JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 96/2004

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE SMITH J.A.
THE HON. MRS. JUSTICE McCALLA, J.A. (Ag.)

BETWEEN	**FIRST CARIBBEAN INTERNATIONAL BANK (JAMAICA) LIMITED FORMERLY CIBC (JA.) LTD.**	**1ST DEFENDANT/APPELLANT**
A N D	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**
A N D	**HORACE MEADE**	**CLAIMANT/RESPONDENT**

Kent Gammon for appellant instructed by DunnCox

Miss Suzette Wolfe for Respondent instructed by Crafton Miller and Company

May 4, 2005 & July 29, 2005

FORTE, P.

Having had the opportunity of reading in draft the judgment of McCalla, J.A. (Ag.), I agree with the reasoning and conclusions therein and I have nothing further to add.

SMITH, J.A.

I also agree with the reasoning and conclusions of McCalla, J.A. (Ag.) and I have nothing to add.

McCALLA, J.A. (Ag.)

After hearing submissions in this matter on May 4, 2005 we dismissed the appeal with costs granted to the claimant/respondent. At that time we promised to put our reasons in writing and I now do so.

On September 10, 2004 Sykes J. (Ag.), as he then was, dismissed the 1st and 2nd defendants' applications to strike out the respondent's claim for want of prosecution. This appeal is by CIBC (Jamaica) Ltd. now known as First Caribbean International Bank (Jamaica) Limited ("the bank"), against that decision. The sole ground of appeal on which the bank relies is that the learned judge erred in law in not applying the correct legal principles on the application to dismiss for want of prosecution.

Chronology

A brief history of the matter is as follows:

April 10, 1995	-	the Claimant, Horace Meade, filed a claim for damages for false imprisonment arising out of his arrest in October 1994 by servants and/or agents of the 2nd Defendant, the Attorney General of Jamaica.
April 24, 1995	-	Appearance entered by the 1st Defendant/Appellant
July 26, 1995	-	1st Defendant/Appellant defence filed.
July 14, 1995	-	Claimant's reply to defence filed.
April 19, 1999	-	Notice of intention to proceed filed by the Claimant.
May 7, 1999	-	Summons for directions and consent order sent to 1st

Defendant/Appellant but no response received.

December 12, 2003 - 1st Defendant/Appellant requests case management conference.

The claimant having filed the Action in 1995, save for the filing of a notice of intention to proceed in 1999, took no further steps until he filed a notice of application for case management, set for hearing on August 31, 2004. This notice was served on the appellant on August 4, 2004. Mrs. Vivette E. Miller-Thwaites, Attorney-at-Law, for the claimant swore to an affidavit on August 25, 2004, stating at paragraph 6 that:

> "The Attorney-at-Law having conduct of this suit has left our Firm and did not assign the file to another Attorney-at-Law before departing. Inadvertently the file was misplaced in our offices and was only found during an audit of our files in 2003 and on the 12th day of December 2003 a case management conference was requested to ensure compliance with the Civil Procedure Rules, 2002."

On August 30, 2004 the bank filed a Notice of Application seeking reliefs as follows:

1. That the Action be dismissed.
2. That the costs of, incidental to and occasioned by this application be awarded to the first defendant to be agreed or taxed.

The bank relied on the following grounds:

a) The Claimant has failed to prosecute the matter

b) The delay as a result has been patently inordinate and inexcusable and has prejudiced the 1st Defendant/Appellant and;

c) There is a substantial risk that there cannot be a fair trial of the matter.

Kent Gammon, Attorney-at-Law for the appellant in an affidavit sworn to on August 27, 2004, chronicled the history of the claim and concluded at paragraphs 10 and 11 that:

> "The substantial and inordinate delay in prosecuting this matter is inexcusable and is an abuse of the process of the court. That the fair trial of this matter is highly improbable.
>
> That trial matters are now listed in 2007 and this is the earliest that the matter can be listed for a trial some near thirteen (13) years after the alleged incident."

The Appellant's submissions

In his written and oral submissions before us Mr. Kent Gammon, contended that there was prejudice to the appellant because of the delay. He argued that the affidavit of Peter Wilson that had been placed before the learned judge established that certain relevant books could not be found and may have been destroyed because of the passage of time. Also, a bank officer who was a signatory on behalf of the appellant to the bill of sale was no longer an employee of the bank as he had migrated to the United States of America.

He placed strong reliance on the case of **Alcan Jamaica Company v. Herbert Johnson and Idel Thompson-Clarke** SCCA No. 20 of 2003 (unreported) where Cooke J.A. in delivering the judgment of the court discussed a number of cases dealing with delay. These included the case of **West Indies Sugar Ltd. v. Stanley Minnell** (1993) 30 J.L.R. 532. In that case Forte J.A., as he then was, in considering the respondent's long delay in filing a summons to extend time to file a statement of claim, at page 546 of his judgment said:

> " 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."

Mr. Gammon also referred to the dictum of Wolfe J.A., as he then was, in the case of **Wood v. H.G. Liquors Ltd. & Another** (1995) 48 W.I.R. 240 at page 256, which was to the same effect:

> "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 being able to obtain a fair trial because of the passage of time."

Mr. Gammon alluded to several passages from the judgment of Cooke, J.A. in the **Alcan** case (supra) and the learned judge's endorsement of the views expressed in the long line of cases to which he referred. At page 15 of his judgment Cooke J.A. expressed himself thus:

> "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."

The learned judge went on to say at page 22 of his judgment:

> "If this case were to be allowed to proceed to trial, even without 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.
>
> All 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 on this aspect of the case."

Mr. Gammon submitted further that when the principles of the **Alcan** case (supra) are taken into account and set against the facts of the instant case the learned judge's exercise of his discretion was incorrect and is inconsistent with the principles stated in the **Alcan** case (supra).

Respondent's submissions

Miss Wolfe, counsel for the respondent, submitted that this court should not interfere with the exercise of the learned judge's discretion. She referred to the case of **Ward v. James** [1966] 1 QB 273 at page 293 where Denning, M.R. stated thus:

> "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 so much with him."

She argued that the learned judge properly advised himself of the correct principles that were to be applied. Miss Wolfe contended that the learned judge gave adequate consideration to the questions of prejudice and delay and on the facts of this case was correct when he concluded that it was still possible to have a fair trial. She said that the **Alcan** case (supra) is distinguishable as on the facts of that case, the claimant was dilatory in providing the instructions necessary to prepare the statement of claim whereas in this case, the claimant was not guilty of any deliberate or flagrant disregard of the rules of the court. Unlike the **Alcan** case (supra) where the memory of the witness was of great relevance, in this case reliance can be placed on documents.

Miss Wolfe relied on the case of **Biguzzi v. Rank Leisure Plc** [1999] 4 All ER 934, and the English cases of **Purdy v. Cambran** (delivered on the 17th December 1999) and **Walsh v. Misseldine** (delivered on February 29, 2000) both unreported. These cases were decided after the English Rules came into effect. In **Biguzzi** (supra at 939). Lord Woolf said that in transitional cases a judge:

> "Had to make a decision applying the principles under the CPR, not under the previous regime, in deciding whether this claim should be allowed to proceed. He could not and should not ignore the fact that the parties previously had been acting under a

> different regime. The fact that they were acting under a different regime does not mean that the judge is constrained to make the same sort of decision as would be made under the previous regime."

Indeed those sentiments were echoed by Lord Justice Brooke in the **Walsh** case (supra at para. 79) when he quoted May L.J. in **Purdy v. Cambran** (supra at para. 46) who said in part:

> "When the court is considering, in a case to be decided under the Civil Procedure Rules, whether or not it is just in accordance with the overriding objective to strike out a claim, it is not necessary or appropriate to analyse that question by reference to the rigid and overloaded structure which a large body of decisions under the former rules had constructed..."

Continuing to quote from **Purdy** (supra at para. 51) the following was stated:

> "...Under the new procedural code of the Civil Procedure Rules, the court takes into account all relevant circumstances and in deciding what order to make, makes a broad judgment after considering available possibilities. 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 is necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective."

The question that arises for determination in this appeal is whether or not the learned judge correctly exercised his discretion when he dismissed the appellants' application.

What therefore are the legal principles that are to be applied and how do they relate to the application that was before Sykes J.?

Rule 2.2 of the Civil Procedure Rules 2002 (CPR) stipulates that:

> "Notwithstanding anything in part 73 these rules apply to all old proceedings save for those in which a trial date has been fixed for the Hilary term 2003 and save for applications which have already been filed and fixed for hearing during the Hilary term 2003."

This case therefore falls to be determined under the CPR and the court was therefore obliged to have regard to Rule 1.1 of the CPR which provides as follows:

> "(1) These Rules are a new procedural code with overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing justly with a case includes-
> ...
>
> (d) ensuring that it is dealt with expeditiously and fairly ..."

Rule 1.2 states:

> "1.2 The court must seek to give effect to the overriding objective when it
>
> (a) exercises any discretion given to it by the Rules; or
>
> (b) interprets any rule."

Under Rule 26.1 (2) (v), in addition to any specific powers given under the CPR, the court is empowered to "take any other step, give any other direction or make any other order for the purpose of managing the case or furthering the overriding objective."

Rule 26.3 (1) of the CPR 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) that there has been a failure to comply with a rule or practice direction or with an order or directions given by the court in the proceedings;
>
> (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;
>
> (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or
>
> (d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10".

The legal principles applicable

This is how the learned judge approached the matter at page 6 of his judgment:

> "It is no secret that the old law as enunciated in **Birkett v James** [1978] A.C. 297 had become critically ill. It was clinically dead but no one wanted to throw the life support switch. Judges kept finding all sorts of reasons to prolong its existence. It had come under increasing attack. The House of Lords felt the increasing weight of the criticism (see **Department of Transport v Chris Smaller** [1989] A.C. 1197 and **Grovit v Doctor** [1997] 2 All ER 417). The **Birkett v James** principles had proven ineffective to deal with excessive delays (see Lord Woolf at page 420e-f in **Grovit).** The failure of the principles coupled with the steadfast refusal to rid the

> law of them led the House in **Grovit's** case to establish the principle that if it could be shown that the claimant had begun proceedings without any intention of bringing them to a conclusion then that in and of itself, without specific proof of prejudice to the defendant, was sufficient for the court to strike out the claim. The source of this power was the inherent power of the court to prevent abuse of its process. This radical development was an attempt to slip from under the judgment of Lord Griffiths in **Smaller's** case. In **Smaller,** despite Lord Griffiths' clear dissatisfaction with the **Birkett v James** rule he said that notwithstanding the inordinate delay the defendant could not say how specifically he was prejudiced and since it was still possible to have a fair trial the action would not be struck out.
>
> In Jamaica the **Birkett v James** rule also proved to be as inadequate as it had proven to be in England. So chronic had the problem become that, after fifteen years with the rule, the Court of Appeal was prepared to hold that inordinate delay by itself was sufficient to strike out a claim (see **West Indies Sugar v Stanley Mitchell** (sic) (1993) 30 J.L.R. 542). This position was arrived at in Jamaica some six years before the House of Lords came to the sad but correct conclusion that the existing rules were unsatisfactory."

Sykes,J. summarized (at page 12 of his judgment) the principles to be extrapolated from transitional cases and cases decided after the U.K. Rules came into effect as follows:

> " (1) There is no preconceived notion of which power of the court is prima facie more applicable than another;
>
> (2) the court takes into account all the circumstances of the particular case in light of rule 1.1;

(3) the factors identified in pre CPR cases are still valid and ought to be taken into account but they are directed to the exercise of the discretion under rule 26.3 or under the inherent powers of the court. The exercise of the discretion must always seek to give effect to the overriding objective of dealing with cases justly;

(4) after examining all the circumstances of the case the court then decides how best to deal with the case at that point in time when the decision is being made. In so doing the court looks at potential harm to all the parties and see how they can be addressed using the powers available to it under the CPR which of course includes the power of striking out."

Delay and prejudice

How did the learned judge approach the question of delay? Sykes, J. having examined the circumstances of the instant case (at page 14 of his judgment) found that:

> "The delay is inordinate and the excuse is poor. However this is not conclusive of the matter. I must go on to look at the other grounds raised by the defendants and still ask whether the case can be dealt with justly at this point."

On the question of prejudice he found that:

> "There is no indication from the defendants that they would not be able to mount a defence even after this long delay. This would be the main prejudice to the defendants. They have not said for example, that their chief witness to speak to the lawfulness of the detention was unavailable. They have not suggested that the information they have would not be admissible under the Evidence Act because they

> would at this late stage not be able to meet the standards stated there."

In considering the question as to whether or not there is a substantial risk that there cannot be a fair trial, the learned judge was of the view, after having considered all the circumstances of the case, that the real issue in the matter was the question of the lawfulness of the arrest of Mr. Meade.

The pleadings make it clear that there is agreement between the parties that it was the bank's action, which triggered the arrest of Mr. Meade.

It is not being disputed that Mr. Meade was arrested and released without being charged. The bank's defence is that it was entitled to act upon a bill of sale under which Mr. Meade, despite repeated demands, had failed to pay the sums which were due.

There is no assertion that material witnesses are not available to the bank for trial or that the provisions of the Evidence (Amendment) Act could not be complied with.

The learned judge found that the absence of the witness Harvey Levers, a signatory to the Bill of Sale, was not crucial in light of the fact that there was no denial that a loan had been granted by the bank.

I am in agreement with Miss Wolfe that the circumstances of the **Alcan** (supra) case are distinguishable from the instant case. In that case up to the date of hearing of the application to dismiss the action, the statement of claim had not been filed.

In the instant case, the respondent had initially proceeded to take the necessary steps in a timely manner, but failed to have the matter set down on the cause list as the file had been misplaced.

However, on the date of hearing of the application to dismiss the matter, the respondent had already set down the matter for case management. Although it could not be said that in this case the respondent had deliberately and intentionally disregarded the rules of the court, the delay was inordinate and the excuse proffered left a lot to be desired.

In the **Alcan** case (supra) which concerned a motor vehicle accident, of necessity, the memory of a witness would be crucial. In the instant case the bank will seek to rely on documents that it has not said are no longer in existence because of the passage of time.

The learned judge correctly recognized that the case is governed by the transitional provisions of the CPR and that by virtue of Rule 1.1 the court is obliged to give effect to the overriding objective to deal with cases justly.

He was mindful of the provision of Rule 26.3 which confers discretion on the court in an application to strike out a claim and the necessity to look at all the circumstances of the particular case, including the inordinate delay of the claimant.

It cannot be overemphasised that the administration of justice requires that the business of the court be conducted expeditiously. In a proper case, inordinate and inexcusable delay may attract the ultimate sanction of striking

out. However, each case must be considered in the light of its own circumstances. In this case I find that the court in considering the overriding objective of the CPR, gave due consideration to the question of delay, prejudice and whether or not in all the circumstances a fair trial was still possible.

Sykes, J. therefore considered all the relevant legal principles and their application to the case before him.

He concluded that in the circumstances of the case it would still be possible to have a fair trial as the court had adequate powers under the CPR to deal with matters relating to damages, costs and interest.

Conclusion

In my opinion the learned trial judge, in exercising his discretion to refuse to dismiss the claim for want of prosecution, applied the correct principles. I am of the view that there is no basis on which this court could interfere with the exercise of his discretion.

For the above reasons, I concurred with the order made on May 4, 2005, as stated at the outset.

FORTE, P. :

ORDER:

1. The appeal is dismissed.
2. Costs to the claimant/respondent to be agreed or taxed.