[2022] **JMSC CIV 102**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012 HCV 03127

BETWEEN	**Fay Campbell**	**CLAIMANT**
AND	**Mark Anthony Forrester**	**1ST DEFENDANT**
AND	**Shevawn Nugent**	**2ND DEFENDANT**
AND	**Damion Melvin**	**3rd DEFENDANT**
AND	**Tonker Trucking and Equipment Ltd**	**4TH DEFENDANT**

IN CHAMBERS

Mr S. Kinghorn instructed by Kinghorn and Kinghorn for the Claimant

Mr. M. Wisdom & Ms. A. Fennell instructed by Nunes, Scholefield, DeLeon & Co. for the 3rd and 4th Defendants

Mr. C. Campbell and Mr. M. Palmer instructed by Archer, Cummings & Co. for the 2nd Defendant

Heard: 13th and 23rd June 2022

Application to dismiss claim for want of prosecution - whether there has been an inordinate and inexcusable delay in prosecuting the case- whether the claimant is responsibility for this delay- whether there would be prejudice to the second defendant if the matter proceeds to trial- whether there is a substantial risk that a fair trial will not be possible.

TIE POWELL, J

The Application

[1] The application before the court is for the claim to be dismissed for want of prosecution against the second defendant. The applicant contends that the claimant has breached rule 26.3(1)(a) of the Civil Procedure Rules (CPR), which provision deals with inter alia, the striking out of a statement of case,

where there has been a failure to comply with a rule, practice direction, order or direction of the court; or alternatively rule 26.3(1)(b), in that there has been an abuse of process.

The Background

[2] In brief, the claim was filed in January 2012, arising out of a motor vehicle accident which took place in September 2011. The claim and particulars of claim were amended in January 2014, and thereafter the second and forth defendants filed their defence. Mediation was held on December 2, 2014, but the outcome was unsuccessful. A case management hearing date has not been set by the Registrar, as is required by CPR 74.12(2).

The Applicant's Submissions:

[3] The applicant, the second defendant, in written submissions, relied on various authorities which addressed the inherent jurisdiction of the court to dismiss a claim for want of prosecution; the duties of counsel as per rules 1.1 and 1.3 of the CPR to help the court deal with cases expeditiously and fairly; and the principles to be considered in applications to dismiss a claim for want of prosecution. The essence of the applicant's submissions is that the claimant has delayed in prosecuting the case, and that this delay is inordinate and inexcusable. Further, this delay has resulted in serious prejudice to the second defendant and has given rise to a substantial risk that it is not possible to have a fair trial. The basis for this assertion is that its sole eye witness can no longer be located; and in any event, given the significant length of time that has elapsed since the incident which has given rise to the claim occurred, a fair trial will not be possible as the evidence is eye witness based and the quality of that evidence will invariably be compromised.

The respondent's submissions

[4] The respondent took no issue with the authorities presented by the applicant or with the submissions made on the applicable legal principles. The respondent however maintained that on the facts, the claimant was not at fault. Rather, the claimant did all that was possible to get the registry to set a case management

conference date, which, as per rule 74.12 of the Civil Procedure Rules (CPR), is within the purview of the Registrar. When a date was not scheduled, counsel for the claimant, through their legal clerk, made frequent checks with the registry of the Supreme Court on the matter, and thereafter in May 2016, filed a 'Notice of request for case management conference,' a document created by counsel. A date was still not forthcoming and their legal clerk did further follow ups with the registry, but to no avail. The explanation given was that the file could not be located. Another 'Notice of request for case management conference' was filed in October 2020.

[5] On the matter of the risk of an unfair trial or prejudice to the second defendant, the respondent argued that existing legislation can adequately address the issue of the possible absence of the applicant's witness, and allow for the admission of a witness statement into evidence. Hence he argues, there is no real risk of an unfair trial or prejudice to the applicant.

Analysis:-

[6] As indicated by Edwards JA in **MSB Limited and Finsac Limited v Joycelyn Thomas [2020] JMCA Civ 4,** the criteria for consideration by a court in determining whether to dismiss a claim for want of prosecution, have been dealt with in **Allen v Sir Alfred McAlpine & Sons [1968] 1 All 543,** and **Birkett v James [1977] 2 All ER 801**, which cases have been approved and applied by the Privy Council in decisions such as **Warshaw, Gillings and Alder v Drew (1990) 27JLR 189**. In **Birkett v James**, Lord Diplock at page 805, stated, "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."

[7] The first issue to be addressed is whether there has been delay which can properly be categorised as inordinate and inexcusable. I am of the view that one must scrutinize what has transpired since December 2014, the date of the failed mediation session, in order to determine whether there has been an unacceptable period of inactivity, and if so, whether the claimant is to be blamed for same.

[8] There is no dispute that the Registrar has failed to set a date for the case management conference. As per rule 74.12(2) of the CPR, where no agreement has been reached in mediation, the Registrar must 'immediately' fix a case management conference, and notify the parties, which notice must be at least 14 days (CPR 27.3(6)). The case management conference is to take place 4 to 8 weeks after the mediation report has been filed (CPR 27.3(3)).

[9] Given the stipulated time frames, the claimant ought to have been alert to the fact that something was amiss by the beginning of February 2015. By then, it would have been clear that the Registrar had not done what ought to have been done as regards to the setting of a case management conference date.

[10] It being clear that the Registrar failed in this regard, the issue is whether the claimant is absolved of any responsibility for the period of inactivity. Was there any duty on the part of the claimant, the Registrar having failed to act in accordance with CPR 74.12(2) and 27.3(3)? If so, has the claimant satisfied same?

[11] The respondent argues that it is the Registrar who is to set the date, and that the Registrar's failings cannot be visited upon the claimant, particularly in the context of the efforts made on behalf of the claimant to have the Registrar act. The applicant, on the other hand, argues that in spite of the deficiencies on the part of the Registrar, the claimant has ultimately failed in its duty to prosecute the case in a timely manner.

[12] In considering this issue, I reminded myself of the duties of counsel in the civil arena. The overriding objective of the Civil Procedure Rules, as per rule 1.1(1) is for the court to deal with cases justly. Dealing with cases justly includes

ensuring that cases are dealt with expeditiously (CPR 1.1 (2)(d)). It is the duty of the parties to help the court to further the overriding objective (CPR 1.3).

[13] I was mindful also of the guidance given in various authorities. In **Julliette Wright and Alfred Palmer v Jason Salmon [2021] JMCA 32,** Edwards JA, whilst dealing with a matter of a different nature, commented on the duties of counsel. She noted that in the case of a claim, the authorities have long established that it is the duty of the claimant to prosecute the claim expeditiously. She referred to the case of **Reggentin v Beecholme Bakeries Ltd, 1968 QBD 276.** That case involved a claim that had been dismissed for want of prosecution. Therein, Lord Denning in refusing to reverse the decision of the trial judge noted, "it is the duty of the plaintiff's advisers to get on with the case. Every year that passes prejudices the fair trial." Edwards JA also referred to the case of **MSB Limited and Finsac Limited v Joycelyn Thomas,** a matter in which she also presided. In that case, there was a delay in prosecuting the case in issue and the claimant sought to lay partial blame at the feet of the Registrar for failing to set a case management date. The Court of Appeal took the view that the claimant had done nothing since their request of the Registrar for a case management conference date, as was the procedure at that time, to ensure that a case management conference. It found that even if there had been administrative inefficiency by the registry, the respondent and her legal representatives had a duty to move the case along.

[14] Similarly, in the case of **Sandals Royal Management Limited v Mahoe Bay Company Limited [2019] JMCA App 12,** whilst acknowledging the responsibility and the role of the registry of the Court of Appeal in moving a case forward, Foster Pusey JA, stated that this did not "undermine, contradict or override the duty of a litigant to maintain an active interest in having his or her matter proceed with expedition."

[15] I am satisfied, given the stipulations of the CPR, and given the guidance set out in the several authorities, that the claimant had a duty to intervene, in an effort to help the court in ensuring that the case was dealt with expeditiously. It is apparent that the claimant's representative recognised this as well, given their intervention.

[16] The respondent speaks to making frequent checks at the registry, through a legal clerk, on the matter of the case management conference date, without success. The information he received was that the file could not be located.

[17] I note that there are no details as to when these checks were made, or the individuals in the registry who were spoken to. What is clear is that this approach was bearing no fruit. This apparently was the sole tactic employed by counsel for the claimant, leading up to the filing of the 'Notice of request for case management conference' in May 2016.

[18] The time period between the failed mediation session, and the initial filed notice of request for case management conference, was over 14 months. This must be considered in the context of the time frame within which a case management conference ought to be held after a failed mediation session, of 4 to 8 weeks. The delay in taking some further action, other than sending a legal clerk to make enquiries at the registry, is difficult to appreciate. The claimant ought to have been put on alert within this time frame that something was terribly awry. Also, the visits to the registry by the legal clerk were not achieving the desired results. These visits, however, apparently continued over the years, and once again, in October 2020, another 'Notice of request for case management conference' was filed. By this time the applicant had already filed the application which is now before the court, albeit it was not yet served on the claimant.

[19] The second filed notice came in excess of four years after the initial filed notice. There has been no explanation as to what accounts for this tardy reaction, in the context of visits to the registry by the legal clerk, which were having no effect, and the lack of response to the previous notice that had been filed.

[20] In addition to having concerns as to the timeliness of the action taken, I question also the practicality of the action taken. Seeking to have a legal clerk address what was a significant and persistent issue, was perhaps not the most practical. Likewise, the filing of the 'Notice of request for case management conference', was perhaps also not the most useful. This document was created by counsel for the claimant and is not a form found in the CPR. Whilst it is endorsed "To: The Registrar of the Supreme Court," it was evidently a document filed in the

same manner as all other court documents, and was not sent directly to the Registrar. There was nothing to ensure that it was brought to her attention. It also did not seek to move the Court itself.

[21] The respondent contends that there was nothing else that could have been done on behalf of the claimant, save for reporting the matter to the Chief Justice. That certainly was an option, but I am of the view that there were so many other avenues that could also have been taken. Counsel indicates that the reason given by the registry staff to his legal clerk for a case management conference date not being set, was that the file could not be located. This begs the following questions: Was there an effort to have same reconstructed? What was done to engage the Registrar herself? Was a telephone call made? Was a letter addressed to, and delivered to the Registrar? Was there any effort to convene a meeting with the Registrar? Was there any effort to move the Court itself? The document filed was not an application to the Court. An application to the Court could have triggered some meaningful response. The claimant, for instance, had the option of applying to the Court to dispense with the holding of a case management conference as per CPR 27.4. In that scenario, the Court would essentially be required to given written directives on matters that would have been addressed in a case management conference.

[22] From the date of the failed mediation (December 2014), to the date when the application to dismiss the claim for want of prosecution was filed (February 2020), over 5 years had elapsed. The file was in a state of dormancy for this period. I am of the view that the time lapse in issue was inordinate and inexcusable.

[23] I am further of the view that whilst it is clear that the Registrar failed in her responsibilities, the claimant was also delinquent. There has been a period of close to 6 years of dead time, i.e. between the failed mediation session to the filing of the second 'notice of request for case management conference'. The case sat dormant during this time, save for undetailed visits to the registry by a legal clerk and the filing of the two documents, which documents were filed over 14 and 70 months respectively, after the failed mediation session. I find the

actions taken on behalf of the claimant to be wholly unacceptable and inadequate.

[24] I find that the claimant and counsel have failed in their obligation to assist the court in fulfilling its overriding objective, as it relates to dealing with cases expeditiously and fairly. The Registrar's failings do not exonerate the claimant and her representative of this responsibility. Having considered the totality of the efforts made on behalf of the claimant, one does not get a sense of urgency on the part of the claimant's representative. I am of the view that there was ultimately a failure to prosecute the case in a timely manner.

[25] I find that it was pointless for counsel for the claimant to maintain the same strategy over the years, that is, visits to the registry by the legal clerk and the filing of the Notice in question, which strategy was having no positive result. How much longer was this fruitless approach going to continue before meaningful action was taken?

[26] Having determined that the delay has been inordinate and inexcusable and that the claimant was significantly responsible, I will now consider whether the applicant has established that the delay has given rise to a substantial risk that it is not possible to have a fair trial of the issues in this action, or whether the second defendant has been prejudiced by the delay or is likely be prejudiced.

[27] The applicant argues that the length of time that has already passed since the motor vehicle accident, the subject of this claim, occurred, in and of itself creates a substantial risk that that a fair trial is not possible. This passage of time, it is argued, must negatively impact on the reliability of the evidence of the witnesses, given that memories invariably fade as the years go by. This also will cause prejudice to the second defendant. More significantly however, the second defendant is now unable to locate his sole witness, Mr Forrester, the driver of the vehicle. The prejudice, the applicant maintains, cannot be cured by the exercise of any powers of the court.

[28] The respondent on the other hand reasons that there are legislative provisions that militate against the 2nd defendant being prejudiced, as the statement of his witness can be admitted into evidence.

[29] Edwards JA, in **MSB Limited and Finsac Limited v Joycelyn Thomas**, having considered several authorities concluded that, "It is clear, therefore, that delay in and of itself may give rise to a substantial risk that a fair trial would not be possible. Again delay in and of itself may provide evidence of potential or likely prejudice to the appellant. Separately, there may also be evidence of actual prejudice."

[30] I am of the view that the 2nd defendant has provided sufficient evidence of not only likely prejudice, but also actual prejudice. The unchallenged evidence of the 2nd defendant is that despite his efforts, which he outlined, he is unable to ascertain the whereabouts of his sole witness, the driver of his vehicle at the time of the collision. I am of the view that this has put the second defendant in a disadvantageous position.

[31] In considering the respondent's stance that legislation can be employed to facilitate the admission of the statement of the claimant's witness, I reflected on the judgment of Forte JA in **Port Services Ltd. v Mobay Undersea Tours Limited and Fireman's Fund Insurance Company, SCCA 18/2001.** Therein, the learned judge of appeal reviewed the trial judge's determination that a fair trial could be had by utilising the provisions of the Evidence (Amendment) Act where there was delay and witnesses could not be located. In reversing the trial judge's decision, he stated at page 8, "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."

[32] I am also of the view that the possible admission of a statement from the second defendant's witness would not cure the prejudice that the applicant asserts. The use of a witness statement cannot equate to the actual presence of a witness, particularly in the context of a motor vehicle accident where details will be important, given that the defendants are casting blame on each other. Surely, the second defendant would not be on an equal footing with the other defendants, the owner and driver of the other motor vehicle involved in the collision.

[33] Even if the witness could be found, I am satisfied that it is very likely that his memory, and indeed that of the other witnesses, would be compromised having regard to the length of time that has elapsed since the motor vehicle accident which gives rise to this claim. This also grounds the position that a fair trial is no longer possible.

[34] The incident which gives rise to this court case took place in September 2011. We are now in 2022. More than a decade has elapsed since the incident took place. I have taken into account that if the case were to proceed to trial, it would likely receive a trial date in 2026, at best. This clearly will affect the quality of the evidence given the nature of the evidence. It is eye witness based and memories invariably fade. This of course is a real issue that affects many cases that pass through the court system ordinarily. What compounds this case is that there has been an unnecessary lapse of over 7 years from the time of the failed mediation session, to date. This claim was filed in 2012 and therefore has been in existence for some 10 years. Of this time, over 7 years have been dormant.

[35] I have given serious consideration to the fact that the Registrar did not fulfil her responsibilities as regards the scheduling of a case management hearing. I find however, that this does not 'undermine, contradict or override' the duty of the claimant and counsel to ensure that the matter progressed through the court system. This case apparently fell off the radar for the Registrar. This ought to have been clear to counsel for the claimant very early in the day. Effective measures should have been taken to advance the case, instead of repeatedly doing that which was having no effect. The measures taken on behalf of the claimant to resolve the problem were neither practical nor prudent, as they did not engage the Registrar, the very individual who could settle same. Accordingly, I find that the claimant's representative was at fault.

[36] I have looked at all of the circumstances of this case and considered the best way to deal justly with the case. I have found that the delay in prosecuting the case is inordinate and inexcusable; that the claimant is significantly responsible for the case not advancing and ultimately culpable in the management of the prosecution of the case; that the second defendant has shown that he will be

prejudiced at a trial and that there is a substantial risk that a fair trial is not possible.

[37] The claim is therefore dismissed against the second defendant, with costs to the second defendant to be taxed if not agreed.

[38] Leave to appeal is granted to the respondent.