

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN**

3 **Cause No: 0053/2006**

4
5 **BETWEEN:**

6 **MARY SUSAN BLAKEMAN**

7
8 **PLAINTIFF**

9
10 **AND:**

11 **TODD OMAR BOWEN**

12
13 **DEFENDANT/APPLICANT**

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16 **Appearances:**

17 **Mr. Colm Flanagan of Nelson & Co. for the**
18 **Defendant/Applicant**

19 **Mr. Kyle Broadhurst and Ms. Kate**
20 **McClymont of Broadhurst Barristers for**
21 **the Plaintiff**

22
23
24 **Before:**

The Hon. Mr. Justice Charles Quin

25 **Heard:**

2nd March 2011

26
27 **JUDGMENT**
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30 1. This is the hearing of the Defendant's Summons filed on the 22nd November 2010
31 seeking an Order that the Plaintiff's Writ of Summons and Statement of Claim
32 dated the 10th February 2006 be dismissed for want of prosecution by reason of
33 inordinate and inexcusable delay.

34 2. The Defendant's Summons is grounded by the affidavits of Megan Reed filed on
35 the 11th January 2011 and Natalie Mayfield filed on the 24th February 2011.

Chronology of Relevant Facts

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3. On the 15th February 2003 at approximately 1:00 a.m. the Plaintiff was struck by a motor vehicle driven by the Defendant on the West Bay Road in the vicinity of *The Anchorage* condominiums. The Plaintiff sustained very serious injuries as a result of the accident.
4. On the 9th June 2003 the Defendant was charged with dangerous driving, leaving the scene of an accident and failing to report an accident to the police.
5. The trial of the Defendant took place in March 2004 before the Summary Court of the Cayman Islands.
6. On the 16th March 2004, in his evidence before the Summary Court, the Defendant admitted driving the motor vehicle and colliding with the Plaintiff on the West Bay Road. The Defendant estimated that he was driving at 40 mph, but said that the Plaintiff dashed out in front of him. The Defendant admitted that he did not stop. The Defendant said that he was in shock, drove on and then he got lost.
7. Some time in June 2003 the Plaintiff instructed Appleby, attorneys at law, and also obtained Legal Aid. The Defendant's attorneys were put on notice of the Plaintiff's claim for damages for personal injuries, loss and damage, in June 2003.
8. In the spring of 2004 the Plaintiff was forced to return to the United States as she was unable to work, due to her injuries, and therefore was unable to support herself in the Cayman Islands. The Plaintiff also required further medical treatment for the injuries she received from the accident.

- 1 9. On the 3rd June 2004 the Defendant was found not guilty of dangerous driving and
2 failing to report an accident to the police, but guilty of careless driving and leaving
3 the scene of an accident. The learned Magistrate imposed a period of four (4)
4 months imprisonment and the Defendant was disqualified from driving for one
5 year.
- 6 10. From the records contained in the Plaintiff's bundle it appears that on the 14th April
7 2005 the Defendant filed an application for an extension of time in which to file a
8 Notice of Appeal, together with a Notice of Intention to Appeal on the grounds that
9 the sentence imposed was too harsh.
- 10 11. There is some confusion in relation to the detail and timing of the criminal
11 proceedings because the records in the trial bundles also reveal that on or about the
12 4th March 2005, the Defendant's appeal against his conviction for careless driving
13 was upheld and yet, on the 8th March 2005, Levers J. granted the Defendant leave to
14 appeal out of time. Then on the 20th May 2005 the Defendant's appeal in relation to
15 the charge of leaving the scene of an accident was struck out.
- 16 12. On the 19th February 2006 the Plaintiff filed her Writ of Summons and Statement of
17 Claim in which she claimed damages for loss, damage and personal injuries
18 sustained as a result of the Defendant's negligence in, and about, the driving of a
19 motor vehicle on the 15th February 2003.
- 20 13. The Defendant's attorneys sought additional time to take instructions in relation to
21 the Plaintiff's Writ of Summons and Statement of Claim on the basis that they were
22 contemplating whether or not liability would be accepted.

- 1 14. On the 28th March 2006 the Defendant filed his defence, denying liability and
2 averring that the accident and the resulting injuries to the Plaintiff were caused
3 wholly or in part by the Plaintiff's contributory negligence.
- 4 15. On the 21st April 2006 the Plaintiff filed her Reply, denying that she was guilty of
5 contributory negligence.
- 6 16. It appears from both parties' evidence and submissions that the parties were
7 engaged for almost 12 months in without prejudice communications.
- 8 17. By April 2007 no resolution had been reached and the Plaintiff instructed her
9 attorneys to prepare an application for an interim payment, in order to pay for her
10 ongoing medical expenses.
- 11 18. It is the Plaintiff's case that relations between her and her then attorneys ran into
12 difficulties and, as a consequence, on the 13th March 2008 her then attorneys issued
13 a Summons to come off the record. The Plaintiff's then attorneys also applied to
14 have the Plaintiff's Legal Aid certificate discharged.
- 15 19. On the 2nd April 2008, one week after the Plaintiff received the Summons from her
16 attorneys to come off the record, the Plaintiff's then attorneys obtained an Order,
17 giving them leave to come off the record. In addition, the Plaintiff's Legal Aid
18 certificate was discharged.
- 19 20. On the 8th April 2008 this Order was served on the Plaintiff.
- 20 21. The Plaintiff's evidence is that, as a result of the accident, she could not work and
21 was unable to take care of herself. She had ongoing medical bills and felt she could

1 not instruct new attorneys because she could not work, and had no money or
2 contacts in the Cayman Islands.

3 22. The Plaintiff's evidence is that she was still suffering from the injuries she received
4 as a result of the accident. She could not afford to travel to the Cayman Islands and
5 was at a complete loss as to what she could do after receiving the Order discharging
6 her Legal Aid Certificate and the Notice of her attorneys coming off the record.

7 23. In 2008 a friend of the Plaintiff contacted an attorney in the United States who
8 made efforts to obtain a copy of the Plaintiff's file from her former attorneys and to
9 instruct new attorneys. This search took some time, but the US attorney finally
10 contacted Broadhurst Barristers in December 2009.

11 24. In early 2010 Broadhurst Barristers received the Plaintiff's file from her former
12 attorneys.

13 25. There were at least two failed attempts to hold a meeting between the Plaintiff and
14 the new attorneys and then, on the 6th August 2010 the Plaintiff's new attorneys,
15 Broadhurst Barristers issued a Notice of Change of Attorney and a Notice of
16 Intention to Proceed.

17 26. On the 9th September 2010 the Plaintiff's attorneys wrote to the Defendant's
18 attorneys enclosing a draft Summons for Directions and Listing Form, and
19 requesting that the Listing Form be completed and returned so that the Plaintiff's
20 Summons could be listed.

21 27. On the 23rd September 2010 the Plaintiff's attorneys had not received the Listing
22 Form from the Defendant's attorneys and accordingly they requested the Listing
23 Officer to list the Plaintiff's Summons for Directions.

1 28. On the 24th September 2010 the Defendant's then attorneys completed the Listing
2 Form and returned it to the Court.

3 29. On the 30th September 2010 the Plaintiff's attorneys served the Summons for
4 Directions on the Defendant's attorneys, which listed the hearing for the 25th
5 November 2010.

6 30. On the 20th October 2010 Nelson & Co., attorneys at law, issued a Notice of
7 Change of Attorney, indicating that they now represented the Defendant.

8 31. On the 27th October 2010 Nelson & Co. wrote to the Plaintiff's attorneys stating
9 that they intended to issue a Summons seeking to dismiss the action for want of
10 prosecution.

11 32. On the 22nd November 2010 the Defendant's new attorneys issued their Summons
12 to dismiss, and it was agreed between the parties that the Plaintiff's Summons for
13 Directions would be stayed pending the hearing and adjudication of the Defendant's
14 application.

15 33. Counsel for both parties, Mr. Flanagan and Mr. Broadhurst, have accepted that the
16 proper test to be applied on an application for dismissal for want of prosecution is
17 contained in the classic dicta of Lord Diplock in *Birkett v. James* [1978] A.C. 297
18 in which Lord Diplock stated at paragraph F on page 318:

19 *"The power should be exercised only where the court is satisfied either (1) that*
20 *the default has been intentional and contumelious, e.g., disobedience to a*
21 *peremptory order of the court or conduct amounting to an abuse of the process*
22 *of the court; or (2)(a) that there has been inordinate and inexcusable delay on*
23 *the part of the plaintiff or his lawyers, and (b) that such delay will give rise to*
24 *substantial risk that it is not possible to have a fair trial of the issue in the*
25 *action or is such as is likely to cause or to have caused serious prejudice to the*
26 *defendants either as between themselves and the plaintiff or between each other*
27 *or between them and a third party."*

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34. This Court has applied the principles set out by Lord Diplock in *Williams v. Bob Soto Diving Limited* [1992-93] CILR 318, *Geninvest v. Bank of Butterfield* [1999] CILR 223, *Cayman Islands Civil Aviation Authority v. Island Air Limited* [2003] CILR 483 and *Cranston v. M.R. Mothersill* [2004-05] CILR 417.

The Defendant’s Position

35. Defendant’s counsel, Mr. Flanagan, submits that following the filing of the Plaintiff’s reply on the 21st April 2006 the Plaintiff ought to have prosecuted her action in accordance with, and within the time frame set down in, the Grand Court Rules. The Defendant’s counsel submits that the Plaintiff should have taken steps prior to the 5th June 2006 to have her Summons for Directions heard.

36. The Defendant’s counsel highlights the fact that the Plaintiff’s main reason for this step not to have been taken was that the primary focus of her attorneys was to secure an interim payment, and that is why both parties’ respective attorneys were engaged in without prejudice discussions in the early part of 2007.

37. The Defendant, through his counsel, submits that the Plaintiff’s reasons for her and or her attorney’s failure to progress the matter are wholly inadequate and further, that the delay is inexcusable.

38. Mr. Flanagan also contends that, from the Plaintiff’s own evidence, she took no positive steps in the prosecution of her action from April 2007 to early August 2010. This, the Defendant contends, is a deliberate flouting of the procedural rules by the Plaintiff, and or her attorneys, which has caused considerable delay and thereby prejudice to the Defendant.

1 39. One period of time which Mr. Flanagan describes as an inordinate and unreasonable
2 amount of time was the twenty-eight (28) months between Appleby coming off the
3 record to Broadhurst Barristers being instructed.

4 40. Moreover, the Defendant's counsel argues that the Plaintiff's injuries cannot be
5 regarded as a special factor when considering the delay, and relies on the authority
6 of *Martin v. Turner* [1970] 1 All E.R. 256. Furthermore, Mr. Flanagan points to the
7 fact that there is no objective medical evidence to substantiate the Plaintiff's claim
8 that her injuries affected her ability to provide instructions, and further, that this
9 issue does not appear to have been raised by her former attorneys in their
10 application to come off the record.

11 41. In conclusion on the question of delay the Defendant's counsel respectfully submits
12 that, as eight (8) years have elapsed since the date of the accident, the Plaintiff and
13 her previously acting attorneys have been guilty of causing an inordinate and or an
14 inexcusable delay.

15 42. In applying Lord Diplock's test in *Birkett v. James* the Defendant's counsel
16 submits that the aforesaid inordinate and inexcusable delay gives rise to a
17 substantial risk that it will not be possible for the Defendant to have a fair trial of
18 the issue in the action, and is also likely to cause serious prejudice to the Defendant.
19 In this regard the Defendant submits that the inference of serious prejudice can be
20 properly drawn from the delay, in and of itself.

21 43. The Defendant's counsel submits that the Defendant has always denied liability and
22 as such the trial of this action will involve disputed facts, which will have to be
23 ascertained from oral testimony of witnesses recounting what they recall of events
24 which happened almost 8 years ago. The Defendant submits that this greatly

1 reduces the chance of the Defendant being able to have a fair trial, and it would
2 make it extremely difficult for this Court to be able to determine from the witnesses
3 what really happened and the quality of their evidence will, no doubt, have
4 diminished.

5 44. The Defendant's counsel submits that whilst the Plaintiff argues that there are
6 witness statements and documentary evidence prepared by the RCIPS at the time of
7 the accident, they will not deal in detail with all the points which may become
8 relevant at trial.

9 45. In addition the Defendant's counsel submits that with the passing of time, the
10 recollection of detail which may not have appeared material or relevant or in issue
11 when the witnesses made those statements, may be completely gone by the time the
12 delayed trial takes place.

13 46. To support his submission the Defendant prays in aid the case of *Houston v. James*
14 *P. Corry and Co. Ltd.* [1972] NIJB and the decision of McGonigal J. in which he
15 reviewed a case similar to the one before this Court. In *Houston v. James P. Corry*
16 *and Co. Ltd.* the accident took place in 1966 and the Judge was reviewing it in
17 1972. It was argued by the Plaintiff that the Defendant had the opportunity to
18 investigate the accident and review the statements taken at the time, thereby being
19 in a position to deal adequately with points relevant to the Defendant's case.
20 McGonigal J. stated:

21 *"If that is a correct view no application to dismiss an action for personal*
22 *injuries would succeed since insurers and their solicitors in general see and*
23 *take statements from such witnesses as appear relevant when making their*
24 *initial inquiries."*

25 McGonigal J. went on to state:

1 *“I cannot, however, accept that this is a correct view. A statement made by a*
2 *witness, particularly by a Defendant’s witness, cannot deal in detail with all the*
3 *points which may become relevant at the trial and his recollection of detail*
4 *which did not appear material or relevant or in issue when he made the*
5 *statement may be completely gone by the time the delay trial takes place; nor*
6 *where there are some disputed issues of fact is it fair for a witness to have to try*
7 *to give evidence based not on actual recollection of facts, but on the*
8 *recollection derived from what he said in the statement made five or six years*
9 *ago.”*

10 McGonigal J. went on to conclude:

11 *“It appears to me that where there is a delay of some years the inference of*
12 *serious prejudice is properly to be drawn from the delay itself, and in my*
13 *opinion this is a case of that kind.”*

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15 47. The Defendant’s counsel raises another case from Northern Ireland namely the
16 Court of Appeal decision in *Boyd v. Sinnamon* [1974] NIJB where the Judge at
17 first instance held that the delay was both inordinate and inexcusable, but the
18 Appellant had not established an adequate degree of prejudice to justify the making
19 of an order in his favour. The Northern Ireland (NI) Court of Appeal, in the
20 Judgment of Jones L.J. stated:

21 *“From my experience, at the Bar and on the Bench, I tend to take the view that*
22 *after a long period – here it is over eight years since the accident – prejudice is*
23 *inevitable and when I say prejudice I mean normally prejudice to the*
24 *defendant. But the standard which has to be shown is serious prejudice and if*
25 *on the facts of the present case the learned Judge of first instance took the view*
26 *that the delay was not likely to cause serious prejudice, then, on the particular*
27 *facts of this case, I think it was open for him to do so.”*

28
29 The NI Court of Appeal agreed with the Court of first instance in finding that
30 although there was inordinate and inexcusable delay, it did not cause serious
31 prejudice. Accordingly, the NI Court of Appeal did not interfere with the Ruling of
32 the Judge of first instance.

1 48. The Defendant argues that he will be prevented from obtaining important evidence
2 relating to stopping distances, field of sight of the Plaintiff, level of street lighting
3 and changes to the locus, and therefore the quality of the evidence will be
4 undoubtedly affected.

5 49. Furthermore, the Defendant acknowledges that the medical evidence in this case
6 will be crucial and there are the potential financial repercussions to the Defendant,
7 which could be substantial.

8 50. The Defence argues that the lapse of time is likely to have rendered diagnosis and
9 treatment all the more difficult, thereby causing prejudice to the Defendant and
10 increased risk for the possibility of the question of potential damages. In this regard
11 the Defendant submits that he is prejudiced because the period of time prevents him
12 from obtaining any independent and reliable evidence on the Plaintiff's pre-
13 accident medical condition, and also the Plaintiff's condition shortly after the
14 accident.

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The Plaintiff's Position

17 51. The Plaintiff points out that the Defendant does not allege that the delay is caused
18 by any default of the Plaintiff being intentional and contumelious.

19 52. The Plaintiff submits that the burden was on the Defendant to establish that there
20 was inordinate and inexcusable delay on the part of the Plaintiff or her attorneys
21 and further that the delay would give rise to substantial risk that it would not be
22 possible to have a fair trial or, alternatively, the Defendant would be seriously
23 prejudiced by the delay.

- 1 53. The Plaintiff highlights four distinct periods of time for the Court to consider.
- 2 54. Period 1: 5th February 2003 – 10th February 2006: The Plaintiff submits that the
3 Defendant was always aware of the Plaintiff’s intention to claim, and in fact, the
4 parties, through their attorneys, were in discussions. The Plaintiff further submits
5 that at the time when the Writ of Summons was issued, the Defendant had not yet
6 determined whether he would accept liability. The Plaintiff’s counsel submits that it
7 was quite reasonable for the Plaintiff to wait until the outcome of the criminal
8 proceedings, and further, the Defendant could not be said to have been taken by
9 surprise.
- 10 55. Period 2: April 2006 – April 2007: The Plaintiff submits that this period of time
11 was from the filing of the Plaintiff’s Reply through to the “without-prejudice”
12 correspondence, and that there is nothing unreasonable or untoward about the
13 parties attempting to agree any issues they could agree between them.
- 14 56. Period 3: May 2007 – April 2008: This is the period of time from the conclusion of
15 the without prejudice communications to the Plaintiff’s first attorneys serving
16 notice that they were coming off the record. The Plaintiff submits that whilst she
17 accepts that there was a delay, it could not be described as inordinate, nor was it
18 inexcusable. The Plaintiff’s counsel submits that the breakdown of the relationship
19 between the Plaintiff and her attorney was unfortunate and partly due to the
20 Plaintiff’s reduced capacity to provide instructions as a result of her injuries due to
21 the accident.
- 22 57. Period 4: May 2008 – August 2010: The Plaintiff points out that this is the period of
23 time from when the Plaintiff’s first attorneys ceased to act and Broadhurst
24 Barristers came on the record. The Plaintiff submits that after the first attorneys

1 came off the record she was left in a hopeless position. The Plaintiff's counsel
2 argues that for her former attorneys to apply to have the Legal Aid certificate
3 cancelled, was a most unusual step and further, it would appear from the record that
4 the Legal Aid certificate was cancelled without the Plaintiff having an opportunity
5 to address the Court. The Plaintiff's counsel submits that it is more common for the
6 Legal Aid certificate to remain alive and to be transferred to another firm of
7 attorneys. Consequently, the Plaintiff contends that she was left in a state of
8 confusion and despair. It appears from the evidence that the Plaintiff had received
9 very serious injuries and initially had to be taken off the island for emergency
10 medical treatment. It also appears from the Plaintiff's evidence that the injuries
11 were so serious that she could no longer remain in the Cayman Islands because she
12 was unable to work, and thereby unable to support herself. The Plaintiff's evidence
13 is that she had a reduced mental capacity as a direct result of her injuries and this
14 may well have caused the breakdown in communication with her first attorneys
15 and, in some measure, the reason for the failure to instruct Broadhurst Barristers at
16 an earlier stage.

17 58. The Plaintiff's counsel highlights the fact that the Court has to view every case on
18 its own facts. The Plaintiff's counsel points to the fact that the Plaintiff undoubtedly
19 received serious medical injuries which made it very difficult for her to work, earn
20 a living, and thereby instruct attorneys. To some extent the Plaintiff honestly and
21 properly accepts that there has been an inordinate delay, but not an inexcusable
22 delay. The Plaintiff argues that there is a reasonable explanation for the delay.
23 Legal Aid had been cut off by the Court; the Plaintiff's mental capacity had been
24 reduced as a result of the accident; the Plaintiff was further hampered by her

1 inability to engage in gainful occupation; and there was also the factor of the
2 Plaintiff's geographical location.

3 59. The Plaintiff's counsel submits that although there was a delay which could
4 properly be described as inordinate, the question the Court has to ask is whether the
5 delay gives rise to a substantial risk that it is not possible to have a fair trial, or,
6 alternatively, whether the Defendant has been seriously prejudiced by the delay.

7 60. The Plaintiff submits that the Defendant has not produced any direct evidence that
8 there is a substantial risk that there will not be a fair trial, nor is there any direct
9 evidence that the Defendant will suffer any serious prejudice.

10 61. In relation to evidence the Plaintiff contends that the RCIPS has produced a detailed
11 accident report with notes and sketches of the scene of the accident. The three eye
12 witnesses all gave contemporaneous statements to the police and further, gave
13 evidence in the Magistrate's Court. The witness statements and the transcript of the
14 evidence before the Magistrate are available for the witnesses to refresh their
15 memories. All witnesses are apparently available and, most importantly, the
16 Plaintiff and the Defendant are available to give evidence.

17 62. Accordingly, the Plaintiff submits that it is possible to have a fair trial and further,
18 there is no serious prejudice to be suffered by the Defendant.

19 63. The Plaintiff takes issue with the Defendant's submission that the inference of
20 serious prejudice can be properly drawn at the delay in and of itself. The Plaintiff
21 contends that this presumption is plainly rebutted by virtue of the existence of the
22 contemporaneous reports of the RCIPS, the Statements and that the evidence that
23 was given before the Magistrates Court is available in transcript form.

1 64. The Plaintiff also submits that the locus of the accident will not have changed,
2 neither will the detailed measurements and sketch maps, which were properly
3 recorded in the police reports. Further, the Plaintiff submits that the Defendant and
4 his attorneys will have full discovery of all the Plaintiff's medical reports and
5 records.

6 65. The Plaintiff argues that, in fact, she is the one who has been significantly
7 prejudiced. Her position is that the negligence of the Defendant in the driving of the
8 motor vehicle on the morning in question has left the Plaintiff severely handicapped
9 and in dire financial straits. The Plaintiff argues that, should this action be
10 dismissed, the Plaintiff will have no hope of ever seeking redress for the tragic
11 event that altered her life.

12 66. The Plaintiff further submits that at no time, until this current application, has the
13 Defendant raised any complaint with respect to any delay in the prosecution of the
14 action.

15 67. The Defendant himself has sought additional time to consider the matter at various
16 points during the progress of these proceedings and he took no steps to attempt to
17 advance the matter at any stage.

18 68. The Plaintiff indicated to the Defendant that she would proceed with her action in
19 August 2010 and issued a Summons for Directions and Listing Form in early
20 course. After further delay the Defendant subsequently agreed to the listing of the
21 Summons for Directions and yet it was not until November 2010 that the Defendant
22 issued his application to strike the Plaintiff's action out. In short, the Plaintiff
23 submits that whilst there has been a delay, it is not inexcusable, and has been

1 explained by the difficulties encountered by the Plaintiff as a direct result of the
2 accident and the injuries she received.

3 69. The Plaintiff contends that the Defendant has failed to establish that there is a
4 substantial risk that a fair trial could not take place, and further, has failed to
5 establish that he has suffered any serious prejudice as a result of the delay.

6 **Conclusion**

7 70. The Court is grateful to both counsel for their well reasoned arguments and for their
8 extensive research on relevant case law.

9 71. First, I do not find from the evidence before me that the Plaintiff's default in
10 prosecuting her action in a timely fashion has been intentional and contumelious.
11 Also, there has been no disobedience to a peremptory Order of this Court.

12 72. However, I think when one reviews the time lapses it would be accurate to describe
13 the delay as an inordinate delay on the part of the Plaintiff and, at times, her first
14 attorneys.

15 73. Accordingly, there are three questions I have to ask myself:

- 16 i. Is the delay an inexcusable delay on the part of the Plaintiff?
- 17 ii. Will the delay give rise to a substantial risk so that it is not possible to
18 have fair trial of the issue in the action?
- 19 iii. Is the delay likely to cause or to have caused serious prejudice to the
20 Defendant?

1 74. In answering these questions I draw considerable help and assistance from the
2 English Court of Appeal decision in *Shtun v. Zalehska* 1996 1 WLR 1270 in which
3 Peter Gibson L.J., at page 1284 paragraph D quoted some general observations of
4 Neill L.J. in *Slade v. Adco Ltd.* LT 7/12/95 and stated:

5 *“The prejudicial effect of delay on a defendant and the effect of delay on the*
6 *possibility of a fair trial will depend in large measure on the nature of the*
7 *issues in the case. In some cases much of the evidence will be in documentary*
8 *form, or there will be in existence statements made soon after the relevant*
9 *events which will enable witnesses to refresh their memories. In other cases,*
10 *however, including many cases involving road accidents or industrial accidents*
11 *where claims for damages for personal injuries are made, the crucial evidence*
12 *may be largely oral and any statements made shortly after the event may be*
13 *imprecise or incomplete. It follows therefore that each case is likely to depend*
14 *on its own facts. The onus of proving prejudice or the impossibility of a fair*
15 *trial rests on the person who asserts it...An account must also be taken of the*
16 *fact that delay may create difficulties for a defendant when he seeks to test by*
17 *way of cross-examination the reliability of the plaintiff and his witnesses.”*

18
19 75. In *Shtun v. Zalehska* Neill L.J. offered some further assistance at paragraph C on
20 page 1290 when he said:

21 *“In many cases, however, the resolution of the issues will depend on oral*
22 *testimony. Sometimes the defendant will be able to show that a witness has died*
23 *or has become too infirm to give evidence or has disappeared. But there will be*
24 *cases where the proper assessment of the defendant’s position and the nature*
25 *and degree of any prejudice will not depend primarily on the absence of one or*
26 *two particular witnesses, but on all the circumstances of the case. It is in these*
27 *cases where the experience of the judge has a crucial part to play in evaluating*
28 *prejudice and the possibility of a fair trial. As Lord Griffiths indicated in the*
29 ***Smaller** [1989] AC 1197 case at page 1208D, it is incumbent on the defendant*
30 *to explain his position and to establish prejudice. He must explain how the*
31 *relevant delay will affect his case and, where relevant, the evidence he will be*
32 *able to call and how it will affect the resolution of identified issues. But the*
33 *court is not trying the case. The judge’s task is to assess the likely effect on the*
34 *trial and on the defendant’s ability to put his case forward. The judge must,*
35 *therefore, draw inferences based on all the material before him. These*
36 *inferences will include inferences as to the effect of delay on the recollection of*
37 *witnesses. It is in this context that I think it is important to keep in mind the*
38 *words of Lord Browne-Wilkinson in **Roebuck v. Mungovin** [1994] 2 AC 224 at*
39 *234 when he said that a judge can infer a further loss of recollection from any*
40 *substantial delay. Whether that further loss of recollection is sufficient in a*
41 *particular case will be for the judge to evaluate.”*

1 76. It is clear that the Plaintiff suffered very serious and life-threatening injuries. The
2 injuries necessitated her travelling by air ambulance to the University Hospital of
3 the West Indies so that her unstable neck injury could be treated by a neurosurgeon.
4 The Plaintiff underwent a cervical fusion and open reduction internal fixation of her
5 lower limb fractures, spent two weeks in the hospital in Jamaica, and then spent a
6 further period of time in George Town hospital. The Plaintiff was unable to work
7 and, due to her medical injuries, she had to fly back to the United States to undergo
8 further surgery at the Brigham and Women’s Hospital in Boston, Massachusetts.
9 The Plaintiff’s evidence is that she had difficulty with her short term memory and
10 was often confused and unable to understand instructions. The Plaintiff’s claim was
11 that these medical conditions were related to the motor vehicle accident.

12 77. I do accept that these serious injuries were sustained and that, consequently, the
13 Plaintiff has experienced a very difficult time. It is clear that she has always
14 intended to pursue her claim notwithstanding her problems in engaging attorneys. It
15 was not until a friend of the Plaintiff engaged an American attorney who ultimately,
16 through his persistence, was finally able to identify and engage Broadhurst
17 Barristers on behalf of the Plaintiff, that some progress was made.

18 78. Although this delay can properly be described as inordinate, it does not qualify to
19 be described as inexcusable. The Plaintiff has given some reasonable, plausible and
20 significant excuses for her delay in prosecuting the proceedings.

21 79. I turn now to the Defendant’s position. I am guided by Neill L.J.’s dicta in *Shtun v.*
22 ***Zalehska*** where he adopted Lord Griffiths’ dicta in *Smaller*:

23 *“It is incumbent on the defendant to explain his position and to establish*
24 *prejudice. He must explain how the relevant delay will affect his case and,*

1 *where relevant, the evidence he will be able to call and how it will affect the*
2 *resolution of identified issues.”*

3

4 80. There is no evidence before the Court that any witnesses have disappeared, died or
5 are too infirm to give evidence. It seems to me that a significant amount of crucial
6 evidence has already been reduced to writing by the RCIPS and further, we have
7 the benefit of a detailed transcript of the evidence of the witnesses that was taken
8 before the Magistrate in March 2004. I note that there is no evidence from the
9 Defendant himself as to his position and what serious prejudice he will suffer as a
10 result of the delay.

11 81. The Defendant and his first attorneys presumably received all the statements and
12 papers compiled by the RCIPS. The Defendant, unlike the Plaintiff, has been
13 represented by attorneys from the date of the criminal charges in the Summary
14 Court until to date. The Defendant will be able to review the papers and his
15 evidence before the Summary Court, and he and his attorneys will be able to
16 carefully review the statements of the other witnesses and the evidence given before
17 the Summary Court. The Defendant will have a full and proper opportunity to
18 prepare his defence and the cross examination of the Plaintiff and her witnesses.
19 The Defendant, the Plaintiff, and indeed all the witnesses will be able to refresh
20 their memories.

21 82. We are fortunate that all the witnesses are available and that these records have
22 been kept in good order. The delay will have an effect on the Defendant, the
23 Plaintiff and the witnesses, but this is something that a judge hearing the case can
24 take into account.

1 83. There has been inordinate delay in this case but I find from the evidence and all the
2 circumstances that the Plaintiff has provided reasonable and plausible excuses for
3 the delay in prosecuting her case. I also find, from all the evidence put before me,
4 that the Defendant has failed to establish that there is a substantial risk that a fair
5 trial could not take place or that he has suffered any serious prejudice as a result of
6 the delay.

7 84. The Plaintiff's delay in prosecuting her action does not, in my view, amount to an
8 abuse of process. Her inactivity at various times has been explained and nowhere
9 can I find that her behaviour to prosecute the case has been intentional or
10 contumelious. In my view, in order to do justice in this case, I think it is an
11 appropriate case to allow the Plaintiff to proceed and to prosecute her case.

12 85. Accordingly I dismiss the Defendant's application to dismiss the Plaintiff's action
13 for want of prosecution and order that costs are to be costs in the cause.

14 86. Should the parties' attorneys be unable to agree the necessary directions for the
15 future conduct of this action, I will hear counsel in early course.

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18 **Dated this the 28th day of March 2011**

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22 **Honourable Mr. Justice Charles Quin**
23 **Judge of the Grand Court**