Privy Council Appeal No. 18 of 1988

(1) Murray Warshaw
(2) Roy Gillings and
(3) Richard Adler *Appellants*

v.

Willard Drew *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST MAY 1990

Present at the hearing:-

LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD OLIVER OF AYLMERTON
LORD JAUNCEY OF TULLICHETTLE
SIR ROBERT MEGARRY

*[Delivered by **Lord Brandon of Oakbrook**]*

This interlocutory appeal arises in an action brought in the Supreme Court of Jamaica in January 1976 by the respondent as plaintiff against the appellants as defendants, in which the respondent claimed to enforce an option for the purchase of land. By a summons issued on 26th October 1983 the appellants, who had not previously entered an appearance in the action, applied to strike out the action for want of prosecution. The summons came before Master Lambert on 15th May 1985. No point was taken by the respondent that the appellants, not having entered an appearance in the action, were not entitled to make the application concerned, and the Master made an "unless" order, that is to say, an order that the action should be dismissed for want of prosecution unless the respondent within 14 days, served the statement of claim which had earlier been filed in court on the appellants or their attorneys-at-law. On 20th May 1985 this condition was complied with by the respondent. The appellants appealed against the Master's order to the Court of Appeal of Jamaica (Kerr, Carberry and Wright JJ.A.), seeking to have substituted an unconditional order for the dismissal of the action. The Court of Appeal, by order dated 28th July 1986, dismissed the appeal. The appellants now bring a further appeal, by special leave of this Board, against the order of the Court of Appeal.

The circumstances leading up to the action are these. The appellants, who reside in the United States of America, are, and were at all material times, the registered owners of certain land known as Coral Gables, Coral Gardens, Montego Bay, Jamaica ("the premises"). By an instrument in writing dated 1st February 1971 ("the lease") the appellants granted a lease of the premises to William Chenoweth and Arthur Lemieux ("the original lessees") for a term of 5 years commencing on 1st March 1971. The lease further granted to the original lessees an option to purchase the premises at the expiration of the term. The respondent contends, first, that on 14th September 1971 the original lessees assigned to him the residue of the term of the lease, together with the option to purchase; and secondly, that in January 1975 he duly exercised that option. The appellants contest both these contentions. It appears not to be in dispute that the respondent has, since some time in 1971 until the present day, been in possession of the premises.

There is some doubt about the date on which the action to enforce the option to purchase referred to earlier was begun, but nothing turns on the matter. The likelihood appears to be that the writ, though the copy of it placed before their Lordships was dated 28th January 1976, was in fact issued on 20th January 1976, when a statement of claim bearing that date was filed in court. On 28th January 1976 the respondent applied for, and obtained ex parte, first, an order giving him leave to serve notice of the writ out of the jurisdiction; and secondly, an interlocutory injunction restraining the Registrar of Titles from registering any dealings with the premises which has remained in force ever since. Despite the fact that the respondent's attorneys-at-law had, on 28th January 1976, obtained on his behalf, the first of the two orders referred to above, they issued on 17th May 1976 a further summons for leave to serve notice of the writ on the appellants out of the jurisdiction. That summons was clearly unnecessary and, although two dates were fixed for its hearing, (the second apparently in error) no further proceedings were taken on it. There is a dispute as to whether the writ in the action was ever served by the respondent on the appellants. Subject to that it is common ground, first, that the appellants never entered any appearance in the action; and secondly, that the respondent took no further step in the action at any time before the issue of the appellants' summons to strike out on 26th October 1983.

On 22nd February 1977, the first and second appellants issued a writ against the respondent in the Supreme Court of Jamaica, in which they claimed possession of the premises. Service of the writ was accepted and an appearance to it entered on behalf of the respondent by Gresford Jones, his attorneys-at-law. A further action for possession of the premises appears to have been brought by the appellants or some

of them, against the respondent in about March 1983, but the writ was not served and no appearance was entered. The appellants appear to have taken no steps to prosecute either of these actions.

Their Lordships will deal first with the matter of service of the writ. With regard to this two questions arise. The first question is whether there are any special features of this case which would justify their Lordships in interfering with the concurrent findings of fact of the two courts below that, in 1977, Edsel Keith, the attorney-at-law then acting for the appellants, accepted service of the writ on their behalf. The second question is, if so and the right finding to make is that there was no such acceptance of service, whether the appellants nevertheless, by their conduct in issuing and proceeding with their summons for an order dismissing the action for want of prosecution, waived service of the writ.

With regard to the first question, the only evidence before the courts below consisted of affidavits filed by either side in support of, and in opposition to, the appellants' application to strike out. In support of the application the appellants filed an affidavit of Joye Hanchard sworn on 26th October 1983. She is an attorney-at-law and was an associate in the firm of Harding and Company the attorneys-at-law then acting for the appellants. She stated in paragraphs 3 and 4 of her affidavit that, since the grant to the respondent on 28th January 1976 of leave to serve notice of the writ on the appellants out of the jurisdiction, none of the appellants had ever been served with such notice. In answer to that affidavit the respondent filed two affidavits, one of the respondent sworn on 12th March 1984, and another of Sonia Jones sworn on 7th May 1985. She is an attorney-at-law in the firm of Gresford Jones, who has at all material times had the conduct of the respondent's case. The respondent did not refer in his affidavit to the question of service, but paragraphs 3 and 4 of the affidavit of Sonia Jones read as follows:-

> "3. That subsequent to the Writ of Summons filed on the 28th day of January, 1976 and the Order granting leave to serve Notice of the Writ out of the jurisdiction, that there were several telephone discussions with Mr. Edsel Keith the Attorney-at-Law for the Defendants in relation to this matter.
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> 4. That in late 1976 Mr. Keith indicated that he intended to file Summons asking for Recovery of Possession. We agreed at that time that he would accept service of my Writ and in turn I would accept service of the Writ for Recovery of Possession to be filed by him."

The appellants filed a further affidavit of Joye Hanchard in reply, but there was nothing in it to contradict or qualify paragraphs 3 and 4 of the affidavit of Sonia Jones set out above.

It was argued for the appellants before the Master and the Court of Appeal, and again before their Lordships, that there was no evidence to show that the agreement testified to by Sonia Jones in paragraph 4 of her affidavit had subsequently been put into effect. According to the Master's notes of the hearing before him contained in the record before their Lordships, the Master dealt only briefly with the question of service, saying simply that he accepted that the writ was served on the attorney-at-law then acting on behalf of the appellants. He can only have made that finding by inferring from all the circumstances, including in particular the fact that Gresford Jones accepted service of the appellants' writ for recovery of possession issued on 22nd February 1977, that the agreement referred to in paragraph 4 of the affidavit of Sonia Jones had, on a balance of probabilities, been implemented by both sides; and possibly, having regard to what was said by Carberry J.A. in his judgment in the Court of Appeal to which their Lordships will refer later, on the additional basis of an assurance by counsel for the respondent that service of the writ had been accepted by Edsel Keith.

The Master did not make any finding as to the date on which service of the writ was accepted. However, since the appellants' writ claiming possession of the premises, service of which was accepted by Gresford Jones, was not issued until 27th February 1977, there is a possibility that, assuming Edsel Keith did accept service of the respondent's writ, its initial period of validity of 12 months had by then expired. An expired writ is not, however, a nullity: see *Sheldon v. Brown Bayley's Steel Works Ltd. and Dawnays Ltd.* [1953] 2 Q.B. 393. It was, therefore, open to Edsel Keith to accept service of the writ voluntarily and without protest even if its period of validity had expired.

The first judgment in the Court of Appeal was given by Carberry J.A. He recorded early in his judgment that to date there had been no formal proof of service nor any entry of appearance on behalf of the appellants. Subsequently he referred more than once to the fact that Sonia Jones had, in her affidavit, fallen short of alleging that Edsel Keith accepted service of the writ pursuant to the agreement deposed to by her. Carberry J.A. expressed his view on the question of service as follows:-

> "When the point surfaced so to speak before the Master, Counsel for the plaintiff, acting on the instructions of the Plaintiff's attorney, assured the Master that service of the writ had been accepted by the Defendants' previous attorney. The Master has accepted this. ...
>
> It is true that the affidavit of the Plaintiff's attorney stops short, or falls short on this point, but it was drafted to meet a different situation.

> There was on the other side no affidavit by the Defendant alleging non-service, and they had taken over the years, by negotiations, and bringing this summons a position which implicitly if not expressly recognised the service of the writ. Accepting that the period of limitation had run, and that it would not be possible to bring a fresh action, or for that matter to apply for leave to renew or to re-serve the writ, it is hardly surprising that the Master on the material before him accepted that the writ had been served ..."

Kerr J.A. gave a short judgment agreeing with Carberry J.A. on all matters except for one not here material. Wright J.A. simply agreed with Carberry J.A.

There are several observations which their Lordships would make on the passage from the judgment of Carberry J.A. set out above. First, there is the reference to counsel for the respondent, acting on the instructions of the respondent's attorney, assuring the Master that service of the writ had been accepted by the appellants' previous attorney, and to the Master accepting that assurance. There is no reference in the Master's notes to his having been given any such assurance. In any case, since the question of service was in dispute, if the Master was given any such assurance he should have insisted on its being supported by evidence and should otherwise have disregarded it. Secondly, it is not clear to their Lordships what Carberry J.A. meant when he said that the affidavit of Sonia Jones was drafted to meet a different situation. It seems likely that he meant that it was drafted to meet a situation in which what was being denied by the appellants was service on them of notice of the writ outside the jurisdiction pursuant to the leave obtained by the respondent on 28th January 1976. Nevertheless, service of the writ having once been put in issue by the appellants, it seems to their Lordships that Sonia Jones should have deposed not only to the fact that Edsel Keith had agreed to accept service on a certain condition, but also (if it was the case) that he had later, on or in the expectation of such condition being fulfilled, actually done so. Thirdly, in so far as Carberry J.A. was saying that the Master's decision on the question of service might properly have been influenced by the consideration that, if the period of validity of the writ had expired before service the claim made by it would have been time-barred, so as to prevent the issue of a fresh writ or renewal of the original writ, their Lordships are unable to agree with this view. There is, however, nothing to show that the Master, in accepting that the writ had been served, was influenced by any such consideration.

Their Lordships consider that it is unfortunate that the question of service of the writ was not more fully investigated before the Master than it was. One way in

which this could have been done would have been by Sonia Jones being cross-examined on her affidavit. Their Lordships have little doubt that the reason why a fuller investigation was not made was that the appellants, by applying to dismiss the action for want of prosecution, gave the impression that they had just as properly been made parties to the action as if they had been duly served with the writ and entered an appearance to it, and that, because of this, the question of service was not seen as having the significance which the argument for the appellants sought to attach to it.

In deciding whether their Lordships would be justified in interfering, contrary to their established practice, with the concurrent findings on the question of service made by the two courts below, they think it necessary for them to bear in mind that those two courts are necessarily far more familiar than are their Lordships with the manner in which Jamaican attorneys-at-law conduct civil actions of this kind. With that consideration in mind, while their Lordships are by no means sure that they would themselves, if trying the matter on the evidential material available, have reached the same conclusion on the question of service as did the two courts below, they are not prepared to hold that this is a case in which they would be justified in interfering with the concurrent findings of fact made by those two courts on that question.

In view of their Lordships' decision on the first question relating to service of the writ, it is unnecessary for them to examine the second question, whether, if there were no service, the appellants nevertheless by their conduct waived such service. Since the matter was fully argued before them however, they think it right to state their views on this question also.

It is well established that it is open to a defendant in an action to enter an appearance in it voluntarily, even though the writ in it has not been served on him, and that by doing so he waives such service. Modern authority for this proposition is to be found in *Pike v. Michael Nairn & Co. Ltd.* [1960] Ch. 553. That was a case of proceedings begun by originating summons which was not served on the respondent. Cross J. said at page 560:-

> "The service of the process of the court is made necessary in the interests of the defendant so that orders may not be made behind his back. A defendant, therefore, has always been able to waive the necessity of service and to enter an appearance to the writ as soon as he hears that it has been issued against him, although it has not been served on him."

The learned judge then referred to two authorities in support of his statement: *Fell v. Christ's College, Cambridge* (1787) 2 Bro. C.C. 278 and *Oulton v. Radcliffe* (1874) L.R. 9 C.P. 189. The principle was applied again later in *The Gniezno* [1968] P. 418, where the defendant had voluntarily entered an appearance to a writ the period of validity of which had already expired.

It appears to their Lordships that, if a defendant in an action who has not been served with the writ in it can waive such service by voluntarily entering an appearance, it must follow that he can also waive such service by voluntarily taking an even more advanced step in the action than entering an appearance, such as issuing and prosecuting a summons for an order dismissing the action for want of prosecution. That was indeed the step taken by the respondents in *Pike v. Michael Nairn & Co. Ltd. (supra),* (where the rules did not require an appearance to be entered) which Cross J. held to constitute a waiver of service of the originating summons. In the present case the appellants would ordinarily only have been entitled to apply for dismissal of the action for want of prosecution if they had been served with the writ and entered an appearance. They elected to do so however, without either of these procedural steps having been taken. By doing so the appellants waived service of the writ on them, and the respondent, by taking no point on the appellants not having entered an appearance, waived the need for such entry. In their Lordships' view, therefore, on the assumption (contrary to the fact) that the writ in the present case was not served on the appellants, their conduct, in voluntarily applying for an order dismissing the action for want of prosecution, constituted a clear waiver by them of such service. The justice of this is obvious: a defendant cannot be allowed to take an active part in an action and at the same time to assert that he has never been served with the process by which the action was begun.

Their Lordships turn now to the question of dismissal of the action for want of prosecution on the basis that the service of the writ was accepted by Edsel Keith on the appellants' behalf. The principles governing the court's power to dismiss an action on that ground are not in doubt. They were authoritatively stated by the Court of Appeal in England in *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229, a decision later expressly approved by the House of Lords in *Birkett v. James* [1978] A.C. 297, and have been to some extent developed in subsequent English cases. Leaving aside cases of contumelious behaviour on the part of a plaintiff or his lawyers, of which the present case is clearly not one, the authorities referred to show that dismissal of an action for want of prosecution will only be justified if the following matters are established:

first, that there has been inordinate and inexcusable delay in the prosecution of the action on the part of the plaintiff or his lawyers; and secondly, that such delay has given rise to a substantial risk that a fair trial of the action will no longer be possible, or has caused serious prejudice to the defendant in one way or another (see for example *Biss v. Lambeth, Southwark and Lewisham Area Health Authority (Teaching)* [1978] 1 W.L.R. 382, where it was held that persons could be seriously prejudiced by having an action hanging over their heads indefinitely).

It is not in dispute that, since the appellants accepted service of the writ, the respondent took no steps of any kind in the action before the issue of the appellants' summons to dismiss the action for want of prosecution on 26th October 1983. That means that there had been a delay in the prosecution of the action on the part of the respondent or his attorneys-at-law of at least six and a half years. In his affidavit sworn on 12th March 1984 the respondent sought to explain and justify the delay by saying that there had been continuing negotiations between his attorneys-at-law and a succession of different attorneys-at-law acting for the appellants during the whole of the period concerned. The appellants filed no evidence contradicting the respondent's account of these matters.

According to the Master's notes he dealt only briefly with this question also. After referring to *Allen v. Sir Alfred McAlpine & Sons Ltd.* he said, (as slightly amended to express the evident intention):-

> "In this case the Court finds that there has been delay in serving the Statement of Claim on the defendants but that having regard to the nature of the case, that delay would not [defeat] any claims to a fair trial of the issues nor [cause] any grave prejudice to the defendants. ...
>
> I also find that this delay was not intentional or contumelious as negotiations were going on between the Attorneys during the period of which complaint is made."

The Master made no express finding as to whether the delay to which he referred, was either inordinate or inexcusable, as he might have been expected to do. Be that as it may, however, he did make an express finding that the appellants had not been prejudiced by the delay having made it impossible for the issues in the case to be fairly tried, and it is clear that that was the ground for his refusal to make the unconditional order for the dismissal of the action sought by the appellants.

Carberry J.A., in his judgment in the Court of Appeal, made a comprehensive examination of the

English authorities on the subject, beginning with *Allen v. Sir Alfred McAlpine & Sons Ltd.* and *Birkett v. James* and continuing with a substantial number of other cases decided in the light of one or both of those primary authorities. Then, dealing with the present case he said:-

> "I am of opinion that in the instant case before us the delay was not only inordinate, but that it was also inexcusable. Though it was reasonable for some time for the plaintiff to hope for a settlement, his version of the settlement negotiations established that as soon as settlement was imminent between the lawyers, the principal defendant [Murray Warshaw] went back on it, and sought new lawyers and commenced the process de-novo. The unexpressed background of course was the steady rise in land values in that area, and generally in Jamaica, over the period. I think this made the plaintiff the more anxious to secure the prize without a fight, and the defendant more anxious to avoid surrender, whatever his lawyers advised. It was the plaintiff's duty after the expiry of a reasonable time to get on with the action, as settlement was plainly not forthcoming.
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> There remains however the other consideration; have the defendants succeeded in showing that the delay has caused them serious prejudice, or been of such a sort that it is not now possible to have a fair trial of the issues involved?
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> It is clear that the onus is on the defendant to file evidence to establish the nature and extent of the prejudice occasioned to him by such delay. Nothing of this sort appeared in the affidavit filed by the defendant, and it appears that before the Master the defendant's attorney went so far as to argue that it was not necessary to prove that the delay will prejudice the fair trial of the action. This of course is not correct, and the Master has specifically found 'that having regard to the nature of the case that delay would not cause (? defeat?) any claims to a fair trial of the issues nor any grave prejudice to the defendant'.
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> There has not before us been any real challenge to that finding. The nature of the case is that the plaintiff has been a tenant of the defendant for some 13 to 14 years. He pays his rent regularly, and there is no suggestion that any of his obligations have gone unfulfilled. He even claims to have made substantial improvements to the premises. What is on issue is whether he has an option to buy the premises, and whether he has validly exercised it. These will turn on the construction of the documents and correspondence in the case, and prima facie oral evidence will play no substantial role in the matter. There is no reason to reject the Master's view on this fundamental issue."

Kerr J.A. began his judgment by saying that he agreed with the reasoning of Carberry J.A. subject to one small reservation. He explained this reservation by saying:-

> "I am unwilling to join him [Carberry J.A.] in categorising the Plaintiff's delay as 'inexcusable'. While the time spent in negotiating a settlement of a case may not per se excuse long delay yet in the instant case there are special circumstances, which in my view provide reasonable excuse. Carberry, J.A. in his judgment has carefully chronicled the history of the proceedings and the conduct of the parties, prior to the application by the Defendant to dismiss the Plaintiff's action for want of prosecution. With respect to such special circumstances it is enough to advert to the nature of the contract sought to be specifically performed, namely a contract for the sale of land, and attendant thereon, of the preparation of documents and their due execution by the Defendant, who resides abroad; the changes of defence attorneys during the period, the vacillating conduct of the Defendant and his keeping the contention alive by serving the Plaintiff in March, 1983 a Notice to Quit the demised premises and following on with his second action for recovery of possession and to say that these circumstances cumulatively provide acceptable excuses for the Plaintiff's delay."

Wright J.A. agreed with the judgment of Carberry J.A.

With the question of service out of the way, counsel for the appellants appreciated that, in order to enable the appellants to succeed in this appeal, it was necessary for him to persuade their Lordships that the Master and the Court of Appeal had erred in finding that the respondent's delay in prosecuting the action, which a majority of the Court of Appeal categorised as both inordinate and inexcusable, had not caused any serious prejudice to the appellants. In attempting this task he did not challenge the concurrent findings of the Master and the Court of Appeal that the delay had not caused prejudice to the appellants by giving rise to a substantial risk that the issues in the action could no longer be fairly tried. He advanced, however, a fresh argument, which had not been relied on before the Master or the Court of Appeal. This argument was based on the fact that the respondent, as their Lordships recorded earlier, had on 28th January 1976 obtained ex parte an interlocutory injunction restraining the Registrar of Titles from registering any dealings with the premises, which was still in force at the time when the appellants applied for dismissal of the action for want of prosecution more than 7½ years later. Counsel for the appellants contended that the continuing existence of the injunction imposed on the respondent and his attorneys-at-law an even greater duty to

prosecute the action expeditiously than the duty under which they would in any case have been, because, so long as the injunction remained in force, the appellants were prevented from dealing with the premises as they wished, for instance by selling them to a third party.

Their Lordships accept that the continuing existence of the injunction provided an additional reason for expeditious prosecution of the action by the respondent or his attorneys-at-law. They do not, however, accept that the appellants suffered any serious prejudice by reason of the injunction. Their Lordships agree with the view expressed by Carberry J.A. in his judgment that the onus was on the appellants to establish by evidence the nature and extent of any prejudice caused to them by the delay on which they relied. There was, however, no evidence filed for the appellants to show that they had been prejudiced, either seriously or at all, by the continuing existence of the injunction, and their Lordships do not consider that it would be right to infer such prejudice in the absence of any such evidence. In particular, there has been no suggestion that the appellants ever took any steps to obtain the discharge or modification of the injunction. In these circumstances counsel's fresh argument for the appellants can only be regarded as a gallant but inevitably unsuccessful attempt to make legal bricks without evidential straw.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs.