JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 20 OF 2003

SUIT NO. C.L.420 OF 1996
MOTION NO. 25/03

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE COOKE. J.A.

BETWEEN ALCAN JAMAICA COMPANY APPELLANT/ 2ND DEFENDANT

AND HERBERT JOHNSON 1st RESPONDENT/DEFENDANT

AND IDEL THOMPSON CLARKE 2ND RESPONDENT/PLAINTIFF

Wendell Wilkins instructed by **Robertson, Smith, Ledgister & Co.** for the 2nd Respondent/Plaintiff

Christopher Kelman & Nigel Jones instructed by **Myers Fletcher & Gordon** for the Appellant/2nd Defendant

May 26,27,28,29, 2003 and July 30, 2004

DOWNER , J.A.:

I am in agreement with the reasons and conclusions of Cooke J.A.

WALKER, J.A.:

I agree.

COOKE, J.A. :

On the 12th of December, 1993 there was a motor vehicle accident along the Pen Hill main road in Manchester. Kadeen Clarke and Oneil Wray Demetrius succumbed to injuries as a result of the accident. Arising therefrom a writ was filed on the 11th December, 1996 by the plaintiff

under the Fatal Accidents Act for and on behalf of the near relations of the two deceased. Demetrius was the driver of one vehicle in the accident and Clarke the plaintiff was his passenger. The driver of the other vehicle, the respondent/1st defendant - was Herbert Johnson and the appellant/2nd defendant Alcan Jamaica Limited his employer. The suit was in negligence. It is not certain when this writ was served but an appearance to the suit was entered on the 2nd of September, 1997. A summons dated the 26th August, 2002 to dismiss for want of prosecution instituted by the Appellant/ 2nd defendant was heard on the 29th January and 11th March 2003 at the conclusion of which the learned trial judge ordered:

> "1. Suit to be dismissed for want of prosecution **UNLESS** the Plaintiff within **14 days** of the date hereof file and serve a Statement of Claim herein;
>
> 2. Costs to the 2nd Defendant against the plaintiff in accordance with schedule A.
>
> 3. Leave to appeal granted."

From this order there was an appeal to a single judge of the Court of Appeal challenging the discretion exercised by the court below. This appeal was brought pursuant to Rule 2.4 of the Court of Appeal Rules 2002. The Rule is in these terms:

> "(1) On a procedural appeal the appellant must file and serve written submissions in support of the appeal with the notice of appeal.

(2) The respondent may within 7 days of receipt of the notice of appeal file and serve on the appellant any written submissions in opposition to the appeal or in support of any cross appeal.

(3) The general rule is that a procedural appeal is to be considered on paper by a single judge of the court.

(4) The general rule is that consideration of the appeal must take place not less than 14 days nor more than 28 days after filing of the notice of appeal.

(5) The judge may, however, direct that the parties be entitled to make oral submissions and may direct that the appeal be heard by the court.

(6) The general rule is that any oral hearing must take place within 42 days of the filing of the notice of appeal.

(7) The judge may exercise any power of the court whether or not any party has filed or served a counter-notice."

On the 2nd of May, 2003, Bingham, J.A. allowed the appeal. Before him was only the written submissions by the appellant. The 2nd respondent/plaintiff in this appeal did not comply with rule 2.4(2) supra. There was no written judgment by Bingham, J.A. The next step was the filing of a Notice of Motion by the 2nd respondent/plaintiff by which an application was made to this court seeking:

"(1) The order of Mr. Justice Bingham made on May 2, 2003 in this appeal be varied or discharged.

(2) The Respondent/Plaintiff be permitted to apply out of time for an extension of time in which to file and serve her written submissions in this appeal.

(3) The written submissions be filed and served within three days of the date of this order or alternatively be taken as filed.

(4) The appeal be heard in open Court.

(5) There be further or other relief as the Court may deem fit."

At the conclusion of the submissions of Mr. Wilkins for the 2nd respondent/plaintiff, Mr. Kelman began by submitting that the decision by Bingham, J.A. made pursuant to 2.4 of the Court of Appeal Rules 2002 was not subject to review by a full Court of Appeal. However this submission was withdrawn, and the hearing proceeded for a determination on the merits of the rival submissions.

Dismissal for want of prosecution

I will begin the discussion by reproducing at some length passages from the speech of Lord Diplock in **Birkett v James** [1977] 2 All E.R. 801 at 804 – 5 (d – b). This extract is fairly lengthy but I consider the citation necessary as therein is set out (a) the problem (b) the approach to confront the problem and (c) guidelines which should inform this approach.

> "The modern practice as to dismissing actions for want of prosecution dates from 1967. By that time the dilatory conduct of proceedings in the

High Court by solicitors to plaintiffs whose causes of action would turn on the reliability of witnesses' recollections of past events had become a scandal, particularly in the case of those who litigated with the help of legal aid. Postponement of a trial until memories had faded and witnesses had vanished created a substantial risk that justice could not be done. True it is that at the trial the evils of delay would be likely to bear more heavily on the plaintiff on whom the onus would lie of proving that things had happened as he alleged, but the risk that justice would not be done to him extended also to the defendant and, even if successful at the trial, the defendant was likely to be out of pocket for his costs, which in legally aided cases he had little prospect of recovering.

Although the Rules of the Supreme Court contain express provision for ordering actions to be dismissed for failure by the plaintiff to comply timeously with some of the more important steps in the preparation of an action for trial, such as delivering the statement of claim, taking out a summons for directions and setting the action down for trial, dilatory tactics had been encouraged by the practice that had grown up for many years prior to 1967 of not applying to dismiss an action for want of prosecution, except on disobedience to a previous peremptory order that the action should be dismissed unless the plaintiff took within a specified additional time the step on which he had defaulted.

To remedy this High Court judges began to have recourse to the inherent jurisdiction of the court to dismiss an action for want of prosecution even where no previous peremptory order had been made, if the delay on the part of the plaintiff or his legal advisers was so prolonged that to bring the action on for hearing would involve a substantial risk that a fair trial of the issues would not be possible. This exercise of the inherent jurisdiction of the court first came before the

> Court of Appeal in **Reggentin v Beecholme Bakeries Ltd.** [1968] 1 All ER 566, [1968] 2 QB 276 (reported in a note to **Allen v Sir Alfred McAlpine & Sons Ltd.** [1968] 1 All ER 543, [1968] 2 QB 229 and **Fitz Patrick v Batger & Co. Ltd.** 2 All ER 657 [1967] 1 WLR 706.
>
> The dismissal of those actions was upheld and shortly after, in the three leading cases which were heard together and which, for brevity, I shall refer to as **Allen v McAlpine** [1968] 1 All ER 543, [1968] 2 QB 229, the Court of Appeal laid down the principles on which the jurisdiction has been exercised ever since. Those principles are set out, in my view accurately, in the note to RSC Ord. 25, r 1 of the current White Book Supreme Court Practice 1976, vol.1 pp 424-427. 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."

The want of enthusiasm in our legal fraternity for utilizing the recourse of seeking dismissal for want of prosecution was bemoaned by this court per Carberry, J.A. in **Warshaw, Gillings, and Adler v. Drew** [1986] 45 W.I.R. 265 at page 270 g, where he said:

> "... in England, (at the instance of the Judges), there has been a greater willingness by defendants and their attorneys to resort to the remedy of dismissal for want of prosecution than

> we have seen in this jurisdiction. A similar response by Jamaican Attorneys and Judges is perhaps long overdue."

This **Warshaw** case received the attention of the Judicial Committee of the Privy Council (1990) 27 JLR 189 and the **Birkett** principles were approved.

In **Patrick Valentine v Nicole Lumsden** (an infant) **and Lascelles Lumsden** (next friend) (1993) 30 J.L.R. 525 the infant plaintiff suffered severe injuries in a motor vehicle accident on March 13, 1986. The Writ of Summons was filed on May 31, 1989 and the defence on June 19, 1990. Thereafter nothing happened in the matter. On April 22, 1992 the appellant filed his summons to dismiss the action for want of prosecution. The reason given for the delay was that his attorney-at-law had mislaid the file since April 1991 and it was not discovered until May 21, 1992. The master before whom the summons came dismissed it. On appeal the master's decision was reversed. Downer, J.A. said at page 527 (G).

> "There are three features to note as regards the circumstances of this case. Firstly, the inordinate delay was caused by the respondent's Attorney-at-Law. Secondly, there was no justifiable excuse, and thirdly, it does not matter that the plaintiff may not have a remedy against his solicitor. As for inordinate delay the courts have taken a stern attitude towards inexcusable delay especially in running down actions which depend largely on the personal recollection of witnesses. Even the best of memories falter after a lapse of six years and so it may be impossible to obtain a fair trial."

In **West Indies Sugar v Stanley Minnell** (1993) 30 JLR 542, I take the accurate factual circumstances from the headnote which reads:

> "The respondent served a writ on the appellant four years after the accident which gave rise to the cause of action. The writ was served in June 1988. The appellants entered an appearance in August 1988. Nothing was done by the respondent until he filed a summons in July 1992 to extend the time to file the statement of claim out of time. The Master found that there was inordinate delay but that the appellant would not be prejudiced in its defence and granted the extension."

Forte, J.A. (as he then was) in allowing the appeal against the Master's decision said at page 546 B – H:

> "In my view, the length of the delay since the filing of the writ is in itself evidence that there is a substantial risk that a fair trial is not possible. The endorsement to the writ which was the only notice to the defendant, as to what it would be called upon to answer merely states:
>
> > 'The Plaintiff claims against the Defendant to recover damages for negligence for that on or about August 17, 1984 the plaintiff in the course of his duties as servant or agent of the Defendant in the Defendant's sugar warehouse at Frome in the parish of Westmoreland was injured by the negligent operation of a crane by GERALD BUCKNOR the servant or agent of the defendant acting in the performance of his duties as servant or agent of the defendant.
> >
> > By reason of the premises the Plaintiff has suffered personal injuries and has been put to loss and expense.'

It discloses, however, that the claim was in negligence, and is to recover damages for personal injuries to the plaintiff.

In an effort to establish that no prejudice would befall the defendant if the extension was granted, the plaintiff, through his attorney, swore to the following in an affidavit in support of the application at paragraph 18:

> 'That the defendant has not been adversely affected by the delay occasioned herein as it would have records of the accident which caused the plaintiff injuries and I am informed by the plaintiff and do verily believed (sic) that the witnesses and workers involved are either still working with the defendant or can readily be found.'

This is a case in which the evidence of the defendant will depend soley on the recall of witnesses, who, in spite of the attorney's affidavit, may not be available, and whose memories as to the incident may have faded over the years. Two other factors are of relevance (i) if the extension is granted, it will still be some time before the action comes on for trial and (ii) the details of the plaintiff's claim having only been revealed in the Statement of Claim filed as a result of the Master's grant of extension, the defendant up until 4 years after the filing of the writ had no idea what the details of the plaintiff's case was, and what it would have to answer.

In those circumstances, I would conclude that the 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."

At page 549, F-G Downer, J.A. said:

> "It is true that the appellant did not file an affidavit to vindicate its defence, nor did it take the step to file a summons to dismiss for want of prosecution. It was not obliged to do either. This was especially so in a case where the circumstances and evidence in the case told a strong story in its favour. Moreover, since the court has an inherent jurisdiction to dismiss for want of prosecution, the case ought to be considered from that standpoint. Also the combined effect of section 192 and section 244 of the Civil Procedure Code gave the appellant a right to move for dismissal for want of prosecution if the statement of claim had not been served within ten days of entry of appearance. A case ought to be dismissed for want of prosecution, if there has been inordinate delay and if there is prejudice to the appellant or that it is impossible in the interest of justice to have a fair trial."

In his view there could not be a fair trial because as is stated at page 550, B.

> "... recollection of eyewitnesses on either side, would be now so vague that a fair trial is impossible, and additionally, the appellant up to the time of the filing of the summons, had no inkling of what the statement of claim would be, so as to prepare its defence."

In Wood v H.G. Liquors Ltd and Another (1995) 48 WIR 240 there again the headnote faithfully represents the factual matrix.

> "Following a road accident in February 1981 in which a person sustained injuries from which he subsequently died, the appellant issued a writ in February 1987 claiming damages on behalf of the close relatives of the deceased and his estate. Although the respondents (the driver involved and his employer) consented in June 1988 to an extension of time for the filing of the

> statement of claim, no further steps were taken in the action and the first respondent (a company) applied for the action to be dismissed for want of prosecution. The first respondent stated that it necessarily relied on evidence to be given by persons who at the time of the accident had been its servants and officers and that such persons (by reason of the delay) were likely to become unavailable. The appellant maintained that the first respondent had failed to show any actual prejudice flowing from the delay. In January 1993, a master dismissed the action for want of prosecution. The appellant appealed against the dismissal of the action and his attorney at law accepted responsibility for the delay in pursuing the claim."

By a majority the appeal was dismissed. Carey J.A. in his dissenting judgment was of the view that the appellant had not demonstrated the prejudice which would have obtained if the matter was allowed to proceed. At page 243 j to 244 (a) he said:

> "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 of many reasons, 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 there may be prejudice to the defendant's business interests: **Biss v Lambeth, Southwark and Lewisham Health Authority (Teaching)** [1978] 2 All ER 125 and **Department of Transport v Chris Smaller (Transport) Ltd.** [1989] 1 All ER 807. But the defendant has the burden of proving prejudice.

> This was at the heart of the submissions of counsel for the appellants."

(This report leaves out the words "will cause prejudice to the defendant for any of many reasons) which I have taken from the original judgment).

At page 246 e, he further said:

> "It follows from what I have said that I must reject the submissions of Mr. Honeywell that no proof or 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."

Gordon J.A. expressed himself thus at page 252, b-g:

> "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 9th February 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 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 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 and six years were in the particular circumstances unacceptable; see **West Indies Sugar Ltd. v Minnell and Valentine v Lumsden.** I find that the delay in this case is inordinate and inexcusable and, moreover, the reasons proffered therefore unacceptable. It would be grossly unfair to the first 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."

Wolfe, J.A., as he then was, said at 256 (d):

> "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 **Port Services Limited v MoBay Undersea Tours Limited and Fireman's Fund Insurance Company** SCCA No. 18/2001 (unreported) delivered on March 11, 2002 the writ of summons was filed on the 26th January 1996. Hereafter the plaintiff remained dormant until 10th January

2000 when they filed a summons for extension of time within which to file a statement of claim. This was returnable on the 25th January 2000. On the 12th January, 2000 the appellants filed a summons to dismiss for want of prosecution. Both summonses were heard together and the learned trial judge dismissed the summons to dismiss for want of prosecution and allowed seven days for the statement of claim to be filed out of time. It was these orders which were the subject of appeal.

Forte, J.A. (as he then was) on page 2 stated that principles concerning this issue of dismissal for want of prosecution were settled in the case of **Birkett v James** and which this court has in several cases approved. Then on page 4 he utilized the opportunity to set forth his approach to this issue:

> "Before dealing with the issues in the appeal, I should reiterate that it is the defendant/appellant who must prove prejudice.
>
> The following words of Lord Griffith in **Department of Transport v. Chris Smaller Ltd** [1989] 1 All E.R. 897 at 900 confirm this:
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> > '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.' [See also **Warshaw, Gillings and Alder v. Drew** (supra)]

> I would however, add that the statement did not address the question of whether because of the delay, there is a substantial risk that a fair trial would not still be possible. As I said in **West Indies Sugar Ltd. v. Stanley Minnell** SCCA 91/92 delivered 20th December 1993 (unreported), the length of the delay per se can give rise to the substantial risk that a fair trial is impossible, and in those circumstances there need not be evidence of prejudice – the two being exclusive of each other. In order to determine the former an examination of all the circumstances must be undertaken. In respect of the latter there must be evidence of serious prejudice."

This court held that in the circumstances of that case it was not possible to have a fair trial and further that the appellant would be caused serious prejudice if the matter went to trial.

This review of the cases indicates that in the development of our jurisprudence in this area much emphasis has been placed on whether or not there is a substantial risk that a fair trial is not possible when there is inordinate and inexcusable delay. Delay is inimical to there being a fair trial. For my part this emphasis is to be applauded. Inordinate and inexcusable delays undermine the administration of justice. Even moreso public confidence will tend to be eroded. Panton, J.A. in **Port Services Limited** (supra) said at page 9:

> "I agree with the learned President that this appeal should be allowed. However, I wish to add a few words. In this country, the behaviour of litigants, and, in many cases, their attorneys-at-laws, in disregarding rules of procedure, has reached what may comfortably be described as epidemic proportions."

And again at page 10:

> "For there to be respect for the law, and for there to be the prospect of smooth and speedy dispensation of justice in our country, this Court has to set its face firmly against inordinate and inexcusable delays in complying with rules of procedure. Once there is a situation such as exists in this case, the Court should be very reluctant to be seen to be offering a helping hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigant's own deliberate action or inaction."

Since January 2003 the new Civil Procedure Rules 2002 have come into effect. One of the cardinal objectives is to prevent delay, through court management. Not long from now dismissals for want of prosecution may well be an anachronism – at least in its present guise.

In **Grovit and others v Doctor and others** [1997] 2 All ER 417 the House of Lords considered **Birkett v James** (supra). It is unnecessary to state the facts. Lord Woolf who delivered the speech with which all the other Law Lords concurred listed the criticism of what I will term the **Birkett v James** formulation. These are to be found at pages 419 j – 420 (a – d). After a discussion of the matter involved his Lordship stated at page 424:

> "The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the

> plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in **Birkett v James.** In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings."

Gordon, J.A. in **Wood** (supra) did recognise the inherent jurisdiction of the court to dismiss cases for being on abuse of the process of the court, although he endeavoured to bring his reasoning within the ambit of the **Birkett** formulation. At page 252, i - page 253 (a – e), he said:

> "In **Bremer Vulkan Schiffbau & Maschinenfabrik v South India Shipping Corporation Ltd.** [1981] 2 WLR 141, 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 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 appellant'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 v James** [1977] 2 All ER 801."

In **West Indies Sugar**, (supra) Downer, J.A. adverted to the court's exercise of its inherent jurisdiction. He said at page 549, f.

> "Moreover since the court has an inherent jurisdiction to dismiss for want of prosecution the case ought to be considered from that standpoint"

The appellate approach when the exercise of the Judge's discretion is challenged

It is well settled that in exercising its jurisdiction in this regard this court's function is that of a reviewing body. The guidance given by Lord Denning, M.R. in **Ward v James** [1966] 1 QB 273 at page 293 has long been accepted by this court.

> "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 ..."

Should the Judge's discretion be impugned?

In resolving this issue two factors will be uppermost in my mind. Firstly, the jurisprudence which has developed in this area and, secondly, the guidance of **Ward v. James.** In this case the learned trial judge did not deliver written reasons for her decision. Further there is no note of what she might have said orally as to the basis of her decision. This court therefore has to examine the evidence which was placed before the court on the 29th January and 11th March, 2003. The affidavit of Marcia Tai Chun, the Manager of the Human Resource and Compensation Department of the Appellant/ 2nd defendant dated the 21st August, 2002 sets out the unchallenged inaction of the plaintiff. That is to be found in paragraphs 3 – 5 which are reproduced hereunder:

> "3. This action was commenced by the Plaintiff on the 11th day of December, 1996, claiming damages for negligence and under the Fatal Accidents Act, arising from a traffic accident which occurred on the 12th day of December, 1993.
>
> 4. On the 2nd day of September 1997, Appearance to the suit was entered on behalf of the Second Defendant by Messrs. Livingston, Alexander & Levy. On the 9th day of October 2001, Notice of Change of Attorney was filed on behalf of the Second Defendant by Messrs. Myers, Fletcher & Gordon.
>
> 5. Since the filing of the Writ of Summons 5 ½ years ago, the Plaintiff has not taken any further step in the action. Consequently,

no Statement of Claim has been delivered to date."

In answer by way of the affidavit of Wendell C. Wilkins a partner of the firm of Attorneys-at-law, representing the 2nd respondent/plaintiff he stated as follows in paragraphs 6 – 8.

"6. That in respect of Paragraph 4 and 5 of the Affidavit, Livingston Alexander and Levy, the previous attorneys for the Second Defendant, wrote to the Plaintiff's attorneys by letter dated September 1, 1997 advising that they were taking instructions and requesting that no default step be taken against the Second Defendant without first advising the said attorneys. In deference to this request, the Plaintiff allowed time to the attorneys in this regard while at the same sought to provide further instructions to her attorneys in respect of the particulars of the claim in order to set out same in the Statement of Claim.

7. That in or about March 1999 the Plaintiff furnished her attorneys with the requested instructions regarding particulars of the dependent near relations of the deceased, Oneil Demetrius. These instructions were incomplete and as a consequence further instructions in this regard were awaited from the Plaintiff. In anticipation of receiving these instructions the Plaintiff's attorneys filed in June 1999 a Notice of Intention to Proceed.

8. That no instructions were received from the Plaintiff as anticipated and in order to proceed with the suit the Plaintiff's attorneys filed in March 2001 a Notice of Intention to Proceed but due to a breakdown in the communication

> between the Plaintiff and her attorneys the expected instructions were not received in order to properly proceed with the filing of the Statement of Claim."

There can be no doubt that in this case there is inordinate and inexcusable delay. Section 192(b) of the Judicature (Civil Procedure Code) Law, which at that time set out the procedural regime, gives the time for filing 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."

It would be recalled that in this case appearance was entered on the 2nd September 1997. The instructions sought pertaining to dependency are quite pedestrian. The bald assertion of "a breakdown in communication" is a weightless juxtaposition of words. It is noted that at the hearing by the learned trial judge there was no draft statement of claim as is the usual practice in matters of this nature. Interestingly, the lines of communication were speedily restored to enable the plaintiff to file a statement of claim within the 14 days allowed by the learned trial judge. So up to the time of the hearing the defendants were totally in the dark as to the specific nature of the case they had to meet. If this case were to be allowed to proceed to trial even with court management, taking into consideration the realities of the trial process in the Supreme Court the most optimistic forecast is that it would not come up for trial for another nine months. At that time there would have been a substantial risk that it would not be

possible to have a fair trial. The passage of time would probably have wreaked havoc with the memory of the potential witnesses on both sides. It is my view that the learned trial judge did not place any or sufficient weight to this aspect of the case. Her decision was inconsistent with the authorities which I have previously reviewed. I would therefore say that her decision ought to be reversed.

It is also my view that in this case the delay is likely to cause serious prejudice to the defendants. In paragraph 7 of the Marcia Tai Chun affidavit the evidence is that the 1st respondent/defendant who was the driver of the appellant/2nd defendant's vehicle is no longer in the employment of the 2nd defendant. Further, he cannot be located. The plaintiff tried to counter this prejudicial circumstance in paragraph 10 of the Wendell C. Wilkins affidavit which reads:

> "That Paragraph 7 of the Affidavit is not admitted. From instructions received from the Plaintiff, there are other witnesses to the accident, for example, Roy Spencer of Bombay District, Manchester, Bertram Watson of George North District, Spaulding, Manchester and Sharon White of Allison District, Bombay, Manchester, who may be available to the Second Defendant as witnesses.

It is unimpressively novel for this plaintiff to suggest that to cure her grave failings, the remedy is to provide the names of potential witnesses on which the defendants could rely.

In this court, though not in the court below it was sought to say that the difficulty envisaged in locating the 1st defendant, (whose testimony would have been fundamental to the defendant's cause) could be overcome by having recourse to the Evidence (Amendment) Act. It is provided therein that a witness' statement may be admitted into evidence if certain prerequisite conditions are satisfied. In this case the relevant condition is to be found at 31E(4)(d). It reads:

> "(i)...
> (ii) that the witness cannot be found after all reasonable steps have been taken to find him." [See Section 31E(4)(d) of the Evidence (Amendment) Act].

A similar submission was made in **Port Services Limited** (supra) and was roundly rejected by this Court. Forte, P. said:

> "In respect of (ii) the appellant would be required to prove that the witnesses cannot be found after all reasonable steps have been taken to find them. This naturally would put the appellant to the expense of trying to find the witnesses. In the end, there could be a possibility of the learned trial judge exercising his/her discretion to exclude the statements.
>
> In my view, to place the appellant in the position of having to satisfy the conditions of the Evidence (Amendment) Act with the possible result that it may fail so to do, is likely to cause serious prejudice to the appellant in advancing its defence."

I hold that the fact that the 1st respondent/defendant cannot now be located is likely to cause serious prejudice to the appellant/2nd

defendant in advancing its defence. It is my view that the learned trial judge in the face of this severe impediment either did not consider or give sufficient weight to this critical factor.

The conduct of the 2nd respondent/plaintiff demonstrated unpardonable indolence in the pursuit of her claim. This refusal to get on with it speaks to a decided disinclination to proceed. In paragraph 13 of the Wendell C. Wilkins' affidavit it is stated:

> "that from instructions received from the Plaintiff, which I verily believe, the Plaintiff is still interested in proceeding with this suit and is prepared to provide all outstanding instructions to her attorneys."

It is my view that this professed intention is all too late. It should have manifested itself long ago. It would seem that the protracted inaction of the plaintiff indicates an abuse of the process of the court. This is a case that beckons the exercise of the inherent jurisdiction of the court to demonstrate that such abuse will not be tolerated. It is my view that the learned trial judge did not consider this aspect of the case or if it was considered, insufficient weight was attached to it.

Now the hearing below was conducted under the Transitional Provisions of the Civil Procedure Rules, 2002. As such it is agreed that it was the former rules i.e. the now repealed Judicature (Civil Procedure Code) Law which were relevant. However, section 73.5 of the Civil Procedure Rules 2002 is in these terms:

"Exercise of Discretion

> Whenever the former rules still apply and the court has to exercise its discretion it may take into account the principles set out in these Rules and in particular Parts 1 and 25."

The submission, as I understand it, is that the making of "unless" orders is a significant feature of this "new dispensation". Therefore the learned trial judge was only acting within the spirit and intendment of the new Rules. Part 25 deals with court management and thus is hardly relevant here. Part 1 deals with what is described as "The Overriding Objective."

> "1.1 (1) states:
>
> These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> 1.1 (2) sets out guidance as to the considerations to be employed in dealing justly with cases. Among those considerations is
>
> 1.1 2 (d) which states:
>
> "Ensuring that it is dealt with expeditiously and fairly."

The plaintiff can find no comfort in 73.5 of the Civil Procedure Rules 2002. These rules are the antidote to the epidemic of delay against which Panton, J.A. so rightly inveighed in **Wood. (**supra).

I would say that the court below was in error and the decision of Bingham, J.A. was correct in allowing the appeal. The appellant/2nd defendant should have its costs both here and in the court below.