submission of 1st Defendant

Miss Wignal states that she agrees there is no express provision in the CPR 2002 to extend time. But this power is inherent under the CPR 2002,1.1 (2) (d).

Cases prior to the new rules has principles that govern the present hearing. It is unjust to allow the claimant to file a statement of claim out of time. The matter should be dismissed for want of prosecution. **Vashti Wood v. H.G Liquor S.C.C.A**. 23/93. Mr. Justice Gordon's judgment outlined facts which are similar to the present. In the case Mr. Justice Wolfe's judgment demonstrated that there is no need to show actual prejudice when there is inordinate delay. This opinion was accepted by the court of Appeal in the recent case of **Port Service Ltd. v. Mobay Under**

S.C.C.A 18/2001. There the President of the Court of Appeal approved the principle of **Vashti.**

Once it can be shown there is inordinate and inexcusable delay on the part of the claimant or the claimant's attorney so that there is a risk that the defendant will not get a fair trial then the claimant should not be allowed to file statement of claim out of time.

On the affidavit the incident took place in 1995. Nearly ten (10) years later the claimant is seeking to file an application to extend time. Nothing was done until November 2002. Nothing has been put forward in the proposed Amended Statement of Claim.

It is not disputed that there has been delay in presenting this matter. No justifiable excuse has been put forward for this delay. This delay is such that a fair trial will not be possible. The passage of time will affect the memories of witnesses.

The defendant has shown actual prejudice. There is no duty on the defendant to show a defence to the claim, so the claimant's action ought to be dismissed for want of prosecution.

Miss Carol Vassall reply to authorities relied on by claimant. Miss Vassall sought to distinguish the **Port Service** case on some twelve grounds. Without doing a disservice to Counsel's submissions one of the grounds

weighed heavily with the court. It is that there was or conduct on action in the **Port Service** case that amounted to an acceptance or admission of liability by the defendants.

While in the instant application there was conduct on the defendant's part on one view that could amount to an acceptance or admission of liability. I take into account the other view of Miss Wignal that the conduct of the defendant in paying for medical treatment of the claimant was only an act of good customer relationship. However, it is my view that the defendant's conduct fall more in the order of acceptance of liability.

The position under the Judicature (Civil Procedure Code)

In **Port Services Ltd. and Mobay Undersea Tours Ltd. v. Fireman's Fund Insurance Co.** S.C.C.A. 18/2001, delivered March 11, 2002, Forte, P. stated the principles dealing with an application to dismiss for want of prosecution were settled and were applied by the Court of Appeal in the cases he listed. The principles he referred to are those approved by House of Lords in **Birkett v. James** [1978] A.C. 297. They are that an applicant seeking to dismiss an action for want of prosecution must show:

(1) That there was inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and

(2) That such delay has given 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 have or have caused serious prejudice to the defendant.

The position under the CPR 2002

1. A judge has an unqualified discretion to strike out a case where there is failure to comply with a rule. (CPR rule 3.4 (c) U.K)
2. To strike out a case is draconian step.
3. A judge has alternative powers to strike out an application or to mark the court's disapproval of delay.
4. The court can order the defaulting party to:
   (i) pay the whole part of the cost of the application brought.
   (ii) pay indemnity cost or.
   (iii) deprive the defending of interest or order interest at a lower rate,
   (iv) award interest at higher rate to a deserving party.

(per.Lord Woolf, M.R, **Biguzzi v. Rank Leisure P.L. C.** [1999] 1 W.L.R 1926

The Master of the Rolls stated that under the CPR 1998 the position is fundamentally different as it introduce a new procedural code with the

overriding objective of enabling the court to deal with cases justly. He opined that the authorities decided under the old procedure were no longer binding, persuasive and generally not relevant. He accepted that it was the primary duty of the claimant to prosecute the claim brought. He also affirmed that an assessment of delay under CPR 1998 should take into account the rule and procedure in force governing time for taking steps in an action at the time the action was filed.

In 2000 the English Court of Appeal followed the decisions in **Biguzzi case, In Axa Insurance Co. Ltd. v. Swire Fraser Ltd.** Times Law Reports – January 19, 2002 d. p. 24. This case added that it was no longer necessary to strictly prove prejudice. Though the Court had to consider prejudice as part if its general inquiry as to what was just.

The question arises whether the settled principles applied by the court in **Port Service Case** is applicable to applications to dismiss for want of prosecution made after CPR 2002. The overriding object of the CPR 2002 to deal with a case fairly and just is my view embrace and incorporate notions of:-

(a) ensuring a fair trial of issues in an action, and

(b) ensuring that delay does not cause serious prejudice to litigant.

To that extent, in my view, the fundamental principle formulated **Birkett v. James** is still alive and well.

Consequently, I direct myself on the instant application that as a part of my general inquiry as to what is fair and just. I must determine whether:

(a) the claimant was responsible for inordinate delay?

(b) Was this delay inexcusable?

(c) If so, whether such delay has given rise to a substantial risk that it is not possible to have a fair trial of the issues in the action, or is such or is likely to cause or have caused prejudice to the defendant?

Findings and Conclusions

On reviewing the defendant's evidence, I find:

(a) There was pre-writ delay of four (4) years and post writ delay of three (3) years.

(b) There was total delay of seven (7) years by the claimant to file statement of claim on the 1st defendant.

(c) The pre-writ delay was due to the claimant's attorney attempts to negotiate a settlement. Delay due to negotiation before filing writ is not a ground in itself to excuse delay. The claimant should within a reasonable time commence proceedings when it appears that no settlement will be achieved. It can not be said that there was any fault at this stage. The claimant's attorney in April 1997 sent the medical report they received in 1995 for the claim to the defendant's brokers. It was when nothing happened that they filed suit two (2) years later. There was delay in obtaining the medical report and this was explained as due to the lack of financial means of the claimant. Two years delay to obtain an expert medical report is not usually long in the context of the complainant's means.

(d) The post writ delay appears to be due somewhat to the attorney for the claimant's pre occupation with the proceeding with the other parties. That is the proceedings against the other parties which against whom the claim was discontinued. The interest of justice is not

achieved if the claimant should be driven from the judgment seat due to delay in presenting her claim because the attorney was pre-occupied with other parties.

(e) The post-writ delay must be view in the context of the conduct of the claimant's attorney. The post-writ delay of (3) three years is inordinate.

(f) However, I did not find the delay inexcusable. The circumstances of the agent or servant's conduct of sending any paying for the claimant's physiotherapy treatment, the 1st defendant's insurers and insurance brokers inactivity are factors that in my view provide a reasonable excuse for the delay.

(g) The issue to be tried in my view is not one of liability but one of damages. I say that because the 1st defendant's conduct of immediately taking responsibility for the claimant's physiotherapy which the claimant acted upon, without any disclaimer make it inequitable for them to deny liability.

(h) Where issues of fact depend on the oral evidence of witnesses it is accepted that delay will affect the

availability of witnesses and if available their ability to recall detail of events. This limitation does ultimately increase the risk that there may not be a fair trial of the issue in the action. The defendant relies on this as they claim the whereabouts of two of their witnesses cannot be ascertained. The defendants did not explain whether they did secure any statements from these witnesses from the beginning.

(i) On the authorities it would be a serious prejudice to put a burden on defendant to seek out evidence to satisfy the conditions for the admissibility of statement of witnesses if available where there was inordinate delay by a claimant. This is the position that the defendant is likely to face.

(j) However, there is documentary evidence available viz the two medical reports from the consultant orthopaedic surgeon. This may not be sufficient to ensure a fair trial of the issues if it is one only of liability. However, it is my view that the issue which remains is one of the extent of the injuries to the claimant. It is a matter of

assessment of damages. The available documentary evidence is sufficient to enable a fair trial on this issue. The defendant will not suffer a serious prejudice if the trial proceeds.

(k) The claimant will be left without any real compensation for her injuries when she was lead to believe the defendant was shouldering responsible for the injuries she sustained and sustained and the resultant loss.

Therefore application for want of prosecution dismissed. Application granted for claimant to file statement of claim out of time within fourteen days from date of order.

Cost of application to the defendant's to be paid by Claimant's attorney.

Leave to appeal granted.