C.J. f

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

CAUSE NO. 104/90

1-06-93

ADELIA WILLIAMS v. ROYAL CARIBBEAN CRUISE LINES

ORDERS

Mr. Parkinson for defendant/applicant
Mr. Murray for plaintiff/respondent

In 1984 the plaintiff in this action took a cruise on board a ship called "The Song of Norway" which was owned and operated by the defendant. From the ship she booked an excursion aboard a dive vessel owned and operated by Bob Soto's Diving Ltd. The excursion took place the day after it was booked, the 28th May 1984, when the ship was berthed in Grand Cayman. During the excursion the plaintiff fell and injured herself. She maintains that the injuries were caused because the dive vessel was not in fit and proper working order. The plaintiff filed a writ of summons in CC 180 of 1987 against Bob Soto's Diving Ltd. on 20th July 1987, claiming damages for negligence. That action was struck out for want of prosecution by Smellie Ag. J on 13th April 1993.

On the 16th March 1990, the plaintiff filed a writ of summons against this defendant claiming damages for breach of contract and for negligence. Counsel for both parties agree that the writ was filed within the limitation period applicable at the time. They urge upon me that the better view is that a six year limitation period from the date of the accident applied on both heads of claim, which would mean that the writ was filed a little more than two months before the expiration of the six year limitation period. An alternative possible expiration date of 14th August 1991, was canvassed but was not urged upon me. I do not think anything rests upon a choice between the two limitation periods.

The defendant to this action now applies that the action be dismissed for want of prosecution. In CC. 180 of 1987 Smellie Ag. J. considered the law relating to a summons such as this. He

followed the judgment of Lord Diplock in the English House of Lords case of Birkett v. James [1977] 2 All ER 801, 805, and held that the power to strike out should only be exercised where the Court is satisfied either (1) that the default has been wilful and contumelious, or (2) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and that such delay would give rise to a substantial risk that it was not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendant. He applied head (2) and struck out the action.

The facts in this application are, with one noteable exception, the same as the facts before Smellie Ag. J. The exception is that the writ in the action against Bob Soto's Diving Ltd. was filed on 20th July 1987, some two years and eight months before the writ in this action was filed. The significance of this fact is that the authorities do draw a distinction between delay before a writ is filed and post-writ delay. The time elapsed before this writ was filed, that is up to the 16th March, 1990, cannot of itself constitute inordinate delay. Be that as it may, as Lord Diplock said in Birkett v. James (supra) at 808:

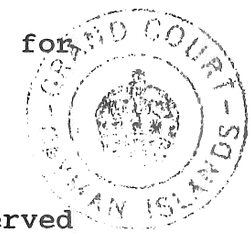
> "A late start makes it the more incumbent on the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ issued."

He went on to say, at p. 809:

> "To justify dismissal of an action for want of prosecution some prejudice to the defendant additional to that inevitably flowing from the plaintiff's tardiness in issuing his writ must be shown to have resulted from his subsequent delay (beyond the period allowed by rules of Court) in proceeding promptly with successive steps in the action. The additional prejudice need not be great compared with that which may have been already caused by the time elapsed before the writ was issued; but it must be more than minimal; and the delay in taking a step in the action if it is to qualify as inordinate as well as prejudicial must exceed the period allowed by rules of Court for taking that step."

I make note in passing that the late start in this action,

although not of itself a ground for striking the action out, could well prejudice the defendant in that the captain of the excursion vessel, one Guy Pelland, fled these Islands in November, 1989, and is unlikely to be available to testify for the defendant.



It is not recorded on what date the notice of writ was served on the defendant. However, a memorandum of appearance was filed on the 9th October 1990. The defence was filed on the 20th February 1991. Although that defence was filed out of time and with the plaintiff's consent it took until the 16th August 1991, a further six months, for the plaintiff to file a reply. Apart from filing a notice of intention to proceed pursuant to Rule 57 of the Grand Court (Civil Procedure) Rules, on 16th December 1992, the plaintiff took no further action in the matter until after this summons was filed in January, 1993. The plaintiff filed a summons for directions on 1st February, 1993, no doubt as a result of the summons. I am of the view that having regard particularly to the delay in filing the writ the post-writ delays on the part of the plaintiff are inordinate.

Are they excusable? The reasons put forward for the delays are that:

a) the plaintiff's Cayman attorneys are instructed by a firm of American attorneys;

b) instructions from the plaintiff have not been forthcoming as speedily as required because she constantly changes her address;

c) it is a policy of the Cayman attorneys that all fees and expenses incurred in representing overseas clients must be paid in advance and those fees and expenses were not completely paid until 15th December, 1992.

None of these reasons provides the plaintiff with a reasonable excuse for not pursuing the action more vigorously. It is for a plaintiff to keep contact with his attorneys and there is no excuse in these modern times for delays in communication. It is significant that even when the Cayman attorneys were put in funds they took no step until prodded into action by the issue of this summons.

Has there been additional prejudice to the defendant caused by the post-writ delay which is more than minimal? An affadavit of Ronald L. Kipp who is the President and General Manager of Bob Soto's Diving Ltd. reveals a major factor which is relevant here. Since the writ was filed the excursion boat on which the plaintiff met her accident has been extensively repaired and modified. It had already been once modified prior to the writ being issued but after the accident as a result of damage caused by Hurricane Gilbert. As the safety of the vessel and its fixtures is in issue in the case the Court may be at a disadvantage in being unable to have it inspected in its condition at the time of the accident. A report on the earlier condition of the vessel was obtained by the defendant from one Floyd Syrcle a safety and environmental consultant and accident reconstructor. Mr. Syrcle died in December 1992, after the writ was filed. Indeed the report may be admitted in Mr. Syrcle's absence but he is sadly unavailable for examination and cross-examination on his report and prejudice may well ensue to the defendant thereby. This more than minimal prejudice. There is a substantial risk that it is not possible to have a fair trial of the issues in the action.

In all the circumstances I consider the action must be dismissed for want of prosecution and the defendant is entitled to his costs in the action and of this summons. It is so ordered.

Judge

CAYMAN-GRAND COURT-ISLANDS

Dated this 1st day of June, 1993