JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 35 OF 2005

BEFORE:	**THE HON. MR. JUSTICE HARRISON, P.** **THE HON. MR. JUSTICE K. HARRISON, J.A.** **THE HON. MR. JUSTICE MARSH, J.A. (Ag.)**	
BETWEEN:	**KEITH HUDSON** **CLANDALE SHECKLEFORD** **WINSTON LETTS** **CARMEN LETTS**	**PLAINTIFFS/APPELLANTS**
AND	**VERNON SMITH** **ALWYN SMITH**	**DEFENDANTS/RESPONDENTS**

Mr. Sylvester Morris for the Appellants

Mrs. Althea McBean-Wisdom instructed by Frater Ennis and Gordon for the Respondents

November 1, 2, & December 20, 2006

HARRISON, P:

I have read in draft the judgment of Harrison, J.A., and I am in agreement with his reasoning and conclusion.

K. HARRISON, J.A:

1. This is an appeal against an order made by Mrs. Justice Norma McIntosh on the 10th February 2005 dismissing an action filed by the Plaintiffs ("The Appellants") for want of prosecution. On November 2, 2006 we dismissed

the appeal and delivered an oral judgment. We promised then to put our reasons for judgment in writing. This is a fulfillment of that promise.

The Background Facts

2. A Writ of Summons was filed in the Supreme Court on the 12th November 1982 by the Appellants seeking:

> "(1) A Declaration and Order that the Plaintiffs are entitled to be registered as the owner of an Estate in Fee Simple in possession of all that parcel of land known as 12 Young Street, Spanish Town, St. Catherine, and as registered at Volume 1171 Folio 442 of the Register Book of Titles;
>
> (2) to recover possession of all that parcel of land known as 12 Young Street, Spanish Town, St. Catherine, and
>
> (3) An Order that the Certificate of Title registered at Volume 1171 Folio 442 in the name of Frederick Sterling Smith be rectified. In that the Certificate of Title was procured by fraud, illegality and misrepresentation."

3. The Statement of Claim alleged inter alia:

> " . . .
>
> 5. That the said registered title was obtained by fraud of the Applicant and the defendant acting together. That the Applicant Rebecca Letts is now deceased".
>
> PARTICULARS OF FRAUD
>
> "(a) That the Applicant for the title Rebecca Letts was of unsound mind before and at the date of the alleged application by her for a registered title.
>
> (b) That Rebecca Letts could not read or write.
>
> (c) That the said parcel of land belonged to William Letts now deceased, and that the said William Letts was in possession of the said 12 Young Street, up to the date of his

death on the 2nd day of October, 1975. That the Declarations of Rebecca Letts and Cromwell Gaynor were to their knowledge false, and as such a fraudulent act to mislead the Registrar of Titles.

(d) That William Letts by his Will dated (sic) and probated on the 21st day of March 1977, had devised the said 12 Young Street, to the third and fourth named Plaintiffs. That the Plaintiffs allowed Rebecca Letts to live there as a relative and tenant at will.

(e) That the statement of the Applicants in their Declarations for a registered title that Rebecca Letts was in possession for 55 years and that she bought it from one Brown were to both Declarants' knowledge false and a fraud.

(f) That up to the date of his death William Letts' name was on the Collector of Taxes Roll. That the Executors did not have his name taken off. Yet the taxes roll was fraudulently altered after William Letts' death and his name taken off. The taxes were paid by William Letts up to the time of his death, and after William Letts' death taxes were paid by the Executors, and beneficiary (sic)".

4. The Defendants alleged inter alia in their Defence:

"4. That the Defendant denies:

(a) That Rebecca Letts was of unsound mind.

(b) That the land belonged to William Letts but states that the said land belonged to Rebecca Letts.

...

6. The Defendant states that if William Letts devised the said land it was not his property to give and denies that Rebecca Letts was living on the premises 12 Young Street as a tenant at will.

7. That the Defendant denies that the statement in any declarations made by the applicants were false or fraudulent and denies that any tax roll was fraudulently altered by him or by anyone acting on his behalf . . ."

The Chronology of events

5. I will now turn to the chronology of events which led to the dismissal of the action:

i) The Writ of Summons was filed 12th November 1982.

ii) Appearance was entered on behalf of the Defendant March 4, 1983.

iii) Notices of Intention to proceed were filed February 1, 1985 and June 18, 1985 respectively.

iv) On July 2, 1985 the Plaintiff sought the Defendants' consent for the Statement of Claim to be filed out of time.

v) The Statement of Claim was filed 23rd July 1985.

vi) The Defence was filed 1st October 1985.

vii) Summons for Directions was filed 18th February 1986.

viii) The Summons for Directions was heard April 8, 1986. It was ordered inter alia that the action should be set down for trial within 30 days of the 8th April 1986.

ix) A letter dated April 10, 1986 was sent by the Plaintiffs' Attorney at Law requesting the Registrar of the Supreme Court to set down the matter for trial. The records do not indicate what further steps were taken by the Plaintiffs after this letter was sent to the Registrar.

x) Frederick Smith the sole defendant at the time of filing the suit died on the 20th July 1987.

xi) Letters of Administration in the estate of Frederick Smith, deceased was granted on the 11th March 1991. Vernon Smith and Alwyn Smith were appointed Administrators of the estate of Frederick Smith.

xii) A Notice of Intention to Proceed with the action was filed by the Plaintiffs on 8th November 1999.

xiii) On 5th April 2000 the Plaintiffs filed an Ex-parte Summons seeking an order to amend the Statement of Claim in order to remove Frederick Smith's name as defendant and to substitute the names of the Administrators of his estate as Defendants. The affidavit in support of this summons was sworn to by the Plaintiffs' Attorney at Law, Sylvester Morris.

xiv) Vernon Smith the 2nd Defendant died on 4th February 2000.

xv) The proposed amended Writ of Summons and Statement of Claim were filed 12th June 2000.

xvi) An Order to substitute the parties was made 20th June 2000.

xvii) The Order granting the amendment of the Writ and Statement of Claim was filed in the Registry of the Supreme Court on 20th November 2000.

xviii) The Order to substitute the parties was served on the 3rd Defendant in July 2001.

xix) Appearance was entered on behalf of the 3rd Defendant on the 12th September 2001.

xx) A Summons to Dismiss the Action for want of prosecution was filed on the 4th November 2002. The Affidavit in support of this summons was sworn to by Mrs. Althea McBean-Wisdom, Attorney at Law for the 3rd Defendant Alwyn Smith.

xxi) A Notice of Intention to Proceed was filed by the Plaintiffs on 14th February 2003. They intended to proceed with the action one month from the 14th February 2003.

xxii) The summons to dismiss the action which was filed on the 4th November 2002 was adjourned sine die on the application of Mr. Morris on the 18th March 2003.

xxiii) A Re-listed Summons to Dismiss the Action for Want of Prosecution was filed on behalf of 3rd defendant on 28th March

2003. This Summons was fixed for hearing on 10th February 2005. Service was admitted by Sylvester Morris.

xxiv) A Letter dated 20th May 2003 was sent by Sylvester Morris to the Registrar of the Supreme Court applying for a Case Management Conference to be fixed pursuant to rule 25.1 of the CPR 2002.

xxv) The Application to dismiss the action for want of prosecution was heard 10th February 2005 by Mrs. Justice Norma McIntosh when the learned judge dismissed the action.

6 A period of twenty (20) years had actually elapsed from the filing of the action up to when it was dismissed for want of prosecution.

The Defendants' affidavit in support of their application to dismiss the action for want of prosecution

7. Mrs. McBean-Wisdom, for the Defendants, filed an affidavit in support of the application to dismiss the action. She deposed to the history of the matter and the failure on the part of the plaintiffs to prosecute the action. She also deposed that the 3rd defendant lived in Chicago USA, and that he was not aware of the full history of the matter. She stated that he only visited Jamaica occasionally and that he would be severely prejudiced if he was called upon after a delay in excess of twenty years to defend the action. She further deposed that other relatives or prospective witnesses who may have been able to furnish him with the relevant information were now deceased or were unable to recollect facts. In the circumstances, she deposed that it would no longer be possible to have a fair trial of the issues in the action.

Notes of the proceedings before McIntosh J on February 10, 2005

8. The Judge's notes of evidence state inter alia:

> "Plaintiff's attorney had applied in May 2003 for a case management conference to be held. Claimants' attorney Miss English said they were waiting to find out who were the personal representatives of the first and second defendants. Third defendant's attorney said this information could have been obtained had counsel contacted them. There was no affidavit in response to the defendant's application – there was no evidence in rebuttal – the delay was inordinate – conduct was inexcusable – after passage of so much time there was no recourse but to grant the application. Action dismissed for want of prosecution".

The Notice and Grounds of Appeal

9. Notice and Grounds of Appeal were filed in the Registry of the Court of Appeal on the 22nd March 2005. The grounds of appeal are as follows:

> "(a) That the Learned Judge erred in finding that at the date of the hearing of the application to strike out the action for want of prosecution the claimants had not pursued their action. That the record shows that by letter dated May 20, 2003 the claimants through their Attorney at Law as required by the Rules 73 s. (4) and (5) of the Supreme Court of Jamaica Civil Procedure Rules 2002 had written to the Registrar of the Supreme Court applying for a Case Management Conference to be fixed as under Rule 73 s 4 and 5. (sic) That copy of the said letter was served on Respondents Attorneys at Law the 20th May 2003. So that at that date of the hearing of the application to strike out for want of prosecution the respondents were aware that application under Rule 73 s (4 and 5) (sic) had been done as required by the said new rules.

That further the claimants/appellants had done all that was required to pursue the action to a trial date and as such was not neglectful to be guilty of want of prosecution of their suit.

(b) The Learned Judge erred in ruling that the claimants having written the letter to the Registrar, had to do more to get a trial date, and not having done more was guilty of want of prosecution in the matter.

(c) The respondents failed to fully advise the court in their affidavit that they were aware of the said letter to the Registrar for the setting down under Rule 73 s (4 and 5) (sic) of the Supreme Court of Jamaica Civil Procedure Rules 2002 and as such mislead the learned judge on the basis of their affidavits filed by them to apply for the suit to be dismissed for want of prosecution.

(d) That at the hearing, however, the fact of the letter being on the file that had been written to the Registrar under Rule 73 s (4 and 5) (sic) was brought to the attention of the Learned Trial Judge who nevertheless proceeded to strike out the suit for want of prosecution notwithstanding.

(e) That the Learned Trial Judge erred in finding that she had an inherent discretion to strike out the action notwithstanding the appellants having fulfilled the requirement of s 73 rule 4 and 5 of the Supreme Court of Jamaica Civil Procedure Rules 2002 while the appellant is awaiting the Case Management Conference applied for".

The findings of fact and law that have been challenged

10. The under-mentioned findings of facts and law are challenged:

"(i) That the appellants are guilty of delay in that they have failed to take the necessary steps at the date of the hearing of the application to have the suit tried so that they are guilty of want of prosecution of the suit. Notwithstanding part 73 Transitional Provisions in particular s 73 s 4 and 5."

> "(ii) That the claimants/appellants are in breach of the law as to which required prosecution of their action against the defendants which require that they prosecute their action."
>
> "(iii) That the Learned Trial Judge erred in striking out the action notwithstanding Rule 73 s 4 and 5 of the Supreme Court of Jamaica Civil Procedure Rules 2002."

The submissions by Mr. Morris

11. Mr. Morris, for the Appellants, submitted that the application for a case management conference was properly made on May 20, 2003 and that the Appellants were awaiting a date from the Registrar of the Supreme Court for that conference to be held. He submitted that since a trial date was not fixed in the matter and an application for a Case Management Conference was made before 31st December 2003, McIntosh J. had no jurisdiction to have heard the application to dismiss the action before the Case Management Conference was heard.

12. Mr. Morris further submitted that rule 26.5(1) of the Civil Procedure Rules 2002 ("the CPR ") provides that a matter ought not to be struck out at a case management conference unless an "Unless Order" was disobeyed. Rule 26.5(1), states however:

> "26.5(1) This rule applies where the court makes an order which includes a term that the statement of case of a party be struck out if the party does not comply with the "unless order" by the specified date".

13. Mr. Morris also submitted that the delay in prosecuting the claim was due mainly to the death of two defendants. This he said, made it necessary for the pleadings to be amended in order to substitute the parties who had been sued.

14. He submitted that the defendant would not have been prejudiced if the matter had gone on to trial since the Plaintiffs' case was based on fraud and that the land in dispute was transferred to the defendants as a gift. Furthermore, he submitted that there was further delay due to the entry of appearance on the 12th September 2001 in respect of the 3rd Defendant. He also contended that since Probate was granted on 8th March 2002 in respect of the estate of Vernon Smith, one could not legally prosecute the suit against Alwyn Smith.

15. Mr. Morris finally submitted that once the new rules laid down the procedure how to deal with the applications for court orders then the old procedural rules would become inapplicable. He submitted that the Plaintiffs could not be guilty of delay since it was the Registrar of the Supreme Court who had failed to fix a date for the hearing of the case management conference. That date he said was not fixed up to the time the application was heard to dismiss the action.

The submissions by Mrs. McBean-Wisdom

16. Mrs. McBean-Wisdom submitted that the learned judge was empowered to dismiss the action for want of prosecution having regard to inordinate and inexcusable delay on the part of the Appellants in prosecuting the matter. She

referred to the well-known cases of ***Birkett v James*** [1977] 2 All E.R 801; ***Wood v HG Liquors Ltd and Anor.*** (1995) 48 WIR 240; ***WISCo v Minnell*** (1993) 30 JLR 542 and ***Grovit v Doctor*** [1997] 2 All E.R 417.

17. She also submitted that the court also has an inherent power to strike out a statement of case under rule 26.3 of the CPR in the following circumstances:

(a) That there has been failure to comply with a rule or practice or with an order or direction given by the court in the proceedings.

(b) That the statement of case or the part to be struck out is an abuse of 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.

(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 and 10.

18. Mrs. McBean-Wisdom submitted that the Court's inherent jurisdiction for dismissing an action for want of prosecution arose under the Old Rules as well as under the New Rules. She argued that there was substantial risk of an unfair trial occurring and that the Respondents would be prejudiced as a result of the inordinate delay.

19. She submitted that pursuant to the overriding objective set out in rule 1.1(2) of the CPR, the Court has a duty to deal justly with matters by ensuring that they are dealt with expeditiously and fairly. She argued that the learned

judge in dismissing the appellant's action for want of prosecution was acting in furtherance of the overriding objective.

20. Mrs. McBean-Wisdom submitted that since the Plaintiffs had not complied with the Rule 73.3(6) of the CPR, it meant that the CPR 2002, would not be the relevant Rules for consideration when the application was heard on the 10th February 2005. The old rules she said, would still be applicable.

21. She further submitted that even if the Appellants had complied properly with Rule 73.3(6) of the CPR this did not fetter the learned judge's discretion to exercise her inherent power in the circumstances of this case to dismiss the action for want of prosecution. She submitted that mere obedience to a practice direction or to the transitional provisions of the CPR 2002 contained in part 73 would not have been sufficient to prevent the learned trial judge from exercising her discretion to dismiss the action for want of prosecution on the basis of inordinate and inexcusable delay.

22. Mrs. McBean-Wisdom therefore submitted that the appeal should be dismissed as there are no grounds on which the Appellants can impugn the decision of the learned trial judge since she had exercised her discretion in accordance with established principles relating to dismissal for want of prosecution on the basis of inordinate delay as well as the overriding objectives of the CPR.

The Transitional Provisions in the CPR

23. Rule 73.3 of the CPR provides inter alia, as follows:

> "73.3 (1) – These Rules do not apply to any old proceedings in which a trial date has been fixed to take place within the first term after the commencement date unless that date is adjourned and a judge shall fix a date.
> ...
> (4) Where in any old proceedings a trial date has not been fixed to take place within the first term after the commencement date, it is the duty of the claimant to apply for a case management conference to be fixed.
>
> (5) When an application under paragraph (4) is received, the registry must fix a date, time and place for a case management conference under Part 27, and the claimant must give all parties at least 28 days notice of that date, time and place fixed for the case management conference.
>
> (6) These Rules apply to old proceedings from the date that notice of the case management conference is given".

24. It is abundantly clear that this matter was an old proceeding and a trial date had not yet been fixed. The Appellants were therefore obliged to apply before December 31, 2003 for a case management conference to be held. This was done by letter dated May 20, 2003. The issue which arose during the arguments was the effective date that the new rules would have come into operation.

25. Mrs. McBean-Wisdom submitted that pursuant to sub-rule (6) (supra) the new rules would apply to old proceedings from the date that notice of the case

management conference is given. Mr. Morris on the other hand, argued that the new rules would apply from the date when the application is made to the Registrar of the Supreme Court for fixing a date for the conference.

26. The Court was inclined to accept the submissions made by Mrs. McBean-Wisdom on the 2nd November 2006. It has subsequently been discovered however, that there was an amendment to the Rules on 13th February 2003 with respect to old proceedings. Notice of the Amendment was published in The Jamaica Gazette Supplement Proclamations Rules and Regulations. Rule 2.2 was amended by adding a paragraph (4) which states as follows:

> "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".

27. By virtue of the above amendment the new rules would apply to all old proceedings save for those in which a trial date had been fixed for the Hilary Term 2003 and save for applications which had already been fixed for hearing during the Hilary Term 2003. The instant case was an old matter but it did not fall within any of the exceptions. It meant therefore that the new rules would be the relevant rules for consideration.

Conclusion

28. It is unfortunate that the Appellants chose not to have filed an affidavit in rebuttal when McIntosh J., heard the application to dismiss the action for want of

prosecution. Mr. Morris tried valiantly however to convince this Court that the delay had been caused from the death of two persons and that it was for this reason why amendments had to be sought in order to substitute the parties.

29. The fact that there were two deaths cannot be denied but in addition, there were periods of inactivity on the part of the Appellants during the period of twenty (20) years that have not been explained, nor has any attempt been made to do so.

30. The records have indicated that the Writ of Summons was filed on the 12th November 1982. It took the Appellants almost three (3) years thereafter to file the Statement of Claim.

31. The Defence was filed quite promptly and the pleadings were closed as of the 8th April 1986. It was ordered by the Master in Chambers at the hearing of the Summons for Directions that the matter should be set down for trial within 30 days of the 8th April 1986. The Appellants complied some two days after the order was made by sending a letter to the Registrar of the Supreme Court requesting that the matter be placed on the Cause List and for a trial date to be fixed. It would appear from the records that this application was not followed up by the Appellants. There were no further letters to the Registrar and there was no evidence of the Appellants' Attorney at Law having attended any date fixing session for a trial date to be fixed.

32. The sole defendant at the time of filing the Writ of Summons died on the 20th July 1987 and the matter seemed to have gone asleep for almost four (4) years.

33. Letters of Administration were granted in Mr. Smith's estate on 11th March 1991. The Appellants were once more inactive for almost 8 ½ years when suddenly they filed a Notice of Intention to proceed on 8th November 1999. No explanation has been given for this inordinate delay. It is therefore the Court's view that the delay in prosecuting the claim was inordinate and inexcusable thereby causing serious prejudice to the Respondents.

34. In the circumstances, there is no basis on which this court could properly interfere with the exercise of the learned judge's discretion to strike out the action for want of prosecution. She had properly concluded that the action should be struck out because it is clear that justice required it.

35. It is further the view of this Court that the delay in prosecuting the claim amounted to an abuse of process. See ***Grovit v Doctor*** (supra); ***Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd*** [1998] 1 WLR 1426. The authorities are very clear that where the defaulting party's conduct is due to prolonged inactivity this amounted to an abuse of the court's process. The learned judge would therefore be justified under Rule 26.3 CPR 2002, to strike out the claim even where the defendant could not point to any prejudice arising from the delay. It is also the Court's view that despite the Appellants' application for a case

case management conference this would not fetter the learned judge's discretion to exercise her inherent power in the circumstances of this case to dismiss the action for want of prosecution.

36. The learned authors of Blackstone's Civil Practice 2004 Edition have stated at page 513 that:

> "the problems under the old law with dealing justly with cases where there had been delay was one of the main motivating factors in introducing the CPR, and it has been hoped that the old principles, and the considerable case law that developed around them, could be consigned to history. These concepts, however, may still have some life on the basis that even in CPR cases they survive as part of the court's inherent jurisdiction".

37. It is further the view of this Court that it would not be just or in accordance with the overriding objective set out in the CPR to permit this particular claim to proceed to trial. The grounds of appeal have all failed.

38. It was for these reasons the Court dismissed the appeal. The order of McIntosh J., is affirmed with costs to the Respondents to be taxed if not agreed.

MARSH, J.A. (Ag.):

I agree.

HARRISON, P.

ORDER:

(1) Appeal dismissed.

(2) Costs to the respondents to be agreed or taxed.