JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 28/96

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

BETWEEN JAMAICA CAR RENTALS LIMITED APPELLANT

AND WAYNE TAYLOR RESPONDENT

Alexander Williams and Miss Minett Palmer,
instructed by Myers, Fletcher & Gordon, for the appellant

Barry Frankson, instructed by Gaynair & Fraser,
for the respondent

November 10, 1997 and March 30, 1998

FORTE, J.A.:

I have had the opportunity of reading in draft the judgment of Bingham, J.A. and agree with the reasoning and conclusion therein. I have nothing to add.

GORDON, J.A.:

I agree.

BINGHAM, J.A.:

On November 10, 1997, we heard arguments in this appeal. At the conclusion of the matter, we dismissed the appeal and ordered costs to the respondent to be agreed or taxed. We promised then to put our reasons for our decision into writing and this we now do.

The claim below, which is yet to be adjudicated on, is for personal injuries for negligence arising out of a motor vehicle collision on July 27, 1982, in the parish of St. James between a motor vehicle registered FS 1220 in which the respondent was a passenger and a motor car registered FT 0356 owned by the appellant company.

For a full and proper understanding of the issues involved in the appeal, it is necessary to set out a chronology of the various stages through which the action has passed leading up to the summons to dismiss being filed.

The History of the Claim

The writ of summons and the statement of claim were filed in the Supreme Court on August 26, 1985. Appearance was entered by the attorneys-at-law for the appellant on October 31, 1985, and a defence was filed on November 29, 1985. The summons for directions was heard on February 18, 1986.

On February 19, 1986, the respondent's attorneys-at-law notified the Registrar of the Supreme Court, in keeping with the provisions of section

343(1) of the Judicature (Civil Procedure Code) Law, requesting that the Registrar set down the action for

Having regard to the chronology of events since the filing of the claim, it could not be argued that up to this point in time there was anything suggesting dilatoriness on the part of the respondent's attorneys in moving the matter forward. Within seven months the action had proceeded from the stage of the filing of the writ of summons to one of having it set down for a hearing date to be fixed.

No hearing date having been set, on June 10, 1986, a follow-up request was made to the Registrar by the respondent's attorneys.

The next stage was on July 7, 1986, when the Registrar wrote to the respondent's attorneys informing them of the placing of the action on the "Term List" in keeping with the provisions of section 344(5) of the Code.

There the matter stood until June 20, 1989, when the first certificate of readiness was filed by the respondent's attorneys. Following this the action was eventually set down for hearing on July 13, 1992. On that day the matter had to be adjourned at the request of the respondent's attorneys as the respondent was unavailable, being off the Island at his job in Guantanamo Bay, Cuba.

The respondent's attorneys filed a fresh certificate of readiness on July 17, 1992, following the adjourned hearing. This failed, however, to

evoke any positive response from the Registrar as no new trial date was fixed.

Thereafter followed a hiatus of almost three years during which nothing was done by the attorneys acting for the parties to move the matter forward.

On January 19, 1995, the appellant's attorneys took out a summons to dismiss the action for want of prosecution.

In his affidavit filed in support of the summons, Mr. Alexander Williams, the attorney-at-law having conduct of the matter for the appellant company, in the material paragraphs deposed as follows:

> 3. "The Plaintiff has not made any serious effort to have this matter tried and disposed of within a reasonable time. After the order for directions was made in February 1986 the first certificate of readiness was not filed until June 1989. When this matter came on for trial in July 1992 it was adjourned sine die at the Plaintiff's request and no further steps have been taken since then by the Plaintiff to conclude this matter.
>
> 4. The lapse of time between the accident and the present has been so great that the Defendant has lost touch with the witnesses that would have been called on its behalf at the trial of this matter. Particularly, the Defence is to the effect that the Defendant's vehicle was being driven at the material time, by an unauthorised driver. I am advised by the Defendant's insurers and do verily believe that the Defendant's vehicle had been rented to one Zachariah Martin who, in breach of the rental agreement with the Defendant, allowed one Paul DeSouza of the United States to drive the vehicle.

> 5. I am advised by the Defendant's insurers and do verily believe that the said Zachariah Martin can now no longer be located, neither the employee of the Defendant who prepared the rental agreement and who could prove that, at the material time, the vehicle was rented."

At the hearing of the summons on March 12, 1996, Reckord, J., in dismissing the application, commented as follows:

> "Registry is partly coming under fire. Plaintiff acknowledges it is his duty to take steps. Certain steps that he has to take. Did so in 1989.
>
> Although Plaintiff could have done further, not expecting another longer delay. Another three (3) years delay occurs. Application made to dismiss.
>
> Clear that blame laid squarely at feet of Registry. Direct that matter be brought to attention of Registrar." [Emphasis supplied]

The decision of Reckord, J. has been challenged on the grounds that:

> 1. "The Learned Judge erred in holding that the inordinate delays occasioned in the Suit were not inexcusable when there was no evidence or only insufficient evidence before him to excuse the inordinate delays.
>
> 2. The Learned Judge failed to appreciate that in the unchallenged evidence before him, a fair trial of the issues was no longer possible."

Learned counsel for the appellant, Mr. Williams, submitted that there was an inordinate delay, which occurred from July, 1992, for three years during which there was no progress in the action. The respondent's attorneys, while relying on the certificate of readiness filed on July 17, 1992,

have not made any serious effort since then to have the matter tried and disposed of within a reasonable time. Due diligence required that when they got no response from the registry after waiting for a reasonable time from the lodging of the certificate they could have taken steps to file another certificate in an effort to expedite the setting down of the matter for hearing.

Counsel relied in support on S.C.C.A. 23/93 ***Vashti Wood (on behalf of near relations of Dalton Roy Box [deceased]) and H. G. Liquors and Crawford Parkins o/c Exford Parkins*** (unreported) delivered on April 7, 1995. This decision, a majority judgment of this court (Carey, J.A. dissenting), provides a useful guide as to the principles to be applied by a court when considering the question of delay. The leading cases both English and Jamaican were referred to and considered by the court on facts that were self-evident. The majority of the court (Gordon and Wolfe, JJA) held, in dismissing the appeal, that the action was rightly dismissed by the Master following a period of thirteen years in which no statement of claim had been filed, and the plaintiff's attorneys had been given every possible accommodation by the defendant's attorneys to do so.

Learned counsel for the respondent, Mr. Frankson, referred to the chronology of events in contending that, in determining the question of delay, the relevant period under review was to be computed as from the filing of the second certificate of readiness on July 17, 1992, to the filing of the summons to dismiss in January, 1995. In filing the certificate following

the adjourned hearing on July 13, 1992, the plaintiff's attorneys had done everything in their power to move the action forward to the stage of obtaining a new trial date. This certificate was superseded by a new practice direction that came into force on July 14, 1994. This required either party to file a certificate of readiness in respect of cases appearing on the cause list forty (40) days before the end of each term. It is only since the issuing of this new practice direction that the attorneys for the appellant took a renewed interest in the matter leading up to the filing of the summons to dismiss the action for want of prosecution.

Counsel for the respondent further submitted that, although the appellants by their affidavit are contending that the long delay has prejudiced their ability to properly defend the suit, they have not suffered any prejudice as they could rely on the provisions of the Evidence (Amendment) Act by tendering in evidence the statement of any witnesses who were no longer available to give viva voce evidence, in proof of their defence. Given the circumstances of this case, had this course been resorted to, the respondent could hardly object to the tendering of such statement(s) at the hearing.

A proper starting point in this matter is an examination of the principles to be applied in determining whether a particular case is a fit subject for the exercise of the court's discretion to favour an applicant at a hearing of a summons to dismiss an action for want of prosecution.

In ***Birkett v. James*** [1977] 2 W.L.R. 38, Lord Diplock in restating the principles governing the jurisdiction in such matters laid down by the Court of Appeal in ***Allen v. McAlpine*** [1968] 2 Q.B. 229 said:

> "... 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."
> [Emphasis supplied]

When the facts in this case are examined one is here looking at a period of nine years and four months from the date of the filing of the writ of summons on August 28, 1985, to the filing of the summons to dismiss on January 19, 1995. This period on the face of it may appear to be inordinately long for an action to have been pending. The long delay from the hearing of the summons for directions on February 18, 1986, to the hearing date on July 13, 1992, can only be attributed to the very heavy court lists resulting in a large backlog of cases awaiting trial as is the experience in the Supreme Court. Although the first certificate of readiness was filed on June 20, 1989, the plaintiff's attorneys were unable to obtain a trial date until July 13, 1992. The matter had to be adjourned as the respondent was out of the jurisdiction

and unavailable. The learned judge found that the inaction following the filing of the second certificate on July 17, 1992, was due solely to fault on the part of the registry of the Supreme Court. He formed the opinion that the respondent's attorneys having waited for some three years from the filing of the first certificate of readiness in 1989 it was reasonable for them to expect that they would not have to undergo another long period in waiting for another trial date.

For this court to differ from the learned judge, we would have to come to a determination that his decision was an unreasonable one. On an examination of the facts from the period in July, 1992, following the adjournment and the filing of the second certificate of readiness it may appear that the plaintiff's attorneys were responsible to some degree in not following up the matter in an effort to expedite the hearing of the action. The appellant's attorneys displayed an equal lack of interest from that period up to the time that the new practice direction came into force on July 14, 1994. It is only at that stage that they then sought to take advantage of nolence on the part of the respondent's attorneys to launch their summons to dismiss the action.

In taking the extreme course contended for by counsel for the appellant, we would first have to be satisfied that the respondent's attorneys were guilty of contumelious conduct by their delay of such magnitude as would now render a fair trial of the action an impossibility.

On a very careful review of the facts leading up to the summons to dismiss, it cannot be said that such delay as there was, was the fault of the respondent.

The due and proper administration of justice cries out for urgent reform when in a situation as here displayed, an action remains pending for such a long period and blame is recognised and "laid squarely at the feet of the Registry" of the Supreme Court. The determining factor nevertheless is one of delay on the part of the plaintiff or his attorney for such a period as to amount to what may be termed inordinate and inexcusable delay which warrants the court's sanction. Given the facts outlined in this case and the principles of law applicable, one cannot justly say that in determining the matter as he did the learned judge acted on the basis of any non-existent fact or applied wrong legal principles in coming to his decision to dismiss the summons.

It was for the above reasons that we dismissed the appeal in terms of the order set out at the commencement of this judgment.