JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 18/2001

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

BETWEEN	**PORT SERVICES LTD**	**DEFENDANT/ APPELLANT**
AND	**MOBAY UNDERSEA TOURS LTD**	
AND	**FIREMAN'S FUND INSURANCE COMPANY**	**PLAINTIFFS/ RESPONDENTS**

Gordon Robinson, instructed by Mrs. Winsome Marsh of Nunes, Scholefield, DeLeon & Co for appellant

Dennis Goffe, Q.C. instructed by Ms. Michele Champagnie of Myers, Fletcher & Gordon for Respondents

November 7, 8, 9, 2001 & March 11, 2002

FORTE, P:

This is an appeal from an Order of Reckord J in which he granted the respondents leave to file statement of claim out of time and within 7 days of his order. At the same hearing, he refused the appellant's summons to dismiss for want of prosecution, the action brought by the respondents. The respondents had filed a writ of summons against the appellants on the 26th January, 1996 arising out of a cause of action which had arisen on the 27th January 1995.

The endorsement on the writ claimed as follows:

> "The First named Plaintiff as owner of the endorsee of the Bill of Lading in respect of a semi-submersible vessel hereinafter referred to as 'the cargo' shipped on board the motor vessel INAGUA TANIA and the Second named Plaintiff as the insurer of the said cargo claim damages against the Defendant for breach of duty and/or negligence and/or breach of their duty as bailees of the cargo, by themselves, through their servants and/or agents in that on or about the 27th day of January, 1995, while discharging the said cargo from the motor vessel INAGUA TANIA at Berth 2, Western Terminals in Kingston, the Defendant and/or their servants and/or agents so negligently handled the said cargo that they severely damaged same thereby causing the Plaintiffs to suffer loss and damage and incur expenses."

After the filing of the writ, the plaintiffs remained dormant until the 10th January 2000 when they filed a summons for extension of time within which to file statement of claim. This summons was returnable on the 25th January 2000; exactly four years after the writ had been filed. Significantly, the writ was not served upon the appellants until the 24th January 1997. On their part on the 12th January 2000 the appellants filed a summons to dismiss the action for want of prosecution. Both these summonses were heard together by Reckord J resulting in the order from which this appeal now lies.

Although five (5) grounds of appeal were filed, the issues arising in the appeal were as follows:

> (1) Was the respondent guilty of abuse of the process of the Court in not filing a Statement of Claim in a period of time which the learned judge found to be inordinate and inexcusable delay.
>
> (2) Was there sufficient evidence to show that the delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues, or is such as is likely to cause or to have caused serious prejudice to the appellant.

The principles out of which these issues arise were settled in the case of ***Birkett v. James*** [1977] 2 All E.R. 801 and which this Court has in several cases approved: [See

the Jamaican case of ***Warshaw, Gillings and Alder v. Drew*** (1990) 27 JLR 189 in which these principles were approved by the Judicial Committee of the Privy Council]. In that case, Lord Diplock stated:

> "The power [to dismiss for want of prosecution] 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."

In this appeal, the learned judge found that the delay was inordinate and inexcusable, a finding which has not been challenged on appeal. He, however, it appears, found that because of the circumstances, the appellant could still have a fair trial and that no serious prejudice had arisen from the delay. Here is his reasoning:

> "There is one distinguishing feature in the instant case. Within days of the incident the defendant, possibly in keeping with company policy, had taken statements from all those who were present, employees and others. Fortunately, these statements have been preserved and can be admitted in evidence under the recently amended Evidence Act. Can the defendant, in the light of this, complain about passage of time and dimming memories? Those who are available will have their statements from which they can refresh their memories. There should not be any difficulty in having the statements of others admitted. Mr. Hugh Gordon, who was the crane operator when the cargo fell, and who should be the key witness for the defendant, has not migrated and his address is known.
>
> Mr. Robinson's complaint that only after 4 years after the cause of action arose that the defendant got information that suit filed in relation to negligence and breach of contract, cannot be justified as the endorsement on the writ clearly states that the plaintiffs were claiming damages for negligence and breach of duty. The only justifiable complaint is that the amount of nearly ½ million U.S. dollars was being claimed.

> In view of the above I am constrained to exercise my discretion in favour of the plaintiff. Accordingly, there shall be an order in terms of the plaintiffs' summons for extension of time dated 10th January, 2000.
>
> The defendant's application to dismiss the action for want of prosecution is refused and the summons is dismissed."

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:

> "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 that 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.

The law in relation to the circumstances in which a case can be dismissed for want of prosecution is, as has hereto been demonstrated, settled. Consequently, this appeal ought to depend for its determination, on whether the particular circumstances are such, that the learned judge can be said to have exercised his discretion erroneously.

1. **Was there an abuse of the process of the Court by the respondent?**

Mr. Gordon Robinson, for the appellant, had to rely on certain reasoning of the learned judge, in order to mount this argument. He found solace in the following words of the learned judge:

> "Not a word has been said of the reasons for this inordinate delay of four years. The plaintiffs are not foreigners, they are local entities. Even if they did not have 'complete instructions' as stated by Mrs. Champagnie, surely they could have filed what they had and reserved the right to apply to amend the statement of claim on the receipt of further instructions. They did not do this – No justifiable excuse has been established for this delay. It is apparent that they have allowed this action to take this leisurely course as it 'would not be statute barred until January 26, 2001'. Be it known that that date has now passed. ... On the issue before the court, based on the decided cases, this action ought to be struck out for want of prosecution. Counsel for the plaintiff's has not denied that the delay in filing their statement of claim is inordinate and inexcusable.
> Notwithstanding, he says the delay is not so prejudicial as to prevent a fair trial."

The appellant contends, on the basis of the above finding, that the reason for the delay in filing the Statement of Claim, amounts to an abuse because, the learned judge found that the respondent allowed the action to take a "leisurely course" as the limitation period, had some time to run before expiry. Mr. Robinson contends, that this amounted to deliberate and intentional delay by the appellant, which is sufficient ground to conclude that there was an abuse of the process test under principle (1) in the ***Birkett v. James*** case (supra). In other words, the appellant deliberately flouted the rules of court which required the Statement of Claim to be filed within ten days.

In my view, Lord Diplock's statement in ***Birkett v. James*** (supra), in relation to an abuse of the process requires something more than the mere failure to file the

Statement of Claim within the statutory period. It envisages a deliberate and intentional act of delay on the part of the plaintiff, either to deliberately hold up the process, or not to proceed with the action at all. The fact that the respondent made reference to the limitation period in the affidavit of Michele Champagnie, cannot be the basis for concluding that the respondent did not file the Statement of Claim because of that fact. Indeed Ms. Champagnie gave the following reason for the delay in paragraph 3 of her affidavit:

> "That the delay in filing the statement of claim arose because the Firm did not have complete instructions from the Plaintiffs in relation to the details of the claims being made. The firm has received the instructions which were outstanding and we are now ready to file the statement of claim and proceed with the action."

The learned judge was quite correct in concluding that that was not a sufficient and adequate reason for the delay, and accordingly found, with the concession of the respondent, that the delay was inordinate and inexcusable. In the circumstances, I am unable to agree with the submissions of Mr. Gordon, that the delay on the part of the respondent amounted to an abuse of the process of the Court.

2. Is it possible to have a fair trial or has the appellant proven that there is a serious risk of prejudice caused by the delay?

The appellant attempted to demonstrate prejudice through the affidavit evidence of Phillip Henry who was at the relevant time, the Managing Director of the Defendant Company. Mr. Henry was also subjected to cross-examination by counsel for the respondent.

In his affidavit Mr. Henry deposed that of the employees who actually witnessed the incident one had died and the others had left the company's employ. He stated as follows in paragraph 4:

> "That the said past employees are:
>
> (i) Mr. Louis Dear, deceased;

(ii) Mr. Freddie Hooke, Supercargo and Mr. Noel Carr Operations Manager, who have both migrated and whose exact whereabouts are presently not known to the Defendant;

(iii) Mr. Hugh Gordon, Retired. His whereabouts are at this time still known to the Defendant.

Mr. Henry further deposed:

> "That the said employees were integrally involved in the operation of discharging the semi submersible on the material date, and whose evidence would be essential in establishing the Defendant's Defence not only as to what was done and how it was done also as to the role of the principal of the First named Plaintiff both prior and subsequent to the entire operation."

In cross-examination, he admitted that his Operations Manager, Mr. Louis Dear took statements from "men who were there." Statements were taken from, Mr. Noel Carr, Operations Manager for the Stevedore Department, Mr. Hooke, Mr. Hugh Gordon, the Shore Crane Operator, and Louis Dear himself, all statements having been given on the 31st January 1995. The incident occurred on the 27th January 1995. Mr. Hooke was the immediate "supercargo" for this project and supervisor. He was in charge of the ship while in port, and it would be his duty to supervise the discharge of the particular goods that day. This, he stated would involve "some amount of consultation with his supervisors – Noel Carr and Louis Dear." Mr. Dear died on the 9th September, 1996. Mr. Gordon retired in July 1997 at age 65.

The learned trial judge relied on the fact that statements had been taken soon after the incident, to exercise his discretion in favour of the respondent, on the basis that by virtue of the Evidence (Amendment) Act the statements would become admissible. In relation to Mr. Louis Dear, he being deceased, it is likely that his evidence would be admissible under the said Act [See Section 31E(4)(a)] However, in respect of those witnesses who it is alleged have migrated and whose addresses are unknown, the

appellant would have to prove before admission of the statements, either of the following:

(i) that the particular witness is outside of Jamaica and it is not reasonably practicable to secure his attendance [See Section 31E(4)(c) of the Evidence (Amendment Act 1995); or

(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].

In respect of (i) the information of Mr. Hooke's migration came per his fiancée Doreen Brown to Mr. Henry who at the time of giving evidence could not recall when last he had spoken to her. Mr. Henry also testified that he was told by Mr. Carr that he was migrating. It is questionable whether the Court would accept that evidence in proof of the fact that the witnesses have indeed migrated.

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. Additionally, though Mr. Hugh Gordon is still available he will be near 70 years of age at the time of trial, and in spite of his statement would certainly be handicapped after such

a long time in recalling the incident in sufficient detail to respond to testing cross-examination as to what in fact occurred.

In my judgment, given all the circumstances, the evidence establishes that having regard to the inordinate and inexcusable delay there is not only a substantial risk that it is not possible to have a fair trial of the issues but also that there is a likelihood that the appellant would be caused serious prejudice if this matter should go to trial.

For these reasons, I would allow the appeal and set aside the order of the Court below. I would order that the action be dismissed for want of prosecution and that the respondents pay the costs of the appellant, such costs to be taxed if not agreed.

PANTON, J.A.

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. The widespread nature of this behaviour is not seen or experienced these days, I daresay, in those jurisdictions from which precedents are cited with the expectation that they should be followed without question or demur here.

In ***Vashti Wood {on behalf of the near relations of Dalton Roy Box (deceased)} v. H.G.Liquors Limited and Another*** [Supreme Court Civil Appeal No.23/93 judgment delivered on April 7, 1995], Gordon, J.A. at page 18, reminded that "the courts have been particularly anxious to ensure that cases are dealt with expeditiously, especially accident cases". This reminder has gone unheeded in too many cases. It is as if the pronouncements of the courts mean very little in this respect.

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. In the instant case, the situation has wider implications of prejudice as the giving of relief to the delinquent litigants would result in an uncalled for and, no doubt, expensive burden being placed on the appellant for it to attempt to conduct its defence through the courtesy of the Evidence (Amendment) Act. In my view, it is unacceptable that the respondents should be placed in a position to so adversely affect the appellant's conduct of its defence.

SMITH, J.A. (Ag.)

I too, agree that, for the reasons the learned President gives, this appeal should be allowed.

I will content myself by respectfully echoing this expression of confidence gleaned from the speech of Lord Griffiths in ***Department of Transport v. Chris Smaller (Transport) Ltd*** [1989] A.C. 1197, that the court control case management procedure soon to be introduced will ensure that once a litigant has entered the litigation process his case will proceed in accordance with the timetable prescribed by the rules of court. Hopefully then, applications such as the instant one, will be of the past.

FORTE, P:

Appeal allowed. Order of the court below set aside, and action dismissed for want of prosecution.

Costs of the appeal to the appellant to be paid by the respondents to be taxed if not agreed.