

1 IN CHAMBERS
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS
3

CAUSE NO: 78 of 1999

4
5
6 BETWEEN:
7 DAVID LORRIBURN CRANSTON

Plaintiff

8
9
10 AND:
11 (1) MARLON RICARDO MOTHERSILL
12 (2) LAVONA MOTHERSILL
13

First Defendant
Second Defendant

14 BEFORE: The Honourable Madam Justice Levers
15

16 APPEARANCES:
17 Counsel for the Plaintiff: Mrs. Rosie Whittaker-Myles of Charles Adams Ritchie &
18 Duckworth
19 Counsel for the First and Second Defendants: Mr. Robert Jones of Ritch &
20 Conolly
21 Counsel for the Third Party: Mr. Shaun McCann of Campbells
22

23 HEARD: June 2, 2005
24
25

JUDGMENT



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27
28 Levers J.
29

30 The application before the Court is for the Plaintiff's claim to be struck out for want
31 of prosecution and the costs of and occasioned by this application to be the
32 Defendants in any event.
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34 By this summons the Defendants Marlon Ricardo Mothersill and Lavona
35 Mothersill seek to have the action brought by the then minor Plaintiff David
36 Lorriburn Cranston struck out for want of prosecution.

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2 The incident which gave rise to the action occurred on the 23 March 1996 and
3 the infant Plaintiff suffered serious injuries therefrom. The history of the action is
4 as follows:

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- 6 1. Accident on 23 March 1996.
- 7 2. 3 years later a Writ of Summons was filed on 4 February 1999.
- 8 3. Statement of Claim was filed on 12 May 1999.
- 9 4. A Schedule of Damages attached thereto was filed on 13 May 1999.
- 10 5. Defence of the First and Second Defendant on 17 July 1999.
- 11 6. An Amended Statement of Claim was filed on 1 July 1999.
- 12 7. Third Party Notice was filed on 2 September 1999.
- 13 8. Acknowledgement of Service of Third Party Notice was filed on 23
14 December 1999.

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16 The Plaintiff subsequently filed three notices of intention to proceed. The first
17 one, 2 years after 1999. The second one, 1 year after the first one and the third
18 one in excess of two years after the second notice of intention to proceed.

19

20 The matter ought to have been proceeded with within the time frame of the
21 Grand Court Rules. The Plaintiff should have filed a reply if necessary, and then
22 taken steps to have a Summons for Directions heard. It is pertinent to point out
23 that at this stage some nine years have elapsed since the date of the accident.

1

2 Mr. Jones on behalf of the Defendants submits that there was inordinate delay in
3 prosecuting this action and that his clients were severely prejudiced by the delay.
4 He says they have been prejudiced because since the accident, his client the
5 First Defendant has left the Island and that this Court has no jurisdiction to bring
6 him back. Further, he submits that he is now unable to find the witnesses who
7 would testify as to the accident. This is of importance because as adumbrated in
8 his defence, the accident was caused by the Third Party who is no longer in the
9 Island. The Defendants have not admitted liability. From the inception the First
10 Defendant, the driver of the vehicle, has attributed part blame or entire blame to
11 the Third Party.

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13 What is the Plaintiff's response?

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15 The Plaintiff's attorney submits:

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- 17 1. That the delay has not been inordinate or in excusable. She submits
18 that the Plaintiff was a 17 year old Caymanian who was seriously
19 injured in the accident and that initially it was his mother because, he
20 was a minor at the time of the accident, that gave instructions.
- 21 2. That subsequently when the Plaintiff took over instructions on reaching
22 majority, instructions were difficult to obtain.

1 3. That the application for Third Party proceedings was only filed on the 6
2 July 1999; and

3 4. That Third Party proceedings were not pursued as vigorously as they
4 should have been.

5
6 She accepts that there is no explanation on the affidavit evidence for the
7 delay but she submits that the Plaintiff has spent considerable time in prison
8 and that the Plaintiff was delinquent in pushing this matter forward. Indeed,
9 she submits that the notice of intention to proceed, (the three of them) were
10 filed because the attorneys hoped that this would give the Plaintiff time to give
11 them instructions.

12
13 As far as the unavailability of the First Defendant and the Third Party in
14 concerned, Mrs. Whittaker-Myles submits that an order of this Court would
15 perhaps persuade the First Defendant to come back into the Island. She
16 concedes, however, that this Court has no jurisdiction to compel him to come
17 back into the Island. As far as the Third Party is concerned she submits that
18 this is a matter between the Plaintiff and the Defendants and that the fact that
19 the Third Party is no longer in the Island cannot be considered a prejudice to
20 the Defendants. She further submits that in her opinion both key witnesses,
21 that is the First Defendant and the Third Party can be contacted.

22

1 This Court has before it, evidence which is conflicting. The Third Party is a
2 Jamaican and has left the jurisdiction. According to the Plaintiff the First
3 Defendant is in Jamaica or was in Jamaica up to five years ago, but five years
4 is a long time. Inquires made by Mr. Jones attorney for the Defendants
5 reveals that the First Defendant is somewhere in the United States married to
6 a Guyanese woman and is remaining there until his papers come through.
7 Although the Immigration Department has agreed on the basis of a letter from
8 the Court to permit him to come back into the Island.

9
10 Mr. Jones in response to Mrs. Whittaker-Myles submissions makes the
11 following points:

- 12
- 13 1. That this Court cannot compel the First Defendant to come back.
- 14 2. Where the question of liability is a live issue, the First Defendant must
15 be present to give evidence. His statement to the police simply cannot
16 suffice.
- 17 3. That the Defendants will be severely prejudiced if the Third Party
18 cannot be joined because of his absence.
- 19 4. That an attorney-at-law is not permitted to seek special consideration
20 because a victim of the accident was an infant at the time of the
21 accident or indeed was severely injured.
- 22
- 23

1 What did the authorities ordain in these circumstances?

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3 As for inordinate delay, the Courts have taken a stern attitude towards
4 inexcusable delay, especially in running down actions which depend largely
5 on the personal recollection of witnesses. Even the best of memories fail
6 after a lapse of six years and so it may be impossible to obtain a fair trial.

7 This was emphasized since the modern trend began in Allen v Alfred
8 McAlpine & Sons Limited [1968] 1 ALL ER 543 at:

9

10 "the fundamental documents in common law
11 jurisdictions all reflect this insistence on promptness
12 in hearing issues."
13

14 In that case Lord Denning M.R. at page 546 refers to the Magna Carta thus:
15 "Magna Carta will have none of it: 'To no one will we deny or delay right or
16 justice.'"

17

18 The head note in the McAlpine case (supra) states the principles accurately.

19 It reads at page 544:

20

21 "Held: (1) In the first and third appeals there had been
22 inexcusable delay due to the negligence of the
23 plaintiffs' solicitors, and it was not possible to have a
24 fair trial after so long a time; accordingly the actions
25 should stand dismissed."
26

1 In this case there is no question of any negligence of the Plaintiff's attorneys,
2 but indeed delinquency on pursuing the prosecution on part of the Plaintiff
3 himself. Much emphasis was laid on the fact that the victim was an infant and
4 that subsequently due to his injuries he was lead astray, took a path of
5 criminal activity, and was not disposed to prosecuting this case.

6

7 **Martin v Turner** [1971] WLR at page 258 is persuasive authority in
8 demonstrating that the Court does not regard disability as a special factor
9 where delay is concerned. It must not be thought that the courts are
10 unconcerned with the outcome of its decision on the victim. But as Lord
11 Denning MR in the **Allen v Sir Alfred McAlpine & Sons Ltd.** case (supra)
12 stated by going straight to the heart of the matter:

13

14 "The principle on which we go is clear: when the delay
15 is prolonged and inexcusable, and is such as to do
16 grave injustice to one side or the other or to both, the
17 court may in its discretion dismiss the action straight
18 away, leaving the plaintiff to his remedy against his
19 own solicitor who has brought him to this plight."
20

21 In the same case, Diplock LJ treated it in this way.

22

23 "Moreover, where the case is one in which at the trial
24 disputed facts will have to be ascertained from oral
25 testimony of witnessed recounting what they then
26 recall of events which happened in the past,
27 memories grow dim, witnesses may die or disappear.
28 The chances of the court's being able to find out what
29 really happened are progressively reduced as time
30 goes on. This puts justice to the hazard. If the trial is

1 allowed to proceed, this is more likely to operate to
2 the prejudice of the plaintiff on whom the onus of
3 satisfying the court as to what happened generally
4 lies. There may come a time, however, when the
5 interval between the events alleged to constitute the
6 cause of action and the trial of the action is so
7 prolonged that there is a substantial risk that a fair
8 trial of the issues will be no longer be possible.
9 When this stage has been reached, the public interest
10 in the administration of justice demands that the
11 action should not be allowed to proceed.”
12

13 In the case of **Birkett v James** [1977] 2 ALL ER 801. Lord Diplock reiterates the
14 principles which should govern the exercise of the court's power to dismiss an
15 action for want of prosecution. He stated, after approving the correctness of the
16 principles as stated in the “current white book” and I quote:

17
18 “The power should be exercised only where the court
19 is satisfied either (1) that the default has been
20 intentional and contumelious, e.g disobedience to a
21 peremptory order of the court or conduct amounting to
22 an abuse of the process of the court; or (2) (a) that
23 there has been inordinate and inexcusable delay on
24 the part of the plaintiff or his lawyers, and (b) that
25 such delay will give rise to a substantial risk that it is
26 not possible to have a fair trial of the issues in the
27 action or is such as is likely to cause or to have
28 caused serious prejudice to the defendants either as
29 between themselves and the plaintiff or between each
30 other or between them and a third party.”
31

32 In keeping with these principles therefore the court should not exercise its power
33 to make an order which would discontinue an action unless one of the
34 alternatives expressed in 2 (b) above is applicable. If there is a substantial risk
35 that a fair trial would not be possible that would be sufficient ground for allowing

1 the application to dismiss, and in the other alternative it would also be sufficient
2 ground if the Defendants would be seriously prejudiced as a result of the
3 prolonged delay.

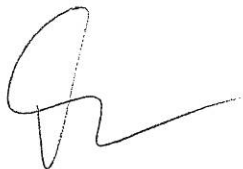
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5 In my view in this case, the fact that the Third Party and the First Defendant are
6 no longer in the Island and that the representatives of the Defendants are highly
7 unlikely to be able to get witness statements of any witnesses that may have
8 been at the scene and the fact that memories fade, would in all the
9 circumstances, amount to the Defendants not being able to have a fair trial.
10 Further, the Plaintiff has not been able to give a reasonable excuse for the delay.
11 Any reason given is entirely his fault. I therefore hold that the Defendants have
12 succeeded in this application and that the proceedings be struck out for want of
13 prosecution. Costs to the First and Second Defendants.

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15 Dated this 7th day of June, 2005

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19 Judge of the Grand Court