IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 3 OF 1995

BETWEEN:	**DERRICK POWELL**	**1ST PLAINTIFF**
	CELIA POWELL BEN DAVID	**2ND PLAINTIFF**

AS PERSONAL REPRESENTATIVES OF THE ESTATE OF JAMES LAMONT POWELL DECEASED

AND:	**THE ATTORNEY GENERAL**	**DEFENDANT**

Appearances: **Mr. Hector Robinson of Quin & Hampson for the plaintiffs**
Ms. Vicki Ellis for the defendant, the Crown

Before: **Hon. Justice Henderson**

Heard: **April 20, 2005**

RULING

This is an application by the Attorney General, the sole defendant, for dismissal of the plaintiff's claim for want of prosecution.

The Circumstances in which I may grant such an order are well summarised in the leading case of *Birkett v. James*. [1978] A.C. 297 (H.L.). The prerequisites are set out in paragraph 1 of the headnote. I may dismiss an action for want of prosecution where the plaintiff's default has been intentional. There is no suggestion of that here. In the alternative, I may dismiss the action where there has been inordinate and inexcusable

delay on the part of the plaintiff (or on the part of his lawyer) which gives rise to a substantial risk that a fair trial would not be possible or, alternatively, to a substantial risk of serious prejudice to the defendant.

The procedural history is summarised in the affidavit of Mr. Lindsay Cacho tile June 4, 2004.

The action was commenced by writ of summons filed on January 6, 1995.

The claim concerns the tragic death of the plaintiff at Northward Prison when certain prisoners were locked in their cells and had to be extracted from it.

Those prisoners were tried commencing February 5, 1996 for the murder of Mr. Powell. On March 5, 1996 they were convicted and sentenced. The writ of summons was then served on May 3, 1996.

The defendant acknowledged service promptly and received (on May 13, 1996) the plaintiff's statement of claim. On May 28, 1996 the defendant filed its defence, after which the plaintiffs filed a reply (on June 19, 1996). That was followed by a request for further and better particulars by the plaintiff and (on August 28, 1996) by the filing of a list of documents of the plaintiffs. After some delay (on the 23 of December, 1996), the defendant filed and served a list of documents on the plaintiff.

In April, 1997 then counsel to the plaintiff, who is not counsel here today, attended the Government Legal Department to inspect the documents. Mr. Cacho says in paragraph 15 of his affidavit "the defendant's attorneys had therefore fulfilled their obligations under the Grand Court Rules regarding discovery". That statement is not challenged.

On the 14 of July, 1998 the plaintiff requested further and better particulars. The defendant responded promptly to that by providing them in September 1998.

After September 3, 1998 there followed a period of inaction on the part of the plaintiffs.

During argument, counsel sought to make something of the fact that the defendant was equally inactive. Nothing can be made of that point. There is no obligation upon a defendant to advance a claim through the courts. The obligation for moving a claim forward rests with the plaintiff, always provided, of course, that the defendant does nothing deliberate to obstruct or delay the proceedings.

Finally, after very considerable delay, on March 10, 2003, the plaintiffs filed a notice of intention to proceed. Remarkably, they did not proceed. There followed another period of delay until, very recently, Mr. Robinson, who inherited the file from others, sought to move it forward.

The defendant says that he has suffered prejudice in several ways.

First, the defendant says that several of the prison officers who were on duty at the material time and were eye-witnesses to the circumstances leading up to the death of Mr. Powell have died or (I quote Mr. Cacho) "disappeared". He also says that some others have "left the employ of the Cayman Islands Government through retirement or dismissal".

Addressing that latter point first, I see no significance in the fact that a witness might have left the employ of the Government through retirement or dismissal. The defendant's obligation at trial will be to seek out those witnesses, interview them, refresh their memories to the extent possible, and present their evidence. Whether they are active or retired employees of the defendant makes no difference.

The significance of the assertion that several of the witnesses have "disappeared" is not clear. If the defendant has taken all reasonable steps to search for and locate those witnesses and cannot find them, perhaps I could infer some degree of prejudice. However, in the absence of any clear evidence that the defendant has looked for the witnesses, I am unable to draw anything from the bald allegation that they have disappeared.

Clearly, there is potential prejudice arising from the fact that some of the witnesses have died. I will return to that subject later.

It is also alleged that the witnesses who remain available to the defendant have faded memories of the events of 1994.

Finally, it is alleged that there was a fire in 1999 at Northward Prison which did serious damage. Part of the damage was to records, files and other documents stored there. It is said these would have been used in evidence in the trial of this action.

The first question is whether there has been inordinate delay.

I am entirely satisfied that the delay here was inordinate. The period of inaction was of prolonged duration.

The second question is whether that delay is inexcusable. It is worth emphasising that the word "inexcusable" in this context takes into account the actions of the lawyer as well as the client. There is no rule of law to the effect that a client should not be punished for the sins of his lawyer. Indeed, the rule is just the reverse. Inactivity on the part of the lawyer may result in dismissal of a client's claim for want of prosecution even if it can be demonstrated that the client himself was innocent of any delay. It is preferable that the party who hired the lawyer should suffer the consequences of the lawyer's negligence.

The delay is sought to be excused by a variety of circumstances which are set out in the affidavit of Derek Powell. (None of these circumstances are laid at the feet of Mr. Robinson.)

Mr. Powell says that around September 1998 he lost confidence in his then counsel and retained another one. There had been little delay up to that point. The new counsel apparently requested certain documents that he considered relevant. He was asked to provide an opinion, which he did not provide, and then in 2002 he passed away. It would appear that he did little to advance the case in the four years in which he had the brief on his desk.

In 2002, another attorney inherited the case, but he was fully engaged in another trial which lasted many months. That would explain what I might term "the second period of delay".

There is nothing in the affidavit which serves to excuse the delay. I am satisfied that the delay here was inexcusable.

The ultimate question is whether the applicant has shown a substantial risk that a fair trial would not be possible. Or, put another way, is there a substantial risk of serious prejudice?

Mr. Cacho asserted under oath in paragraph 15 of his affidavit that "by April 1997 the defendant's attorneys had fulfilled their obligations under the Grand Court Rules regarding discovery". What was that obligation? The obligation was to list (in a list of documents) every document in his possession, custody or control touching upon the

issues in the action. That obligation applies to documents the defendant intends to produce at trial in his defence and to documents he does not intend to produce. It applies to documents which assist the defendant and to those which hurt his position.

The defendant's own evidence is that he complied with that obligation, as he was required to do, by April 1997. I do not think he can be heard to say now that there are relevant documents which were destroyed in a fire in 1999. Those relevant documents must be taken to have been provided to the defendant's attorneys in 1997. It must also be taken that counsel to the plaintiff (during the inspection of the documents in 1997) would have requested and taken copies of those which were of particular interest to him. I am not prepared to conclude that these circumstances enure to the advantage of the defendant and demonstrate that there is prejudice arising from the destruction of documents in 1999.

The defendant pointed, in particular, to documents relating to the training of the officers in question. The statement of claim clearly and unequivocally places the adequacy of the training in issue. That is one of the particulars of negligence which has been pleaded. In 1997, counsel acting for the defendant would or should have known that the quality of the training was in issue.

On the question of witnesses, I have already said that the mere fact of retirement does not demonstrate prejudice. The allegation that witnesses have "disappeared" is not, in the absence of any evidence of a diligent search for them, convincing.

There is a degree of prejudice to the defendant (and possibly also to the plaintiffs) in the unavailability of the oral evidence of those witnesses who have died.

Witness statements were taken from quite a number of people in 1994 when the events would have been relatively fresh in their minds. These witness statements are reasonably detailed. There are provisions in the Evidence Law which may well render the statements of these deceased witnesses admissible at trial (although I make no ruling on that now).

In addition, the common law rule against hearsay provides for certain exceptions in the case of deceased witnesses. Again, those exceptions may stand to the benefit of the defendant when he tries to adduce evidence of what the deceased witnesses have said.

The evidence of the witnesses tends to overlap. This was an event in which quite a number of people were involved. The prejudice flowing from the unavailability of one witness is likely (in the typical case) to be alleviated by the fact that some other witness can testify to what the deceased witness would have said.

Overall, I am not persuaded that there is any substantial prejudice arising from the deaths of some of the witnesses.

The most significant area of prejudice is found in the obvious fact that the memories of those involved will have faded considerably over time. The witnesses may refresh their

memories from statements and other documents. The prejudice which may flow from the fading memories of the witnesses is likely, in my view, to impact upon the plaintiffs as much as on the defendant. The plaintiffs, after all, have the burden of proof. The plaintiffs must prove on the balance of probabilities the allegation of negligence.

Overall, I am not persuaded that the degree of prejudice arising from the deaths of witnesses and from faded recollections is so significant as to pose a substantial risk of an unfair trial. It has not been demonstrated that there will be serious prejudice to this defendant if the trial proceeds.

For these reasons the application is dismissed. The application for disclosure is adjourned generally.

Submission on Costs

This is a case where I should exercise my discretion in favour of the defendant. We are here only because of inordinate and inexcusable delay on the part of the plaintiff. The defendant has established that there is some risk of prejudice but failed to convince me that the risk is substantial enough to warrant a dismissal. My award of costs must be against the plaintiffs in recognition of their default in not prosecuting their claim with more diligence.

I award costs to the defendant on a party and party basis payable forthwith in any events of the cause. I expect those costs to be paid before anything else is done.

Dated this 6th day of May, 2005

Henderson, J.
Judge of the Grand Court