

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. Cv 3794 of 1995

BETWEEN

NEIL BENNETT

Plaintiff

AND

PETER MC KENZIE

Defendant

Before The Honourable Mr. Justice P. Jamadar

Appearances:

Ms. J. Khoorn for the Plaintiff

Mr. I. Harracksingh for the Defendant

JUDGMENT

HISTORY

The application before this Court is a summons filed by the Plaintiff on the 6th November, 1998 pursuant to Order 3 rule 6 of the Rules of the Supreme Court, 1975 (as amended), for leave to proceed in this action. That summons was first returnable on the 16th December, 1998. However, the affidavit in support was only filed on the 10th February, 1999. Subsequently, after the hearing of this summons had commenced before this Court, a supplemental affidavit was filed on behalf of the Plaintiff, with leave, on the 1st March, 1999. On behalf of the

Defendant an affidavit in opposition was filed on the 24th February, 1999. All the affidavits were sworn by the attorneys-at-law for the Plaintiff and the Defendant.

The agreed history and chronology of events in this matter are as follows. The action is for damages (including damages for personal injuries) arising out of a motor vehicle accident on the 18th November, 1991. The writ was filed on the 16th November, 1995 days before the expiration of the limitation period. Though the Plaintiff was a passenger in a motor vehicle, the only party sued as a Defendant was the driver of the vehicle that collided with it. On the 9th October, 1996, about eleven (11) months after the writ was filed, it was served (being about three weeks before it expired). On that very day the Defendant entered an appearance on his own behalf. On the 6th November, 1996 the Defendant filed a notice indicating that Mr. I. Harracksingh had been appointed to act as attorney-at-law for him. On the 4th November, 1997 a Statement of Claim was filed and served (1 year and 26 days after the Writ was served and appearance entered – when it ought to have been served before the expiration of 14 days from the 9th October, 1996). It is not surprising then that this Statement of Claim bears a ‘late acceptance clause’ on it, as clearly it was served outside the time limit fixed by Order 18 rule 1 Rules of the Supreme Court, as the attorney filing same must have known. It is agreed that this Statement of Claim was never accepted out of time.

Next, on the 14th April, 1998 attorney for the Plaintiff realized that there was no Defence served (paragraph 5, supplemental affidavit), and proceeded to write attorney for the Defendant. By that letter, attorney for the Plaintiff noted that there had been no late acceptance of the Statement of Claim and called upon attorney for the Defendant to indicate within 10 days whether he would accept same, failing which ‘a formal application for extension of time’ would be made. Though there was never any subsequent late acceptance of the Statement of Claim, no application was made to extend the time for the filing/service of same.

Indeed, at paragraph 5 of the supplemental affidavit, the reason given for not making the application for extension of time was the need “to correct” certain errors in the Statement of Claim. As a result, on the 4th July, 1998 (8 months after the first Statement of Claim was filed and 91 days after the letter of the 14th April, 1998) an amended Statement of Claim was filed and served. The three errors that took 91 days to correct were the action number of the matter and the spelling/grammar of the words ‘path’ and ‘were’! Nevertheless, following the service of the amended Statement of Claim conversations took place between both attorneys with respect to the late acceptance of same, culminating in a letter of the 15th October, 1998 from Mr. I. Harracksingh. By that letter, the Defendant indicated that acceptance of the Statement of Claim was not possible because of legal notice No. 33 of 1993 (Order 3 rule 6), as a consequence of which, ‘the purported amendment . . . was therefore invalid’. It was also noted, that neither the owner nor driver of motor vehicle 2TTR17, which crashed into the Defendant’s motor vehicle, was a party to the action.

On receiving the letter of the 15th October, 1998 attorney for the Plaintiff:

again read the relevant legal notice No. 33 of 1993 and realized that I had been in error in my understanding thereof and that the period of 1 year began to run with the last step taken in the action by the Plaintiff and not by either party to the action (paragraph 8, supplemental affidavit).

No doubt, as a consequence of this realization the summons before this Court was issued (on the 6th November, 1998), that is, 7 years after the accident; 3 years after the Writ was filed; 2 years after an appearance was entered; 1 year after the original Statement of Claim was filed and 4 months after the amended Statement of Claim was filed.

ISSUES

Two issues fall to be determined by this Court. First, whether no step has been taken by the Plaintiff for a period of more than two years since the 9th October, 1996 (the date on which the Writ was served and the agreed 'last valid step') and therefore whether this action stands dismissed – see Order 3 rule 6A(1)(a). Second, in the event that the first issue is resolved in the negative, then whether no step having been taken by the Plaintiff for more than one year since the said 9th October, 1996 and this action being abated, leave should be granted to proceed with it. That is, whether there is evidence of 'good and sufficient cause for the delay' by the Plaintiff, in failing to take any step in the proceedings which promoted the furtherance and/or continuance of the proceedings/action to bring it to the stage of being set down for trial, between the 9th October, 1996 (last valid step) and the issue of this summons.

THE FIRST ISSUE

As set out above, given that the agreed last valid step in this action taken by the Plaintiff was on the 9th October, 1996 and given that this application for leave to proceed was issued on the 6th November, 1998, that is 2 years and 29 days later, the question is whether this action stands dismissed.

Ms. Khoorn's argument was primarily that the filing of the Statement of Claim on the 4th November, 1997, though done more than one year after the Plaintiff's last valid step in the action (9th October, 1996), is nevertheless 'a step taken', albeit an irregular one, sufficient to interrupt the period of two years and so prevent the operation of Order 3 rule 6A(1)(a) Rules of the Supreme Court. She also argued, that in any event the new Order 3 rule 6 does not exclude or restrict the operation of Order 3 rule 5 Rules of the Supreme Court and that this Court can therefore exercise its discretion to extend the time for the filing of the Statement of Claim. Finally, that in any event this Court had the inherent jurisdiction to do the above and should exercise that jurisdiction to do so.

In support of these submissions reliance was placed on the Judgment of Jairam J. in Indira Maharaj vs Republic Bank Ltd and Albert De Freitas HCA No. 1368 of 1993.

In response Mr. Harracksingh argued that the filing and service of the Statement of Claim on the 4th November, 1997 could not be a step taken because the said filing and service was invalid. In his opinion Order 3 rule 6(1) is mandatory. That is, a “matter shall stand abated until such time as” leave to proceed is granted. Thus, he argued, nothing could validly be done by the Plaintiff until a judge granted leave to proceed. Therefore, once the matter stood abated, anything done thereafter was ineffective until such leave was granted. And, once two years had passed the matter stood dismissed.

The question therefore becomes whether the filing and service of a Statement of Claim on the 4th November, 1997, in the circumstances of this case, was ‘a step taken’ by the Plaintiff in these proceedings within the two year period since the service of the Writ (9th October, 1996).

In Maharaj’s case, Jairam J. noted:

[T]he raison d’être of the new rules is to weed out the dead wood cases and to ensure that current matters are attended to with dispatch so as to clear the tremendous backlog of cases in order to dispense speedier justice as the maxim says “Justice delayed is justice denied”. The salutary object of the new rules is to ensure diligent prosecution of the claim by the Plaintiff or the counterclaim by the Defendant” (at pages 8-9).

He then went on to state:

In my judgment the Court must be cautious in exercising its powers under the new rules which are draconian.

Be that as it may, in my judgment, the summons issued by the Plaintiff on May 21, 1996 albeit an irregularity (in contradistinction to a nullity) had the effect (in the circumstances), under the new rules, of stopping time from running for the purposes of rule 6A. This is so because the new rules do not say that while the cause or matter is abated (which in my opinion means “suspended” as used in the new rules) no further step or proceedings shall be taken unless and until a Judge in Chambers grants leave to proceed with it (see per Denning L.J. in Harkness vs Bell’s Asbestos & Engineering Ltd [1967] 2 Q.B. 729, C.A. at page 735). Given the circumstances of this case it was jurisprudentially possible to cure that irregularity by obtaining leave, having regard to the Court’s powers under the new rules and under Order 2 rule 1 of the Rules of the Supreme Court, 1975 (see Leal vs Dunlop Bio-Processes Ltd [1984] 2 AER. 207, C.A.) because the “*lis*” was still in existence, it was not dead but was merely suspended.”

And concluded that:

Clearly, the failure by the Plaintiff to apply for leave to proceed in this case was a mere

irregularity which was capable of being cured. I do not agree . . . that such failure was a nullity.

Further, the Plaintiff's said summons was a step in the proceedings, an interlocutory step, intended to advance the matter vis-à-vis a formal step intended to bring the matter to conclusion (see for example Deighton vs Cockle [1912] 1 K.B. 206, C.A. at page 209 per Vaughn Williams L.J. and at pp. 213-214 per Kennedy L.J.).

The procedural context of Maharaj's case was that the determination of the last proceeding occurred on the 29th July, 1994 (a consent order on an application for interim payment). Thereafter, over 1 year later on the 21st May, 1996, a summons was issued for a second interim payment, which was subsequently withdrawn on the 21st October, 1996. Then, on the 6th November, 1996, over 2 years since the determination of the said last proceeding, a summons for leave to proceed (Order 3 rule 6) was issued by the Plaintiff and an order in terms made by consent on the 17th December, 1996. Thereafter, on the 19th January, 1997, the Defendants issued a summons seeking leave to withdraw its consent given on the 17th December, 1996. The Defendants argued, *inter alia*, that by Order 3 rule 6A (the summons issued on the 21st May, 1996 being a nullity) more than two years had elapsed between the determination of the last proceeding (29th July, 1994) and the Plaintiff's summons for leave to proceed (6th November, 1996) and therefore the Plaintiff's action stood dismissed before the issue of the said application for leave to proceed. The learned Judge rejected these arguments and granted the Plaintiff leave to proceed.

ORDER 2 AND ORDER 3 RULE 5

This aspect of the decision of Jairam J. is constructed upon two main pillars. First, that "*the new rules do not in any way exclude or restrict the operation or*

*effect of Order 2 (or Order3) of the Rules of Supreme Court, 1975” – see pages 3 and 9 of the judgment in **Maharaj**. The difficulty with this proposition lies in the opinions of the Privy Council in **Barbuda Enterprises Ltd vs Attorney General of Antigua and Barbuda** (1993) 42 WIR 183 (a case referred to by Jairam J.). That case dealt with the interpretation of particular provisions of Order 34 of the Rules of the Supreme Court 1970 of the Eastern Caribbean.*

The relevant rules are set out for ease of reference:

- 1. (1) When a cause or matter has become ripe for hearing, it shall be the duty of the plaintiff ... to file, within six weeks thereafter, a request that it be set down for trial.**

- 2. (1) Subject as hereinafter provided a cause or matter shall be ripe for hearing when - ... (b) the pleadings have been closed by the delivery of a reply, or, if no reply has been delivered, after the time for delivery of a reply has expired; (c) an order has been made under Order 14 or under Order 25 or under any other Order giving directions as to the trial of the cause or matter. (2) If there are any interlocutory proceedings pending, a cause or matter shall not become ripe for hearing until the determination of such proceedings unless the court otherwise orders.**

- 7. (1) A cause or matter shall be deemed deserted if no request for setting down is filed within six months after the expiration of the period fixed for the filing of such request. (2) When an action has been deemed deserted, no further proceedings may be taken therein, unless and until an order for revivor**

has been made by the court on the application of any party or a consent to the revivor and a request for setting down signed by all the parties thereto have been filed.

11. (1) A cause of matter shall be deemed altogether abandoned and incapable of being received if prior to the filing of a request for hearing or consent to judgment or to the obtaining of judgment - ... (b) no application or consent to revivor has been filed within six months after the cause or matter has been deemed deserted ...”

As Lord Bridge of Harwich pointed out in the advice of the Board, the issue raised was procedural and *‘it concerns the interpretation and application of a provision of the relevant rules of court which has the draconian effect that, if a plaintiff fails to take the appropriate steps within specified time limits to have his action set down for hearing, the action is automatically struck out and cannot be restored’* (at page 185 - emphasis mine).

Clearly, the intention and purpose of Order 34 of the Rules of the Supreme Court 1970 Eastern Caribbean, are the same as Order 3 rule 6 (in particular rule 6A) of the Trinidad and Tobago Rules of the Supreme Court.

Before the Privy Council, one of the primary arguments was *‘that the Plaintiff’s failure to comply with the time limits prescribed by Order 34 was a mere irregularity giving the court a discretion whether to set aside the proceedings under Order 2 or to extend time under Order 3’* (at page 187 a- emphasis mine). In the opinion of the Board, agreeing with the courts below, *‘the general provisions of Orders 2 and 3 cannot have intended to derogate from the precise*

and specific provisions of Order 34' (at page 187 d). Thus, in the advice of Lord Bridge (at page 187 f):

If, within the following six months, no application for ... revivor has been filed, the action is then dead and incapable of being revived. Harsh as it may seem, this is, in their Lordship's judgment, the inescapable consequence of the plain language of Order 34 and the court has no discretion to relive against it.

In the light of this advice and given the plain language of the new Order 3 rule 6 and bearing in mind its intention and purpose and that it was introduced in 1993 in the context of the already existing Orders 2 and 3(5), it is difficult for this court to share the opinion of Jairam J., that this new rule does not '*in any way exclude or restrict the operation or effect of order 2 (or Order 3) of the Rules of the Supreme Court, 1975*'.

On the contrary, I am of the opinion, that this new rule introduces a new jurisprudence for the conduct of civil litigation. One which takes into consideration, not simply the limited sphere of parties to an action in isolation, but also the wider sphere of the administration of justice in Trinidad and Tobago and the responsibility of litigants and the court, to ensure that limitation periods aside, litigation must be handled and managed expeditiously, failing which a party's right to pursue a claim may be lost, or rather, taken away.

ABATEMENT

The second pillar in the judgment of Jairam J. is the interpretation given to '*abated*' as used in Order 3 rule 6(1). In his opinion it means '*suspended*'. I respectfully disagree. In my opinion, the term '*abated*', as used in the context of this rule, means more than the neutral term '*suspended*' as suggested by Jairam J.

First, the ordinary legal usage of the term ‘*abate*’ means to quash. That is, to annul or reject as not valid. Thus, one speaks of ‘*to abate a writ*’, or to ‘*abate a nuisance*’ – to put an end to it. Indeed, a ‘*plea in abatement*’ was one in which a ground for abating or quashing an action was raised. Certainly, the common usage of the verb abate, is to diminish or make less. Secondly, and consequentially, in my opinion, when this rule states that after one (1) year ‘*the cause or matter shall stand abated until ... a Judge ... grants leave to proceed with it*’, the word ‘*abated*’ means ‘*taken away*’ or ‘*at an end*’ or ‘*invalidated*’. And the entire action remains so ended unless and until leave is granted to revalidate or recommence or revive it.

Thus, I am of the opinion, that not only does this court not have the power to exercise its discretion strictly under Order 2 or Order 3 rule 5, Rules of the Supreme Court, but also, that until leave is obtained to proceed in a matter that stands abated, any purported step taken in the interim is invalid, a non-step. That is, anything done when a matter is abated, is really ‘no-thing’ – and cannot be relied upon to prevent time running for the purpose of Order 3 rule 6A(1).

I am aware that this interpretation does not in any way lessen the so-called draconian effect of this new rule. However, that seems to be the unavoidable consequence of the language and purpose of this new rule, which has been deemed necessary in the context of civil litigation in Trinidad and Tobago.

Thus, on the 9th October, 1997 this action came to an end subject to the power of the court to revive it. On the 9th October, 1998 it came to an end with no power of the court, under the rules, to revive it. The filing of a Statement of Claim on the 4th November, 1997 was a non-step, a non-thing that a court could not see, unless and until the matter was revived by application under Order 3 rule 6(2). Unfortunately the time for making such an application has passed.

INHERENT JURISDICTION

At page 16 of his Judgment in Maharaj Jairam J. stated:

When hard cases arise, as I am sure is bound to happen, I do not think that the court is deprived of all power to give a remedy in appropriate cases. Of course in those cases it will have to be shown that failure to take any step within the time limits was not intentional or contumacious; that the delay was not inordinate or inexcusable; that common sense, fairness or justice call for a reinstatement of the action; that no prejudice will be caused to the defendant if reinstatement is granted, and that the limitation period has already expired and a fresh action cannot be brought.

Despite a provision in the new rules that a dismissal of a cause or matter shall not prevent a party from filing new proceedings in respect of the same cause or matter within the relevant period of limitation, in my opinion the court would have an inherent jurisdiction to reinstate a cause or matter in appropriate cases.”

And, at page 17 he concluded:

The new rules are subsidiary legislation and do not have the force of a statute of limitations and in my view the court would have an inherent jurisdiction to bring an action to life again where it has been abated or dismissed under the new rules.

It is often the case that when no rule or order can be prayed in aid of an application that seems doomed, attorneys-at-law seek to invoke the inherent jurisdiction of the court. In the words of Bernard CJ in **Wallen and Guerra vs The Attorney General of Trinidad and Tobago** Crim. App. Nos. 50 and 51 of 1994, *'this useful and residual process is so often latched on to in this jurisdiction as if it is some pharmaceutical remedy for any and every assumed internal malady'* (at pages 12-13).

First, the inherent jurisdiction of the court is a part of procedural law and not a part of substantive law. It may be exercised in any given case notwithstanding that there are Rules of Court governing the circumstances of such a case. Thus, it is invoked relative to the process of litigation (be it civil or criminal). Fundamentally, it is part of the process of the administration of justice – in this case, of civil justice.

As Master J.H. Jacob has demonstrated:

The jurisdiction to exercise these powers was derived from the very nature of the court as a superior court of law. For the essential character of a superior court of law necessarily involves that it should be invested with the power to maintain its authority and to prevent its process being obstructed and abused.

- see J.H. Jacob: 'The Inherent Jurisdiction of the Court', (1970) 23 Current Legal Problems, page 23.

Indeed, Lord Morris in **Connelly vs Director of Public Prosecution** (1964) 2 AER 401 at 409E pointed out that:-

There can be no doubt that a court which is endowed with a particular jurisdiction has

powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction.

And, as Master Jacob so effectively put it (at page 28):-

The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.
(emphasis mine)

Thus, precisely because of the pervasive nature of the court's inherent jurisdiction, there can be no set limits upon the power of the court in the exercise of its inherent jurisdiction to control and regulate its process. Because, what determines these limits are the ever changing needs, evaluated on a case by case basis, of a court to fulfill itself as a court of justice – as it seeks to administer justice according to law.

Relevant to all of this is the fact that the rule making authority of the Court, culminating in the Rules Committee and the Rules of the Supreme Court, derived from the inherent jurisdiction of the court to regulate its proceedings (see Jacob, pages 34-37). Indeed, the Rules of the Supreme Court exist to promote the fair, efficient and speedy dispatch of civil litigation. To this extent they are regulatory and prescribe necessary parameters within which civil litigation must be conducted.

Of course, part of the purpose of the Rules of Court is also to provide certainty and uniformity in the process of the administration of justice. For these reasons,

except where no rules exist, the exercise of the inherent jurisdiction of the court is a residual power, to be exercised with care and only in exceptional circumstances. Thus, the powers of the court under its inherent jurisdiction complements its powers under the Rules and may be thought of as beginning where the Rules end. To this extent the inherent powers are wider and more extensive than under the Rules and fill the gaps left by the Rules (Jacob, pp. 50-51).

Indeed, Master Jacob suggests the following definition of inherent jurisdiction (at page 51), which I adopt in its entirety:-

The inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

The exercise of the inherent jurisdiction of the Court is therefore ultimately, *'the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice.'* (per Lord Diplock in Bremer Vulkan vs South India Shipping (1981) 1 AER 289 at 295 e. [See also, Wallen and Guerra vs The Attorney General of Trinidad and Tobago at pp 12-14; Alexander vs Williams (1984) 34 WIR 340 at pages 345-346; AVM Caribbean Ltd vs Caribbean Commercial Insurance Co. Ltd. HCA No. 3624 of 1991 at pages 10-12; S. Cohen, Due Process of Law 1977 pages 344-348.]

In fact, a good recent example of the court invoking its inherent jurisdiction to ensure that procedural justice be done between parties, was in the case of **Anton Piller K.G. vs Manufacturing Processes Ltd.** (1976) 1 AER 779. There, the

order sought was not covered by the rules of court, yet the court granted, in the exercise of its '*inherent power*' under its '*inherent jurisdiction*', what is now commonly referred to as an '*anton piller*' order (see page 787 d-e)

I therefore agree with Jairam J., that to the extent the '*interests of justice*', '*fairness*', '*the rule of law*' or respect for law and legal institutions are under serious threat, the inherent jurisdiction of the court may be invoked, to ensure that its intrinsic nature as a court of justice is preserved and maintained. It must be borne in mind at all times, that this is a jurisdiction exercised independent of any power vested in the court through the Rules *per se*.

To my mind the facts in **Maharaj's** case, exceptional as they were, could properly have justified the exercise of the courts inherent power, to ensure that procedural justice and fairness prevailed and the Plaintiff was not denied the opportunity to have her case continue (see pages 3-7 of the judgement in **Maharaj** for the facts).

The question is, whether the facts before this court also demand the invocation of the inherent jurisdiction of the Court. In my opinion they do not. In this case, the sole reason for the failure to comply with the rules of court was the '*error*' of attorney for the Defendant in his understanding of Order 3 rule 6(1)(a). To my mind this rule is plain and clear. It refers to a '*step taken by the party instituting*' a claim or counterclaim. In this case there could be no confusion, as all that existed was the Plaintiff's writ/claim. Further, it is unreasonable to expect a court to accept that the rule quoted above could conceivably, in this case, ever refer to a step taken by the Defendant (see paragraph 8 of the supplemental affidavit).

Also, the factual situation outlined at paragraph 6 of the Plaintiff's principal affidavit does not justify or explain why an application was not made for leave to proceed [Order 4 rule 6(2)] and only compounds the character of the '*error*' of attorney-at-law.

Finally, though the limitation period has already expired, not only is the reason for failing to apply for leave to proceed inexcusable, but at this stage serious prejudice will be caused to the Defendant. There is no evidence of conciliatory discussions between these parties, nor is there any evidence of acquiescence by the Defendant in the Plaintiff's delays. Rather, there has been an implicit refusal by the Defendant, at all stages, to agree to any waiver of the requirements of the rules. This attitude culminated in the Defendant's letter of the 15th October, 1998, which raised Order 3 rule 6 and specifically highlighted the Plaintiff's failure to make the driver of 2TTR17 a party to the action. Thus, at this stage, no statement of claim having been duly filed or served and the Plaintiff having only sued one party to the accident, the Defendant's right to join the other party to the accident has now been lost. This constitutes a serious prejudice to the Defendant, for if he is only partly responsible for the accident, he will be liable to the Plaintiff for the whole, but will be without recourse to recover by way of contribution from the other party to the accident.

For these reasons, I see nothing exceptional in the circumstances of this case that justify the invocation of the inherent jurisdiction of this court to save this action from the consequences of Order 3 rule 6A(1). In this regard, the distinction between the '*inherent jurisdiction*' of the court and the exercise of '*judicial discretion*' is important to bear in mind. This is not one of those '*hard cases*' to which Jairam J. referred, that justifies the invocation of the inherent jurisdiction of the court to save it from the clear language and meaning of Order 3 rule 6, Rules of the Supreme Court.

For all of these reasons, the first issue is resolved against the Plaintiff.

THE SECOND ISSUE

In the event I am wrong in my resolution of the first issue, it is incumbent that I deal with the second issue. Has the Plaintiff shown ‘*good and sufficient cause for the delay*’?

The explanation in this case is twofold. First, it is stated that the Plaintiff’s attorney was retained in November, 1995, that the writ was filed on the 16th November, 1995 and that the Plaintiff was out of the jurisdiction for 292 days prior to the filing of the Statement of Claim. Because of this absence, the Plaintiff could not supply the information required for settling the Statement of Claim, which was only received by the Plaintiff’s attorneys in September, 1997. The original Statement of Claim was filed on the 4th November, 1997.

An analysis of this explanation demonstrates its unreasonableness. The collision occurred on the 18th November, 1991. By paragraph 3 of the Statement of Claim, the Plaintiff returned to work on the 7th September, 1992. Three (3) years and three (3) months later the Plaintiff gave instructions to begin this action (November, 1995). Almost two years later (718 days), the information for settling the Statement of Claim was supplied. Why? Because the Plaintiff was out of the jurisdiction for 292 days! So what of the other 426 days (1 year and 2 months)?

A perusal of the Statement of Claim reveals that there is nothing pleaded in it that could have reasonably justified the delay in giving instructions for settling or filing same. In my opinion, the facts of this case demonstrate that if this Plaintiff took almost five (5) years to get the information necessary to plead his case, then that tardiness is inexcusable. In this context, it is noteworthy that there is no attempt to explain why it took the Plaintiff this long to obtain and give the information that is pleaded in the Statement of Claim.

The second explanation given for the delay, is the error of the Plaintiff's attorney-at-law. As I have already shown, in my opinion, the primary cause for the delay in taking any step after the service of the writ (9th October, 1996), was the Plaintiff's delinquency in doing what was necessary to have the Statement of Claim settled and filed. The Plaintiff is primarily responsible for the difficulty he finds himself in at this point in these proceedings. Indeed, within about one month of receiving instructions, the Statement of Claim was settled and filed.

Is the Plaintiff's attorney's 'error' in his understanding of Order 3 rule 6(1)(a) a good and sufficient cause for the delay in this matter. For the reasons I have already given, I think not. However, Ms. J. Koorn submits, based on the opinions of Sealy J. in **The Incorporated Trustees of the Anglican Church vs Maurice and Others** HCA No. 3520 of 1983 and of Kangaloo J. in **The Royal Bank of Trinidad and Tobago Ltd vs Persad** HCA No. S1811 of 1989, that for the purpose of Order 3 rule 6, litigants should not be penalised for the inadvertence of attorneys. In this regard I wish to state, that in my opinion, neither Sealy J. nor Kangaloo J. suggested any such rule of law. Both cases were determined on the particular facts before each judge. Indeed, Sealy J. said specifically that *'the litigants in this case should not be penalised'* (at page 9 – emphasis mine). It should also be noted that before Sealy J. the reason for delay was the fact of ongoing negotiations between the parties (at page 8). Before Kangaloo J., not only was the Plaintiff itself held not to be dilatory, but also, the delay in Senior Counsel settling the reply was justified because there were several issues to be dealt with which were raised and which required detailed instructions (at page 4).

However, in the matter before this court, I have found that the Plaintiff has been dilatory in the prosecution of his claim and in the supplying of information for settling his Statement of Claim (information which, on the Statement of Claim filed, does not justify the delay in doing so). Further, any error by attorney for the Plaintiff in failing to either apply for an extension of time to file and serve the Statement of Claim and/or for leave to proceed with this action, in the total

circumstances of this case, does not, in my opinion, constitute a good and sufficient cause for the delay.

I therefore also resolve this second issue against the Plaintiff.

ORDER

In the circumstances, the Plaintiff's summons of the 6th November, 1998 for leave to proceed under Order 3 rule 6(2) is dismissed. The Plaintiff will pay the Defendant's costs of same certified fit for advocate attorney-at-law. Leave is granted to the Plaintiff to appeal.

Dated this 31st day of March, 1999.

Peter Jamadar
Judge