Jeyaretnam Joshua Benjamin v Lee Kuan Yew
[2001] SGCA 55

Case Number : CA 600023/2001

Decision Date : 22 August 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA

Counsel Name(s) : Appellant in person; Davinder Singh SC and Hri Kumar (Drew & Napier LLC) for the respondent

Parties : Jeyaretnam Joshua Benjamin — Lee Kuan Yew

Civil Procedure – Striking out – Dismissal of action for want of prosecution – Principles applicable – Inordinate and inexcusable delay – Respondent's delay of over two years without reason or explanation – Whether delay amounts to intentional and contumelious default – Prejudice by reason of delay – Whether unavailability of services of particular Queen's Counsel amounts to prejudice – Whether inordinate and inexcusable delay amounts to abuse of court process – Limitation period yet to expire – Whether action should be struck out

Statutory Interpretation – Statutes – Repealing – Repeal of Rules of Court O 3 r 5 – Effect of repeal – Distinction between substantive and procedural rights – Whether amendments to procedural rules affect rights of parties retrospectively – Whether rights under repealed order survive – s 16(1)(c) Interpretation Act (Cap 1, 1999 Ed)

Words and Phrases – 'Contumelious conduct'

(delivering the judgment of the court):

Introduction

This appeal arose from an application by Mr Joshua Benjamin Jeyaretnam, the appellant (`the appellant`), to strike out the action in Suit 224/97 initiated by Mr Lee Kuan Yew, the respondent (`the respondent`). The application was heard before the senior assistant registrar and was dismissed. The appellant appealed to a judge-in-chambers, and the appeal was heard before Lai Siu Chiu J. The judge dismissed it and against her decision the appellant now brings this appeal.

The facts

The material facts giving rise to this appeal are briefly these. On 30 January 1997, the respondent sued the appellant in Suit 224/97 for defamation over a statement made by the appellant at a Workers` Party rally held on 1 January 1997. Ten other plaintiffs including the Prime Minister, Mr Goh Chok Tong, also sued the appellant for defamation over the same statement but in seven separate actions. All these actions were, on or about 9 June 1997, set down for trial, and the trial dates were subsequently fixed for 18 August to 22 August 1997. On 18 July 1997, Christopher Lau JC ordered that the action commenced by Mr Goh in Suit 225/97 be tried first, and that was to be followed by the other actions with Suit 224/97 (instituted by the respondent) to be tried last.

All the eight actions came on for hearing before Rajendran J on 18 August 1997. In accordance with the order of Christopher Lau JC made on 18 July 1997, Suit 225/97 instituted by Mr Goh was heard first. The hearing ended on 22 August 1997, and judgment was reserved, and as a result the hearing of all the other seven actions was adjourned. At or about that point in time, all the plaintiffs in the seven actions, including the respondent, indicated to Rajendran J that they agreed to be bound by

the court`s determination in Suit 225/97 as to the meaning of the words complained of. This was clearly borne out in the judgment of Rajendran J (which was delivered later) in **Goh Chok Tong v Jeyaretnam Joshua Benjamin** [1998] 1 SLR 547 , where the judge said at [para]201:

> *I note that the other ten plaintiffs in related actions against the defendant have agreed to be bound by my findings on the meaning of the words. It remains for them to prove that the defendant`s words contained an obvious or readily inferable reference to them as plaintiffs in their respective suits. Damages for those plaintiffs who succeed in establishing reference to them may be assessed separately.*

The appellant, however, did not indicate whether he agreed to be similarly bound.

The judgment in Suit 225/97 was delivered by Rajendran J on 29 September 1997: see ***Goh Chok Tong v Jeyaretnam Joshua Benjamin*** (supra). Both Mr Goh and the appellant appealed against the decision to the Court of Appeal. Their appeals were heard on 27 April 1998 and judgment was reserved. On 17 July 1998, the court handed down its judgment, allowing Mr Goh`s appeal and dismissing the appellant`s cross-appeal: see **Goh Chok Tong v Jeyaretnam Joshua Benjamin** [1998] 3 SLR 337 . The court, among other things, varied the meaning of the defamatory words as determined by Rajendran J.

After the judgment of the Court of Appeal, there was a lapse of about two years and four months during which time there were no further steps or proceedings taken by the plaintiffs in the remaining seven actions (including Suit 224/97 initiated by the respondent). Only on 7 December 2000 did the respondent`s solicitors write to the appellant`s solicitors asking if the appellant would agree that the meaning of the words found by the Court of Appeal would apply in Suit 224/97. The solicitors for the other plaintiffs sent similar letters to the appellant`s solicitors. However, there was no reply from the appellant or his solicitors to these letters. Consequently, on 14 December 2000, the respondent filed an application in SIC 604665/2000 under O 14 r 12 of the Rules of Court for an order that the meaning of the defamatory words in Suit 224/97 would be that as found by the Court of Appeal. The other plaintiffs also filed similar actions. On 22 December 2000, the appellant filed an application in SIC 604770/2000 for an order to strike out the respondent`s action in Suit 224/97 for want of prosecution. For convenience, we shall hereafter refer to Suit 224/97 as `the present action`.

All these applications were heard before the senior assistant registrar on 19 January 2001. He dismissed the appellant`s application to strike out the present action. He allowed the respondent`s application and the other plaintiffs` applications for determination on the meaning of the words complained of. The appellant appealed against the senior assistant registrar`s dismissal of his application; but he did not appeal against the orders allowing the respondent`s and the other plaintiffs` applications. On 13 February 2001, the appellant`s appeal was heard before Lai Siu Chiu J, who dismissed it.

The appeal

Before us the appellant raises the same arguments as were raised before Lai Siu Chiu J and submits that the present action should be struck out. We now turn to consider these arguments seriatim.

Non-compliance with Order 3 rule 5

The appellant`s first argument is that there was a non-compliance by the respondent with O 3 r 5 of the Rules of Court. This rule was repealed on 15 December 1999: see Gazette Notification No S[thinsp]551/99. Prior to the repeal, the rule was as follows:

> *Notice of intention to proceed after year`s delay (O. 3, r. 5)*
>
> *5 Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month`s notice of his intention to proceed.*
>
> *A summons on which no order was made is not a proceeding for the purpose of this Rule.*

The appellant`s contention is that the repeal of this rule did not affect his right to have a notice served on him pursuant to O 3 r 5. He submits that the last step taken by the respondent in the present action was on 18 July 1997, and since then more than two years had elapsed in which no action was taken by the respondent. If immediately prior to 15 December 1999, the respondent wished to proceed with the present action he would have to give the one month`s notice to the appellant under O 3 r 5. The appellant submits that he had this right which had accrued to him prior to the repeal and was preserved by virtue of ss 16(1)(c) and 18 of the Interpretation Act (Cap 1, 1999 Ed). He therefore still has this right, notwithstanding the repeal of O 3 r 5, and as a result there arises a corresponding obligation on the part of the respondent to serve the one month`s notice as required under that rule.

We turn first to the provisions of ss 16(1)(c) and 18 of the Interpretation Act, which, so far as relevant, are as follows:

> *Effect of repeal*
>
> *16(1) Where a written law repeals in whole or in part any other written law, then, unless the contrary intention appears, the repeal shall not -*
>
> *...*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed;*
>
> *...*
>
> *Effect of expiration of written law*
>
> *18 The expiration of a written law shall not affect any civil or criminal proceeding previously commenced under such written law, but every such proceeding may be continued and everything in relation thereto may be done in all respects as if the written law continued in force.*

We do not find that these provisions assist the contention of the appellant. With reference first to s 16(1)(c), we do not find this provision applicable for two reasons. First, as contended by Mr Davinder Singh, counsel for the respondent, this provision is concerned only with substantive rights and not procedural rights. There is a clear distinction between substantive and procedural rights, in that amendments to procedural rules affects the rights of the parties retrospectively. In **Turnbull v Forman** [1885] 15 QBD 234 at 238, Bowen LJ said:

> *Where the legislature mean to take away or lessen rights acquired previously to the passing of an enactment, it is reasonable to suppose that they would use clear language for the purpose of doing so, or, to put the same thing in a somewhat different form, if the words are not unequivocally clear to the contrary, a provision must be construed as not intended to take away or lessen existing rights.* ***A converse rule is that, where the legislature is dealing with matters of procedure as distinguished from substantive rights, the same presumption does not apply****. It is not unreasonable to suppose that, in regard to mere matters of procedure, the legislature does intend to alter the procedure even where past transactions come into question; because no person who sues or is sued on a cause of action which existed before the enactment as to procedure has a vested right to have proceedings regulated by a particular method of procedure which the legislature has thought imperfect, and therefore has altered; and it may, therefore, well be supposed that the legislature intends to apply the new and more perfect procedure universally. [Emphasis is ours.]*

In **R v Chandra Dharma** [1905] 2 KB 335 at 338-339, Lord Alverstone CJ said:

> *The rule is clearly established that, apart from any special circumstances appearing on the face of the statute in question,* ***statutes which make alterations in procedure are retrospective*** *... If the case could have been brought within the principle that unless the language is clear a statute ought not to be construed so as to create new disabilities or obligations, or impose new duties in respect of transactions which were complete at the time when the Act came into force, Mr Compton-Smith would have been entitled to succeed; but when no new disability or obligation has been created by the statute, but it only alters the time within which proceedings may be taken, it may be held to apply to offences completed before the statute was passed. That is the case here. This statute does not alter the character of the offence, or take away any defence which was formerly open to the prisoner.* ***It is a mere matter of procedure, and according to all the authorities it is therefore retrospective.*** *[Emphasis is ours.]*

Secondly, in any case, in terms of s 16(1)(c), there is clear `contrary intention` expressed in the Rules of Court. Simultaneously with the repeal of O 3 r 5 there were enacted, inter alia, O 21 r 2(6) and (7), which read as follows:

> *(6) Where a year has elapsed since the last proceeding in an action, a cause or a matter, the action, cause or matter is deemed to have been discontinued.*
>
> *(7) Paragraph (6) shall apply to an action, a cause or a matter, whether it commenced before, on or after 15th December 1999, but where the last proceeding in the action, cause or matter took place before 1st January 2000,*

the period of one year shall only begin on 1st January 2000.

However, within the short period of just over a year, para (6) was further amended on 1 January 2001: see Gazette Notification No S[thinsp]613/2000. The amendments consisting of three paragraphs read as follows:

> *(6) Subject to paragraph (6A), if no party to an action or a cause or matter has, for more than one year (or such extended period as the Court may allow under paragraph (6B)), taken any step or proceeding in the action, cause or matter that appears from records maintained by the Court, the action, cause or matter is deemed to have been discontinued.*
>
> *(6A) Paragraph (6) shall not apply where the action, cause or matter has been stayed pursuant to an order of court*
>
> *(6B) The Court may, on an application by any party made before the one year referred to in paragraph (6) has elapsed, extend the time to such extent as it may think fit.*

Thus, under r 2(6) as amended on 15 December 1999, where no step or proceeding in an action (confining for our purpose this rule only to action) was taken for one year since the last step or proceeding in that action, the action was deemed to have been discontinued. The effect of this rule then was that there was an automatic discontinuance of the action if no step or proceeding in that action had been taken for one year, and a party could no longer proceed or continue with the action by serving the one month`s notice under the repealed O 3 r 5. By O 21 r 2(7), the provision of r 2(6) was made to apply to `an action, a cause or a matter, whether it commenced before, on or after 15th December 1999`. Accordingly r 2(6) (as amended on 15 December 1999) applied to the present action. Further, under r 2(7) where the last proceeding in the action took place before 1 January 2000, the period of one year under r 2(6) began to run only from 1 January 2000.

Then, under the further amendments made on 1 January 2001 (which are now in force), the automatic discontinuance under r 2(6) does not apply where the action has been stayed pursuant to an order of court, and the court is given the power to extend the one-year period. By virtue of r 2(7), the amended r 2(6) applies to any action whether it commenced before, on or after 15 December 1999, but where the last proceeding in the action took place before 1 January 2000, the period of one year begins to run only from 1 January 2000. Again, r 2(6) (as amended on 1 January 2001) applies to the present action. Therefore, our Rules of Court have clearly shown the contrary intention to preserving any rights under the repealed O 3 r 5.

We now turn to s 18 of the Interpretation Act, which is also relied upon by the appellant. That provision speaks for itself and we do not really see how that section has any application here. It relates to the `expiration of any written law`. What transpired with reference to O 3 r 5 was not a case of an `expiration of any written law`. The written law, O 3 r 5, was repealed on 15 December 1999 and there were enacted, inter alia, O 21 r 2(6) and (7).

Lastly, it should be borne in mind that the purpose of O 3 r 5 is to ensure that a party to an action is not caught off-guard by any step or proceeding taken by the other party after a long lapse of more

than a year. Even if, contrary to our opinion, the appellant`s right to have such a rule complied with had been preserved and there was a non-compliance with such a rule by the respondent in that he had made the application for determination on the meaning of the offending words without first having given the one month`s notice to the appellant, the proper order the appellant should seek is a dismissal of that application and not an order to strike out the entire action for lack of a notice.

Summons-in-Chambers No 604665 of 2000

The appellant`s second argument is that it was unnecessary for the respondent to make the application in SIC 604665/2000 under O 14 r 12 for an order as to the meaning of the defamatory words. Since the respondent had agreed to be bound by the meaning as found by the court in Mr Goh`s action in Suit 225/97, all that was necessary was for the respondent to apply to amend his statement of claim by adopting the meaning as found by the Court of Appeal as the meaning pleaded. Since the application under O 14 r 12 was unnecessary, it was not a genuine `step or proceeding in the action` for the purpose of O 21 r 2(6). This rule, which came into effect on 1 January 2001, states that if no party to an action has `taken any step or proceeding` in the action for more than one year, the action is deemed to have been discontinued.

This argument has no merit whatsoever. True it is that the respondent by his counsel before Rajendran J agreed to be bound by the meaning of the words complained of as determined by the court. However, the appellant did not so agree at that time or at any subsequent time. Even as late as 7 December 2000, when the respondent`s solicitor wrote to the appellant`s solicitor enquiring if the appellant agreed with the meaning found by the Court of Appeal, the appellant`s solicitor did not reply. In fact, the appellant never agreed to be bound by the meaning determined by the Court of Appeal. In the circumstances, it could hardly be said that the respondent`s application in SIC 604665/2000 was unnecessary; nor could it be said that it was not a genuine step or proceeding in the action. It certainly was.

Striking out for want of prosecution

We now come to the appellant`s final argument, which is the main argument in this appeal, namely, that Lai Siu Chiu J erred in not striking out the respondent`s claim and dismissing the present action for want of prosecution. On this issue it will be helpful to examine the law applicable to an application to strike out a claim and dismiss an action for want of prosecution. The convenient starting point is the decision of the House of Lords in **Birkett v James** [1978] AC 297[1977] 2 All ER 801. In that case, the action, which was commenced in July 1972, initially proceeded with reasonable dispatch until June 1973 when an order was made for the trial of a preliminary issue. The order, among other things, required the action to be set down for trial on a certain date, but it was not set down as ordered and no further step was taken by the plaintiff until July 1975 when he gave notice of his intention to proceed. Then in October 1975, which was about six months before the expiration of the period of limitation of the plaintiff`s cause of action, the defendant took out an application to dismiss the action for want of prosecution. The district registrar dismissed the application and the defendant appealed. The judge allowed the appeal. But prior to that, the plaintiff took the precaution of taking out a fresh writ of summons in respect of the same cause of action. The plaintiff appealed but the appeal was dismissed by the Court of Appeal. From that decision, an appeal was brought to the House of Lords, which allowed the appeal. Lord Diplock, who delivered one of the main speeches of the House, referred to the Court of Appeal`s decision in **Allen v Sir Alfred McAlpine & Sons** [1968] 2 QB 229[1968] 1 All ER 543, which laid down the principles on which the court should exercise its power in striking out an action for want of prosecution, and said ([1978] AC 297 at 318; [1977] 2 All ER 801 at

805):

> *Those principles are set out, in my view accurately, in the note to R.S.C., Ord. 25, r. 1 in the current* ***Supreme Court Practice*** *(1976). The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants ...*

The House considered as relevant the fact that, at the time of the hearing of the application for dismissing the action, the limitation period applicable to the action had not expired. Lord Diplock said ([1978] AC 297 at 320; [1977] 2 All ER 801 at 806):

> *Crucial to the question whether an action ought to be dismissed for want of prosecution before the expiry of the limitation period is the answer to a question that lies beyond it, viz., whether a plaintiff whose action has been so dismissed may issue a fresh writ for the same cause of action. If he does so within the limitation period, the effect of dismissing the previous action can only be to prolong the time which must elapse before the trial can take place beyond the date when it could have been held if the previous action had remained on foot. Upon issuing his new writ the plaintiff would have the benefit of additional time for repeating such procedural steps as he had already completed before the action was dismissed. This can only aggravate; it can never mitigate the prejudice to the defendant from delay.*

His Lordship later said ([1978] AC 297 at 321; [1977] 2 All ER 801 at 807):

> *If this be so, it follows that to dismiss an action for want of prosecution before the limitation period has expired does not, save in the exceptional kind of case to which I have referred, benefit the defendant or improve his chances of obtaining a fair trial; it has the opposite tendency.*

and arrived at the following conclusion ([1978] AC 297 at 322; [1977] 2 All ER 801 at 808):

> *For my part, for reasons that I have already stated, I am of opinion that the fact that the limitation period has not yet expired must always be a matter of great weight in determining whether to exercise the discretion to dismiss an action for want of prosecution where no question of contumelious default on the part of the plaintiff is involved; and in cases where it is likely that if the action were dismissed the plaintiff would avail himself of his legal right to issue a fresh writ the non-expiry of the limitation period is generally a conclusive reason for not dismissing the action that is already pending.*

Thus, it was also held in that case that before the limitation period applicable to the action expires, an action will not normally be struck out on the ground of inordinate and inexcusable delay. The reason is that it would not be of any benefit to the defendant to have the action struck out, since this would result in a fresh action being taken by the plaintiff, which would inevitably cause more

expenses and delay, unless there is present some conduct on the part of the plaintiff which would justify a stay or striking out of a second action.

The principles in ***Birkett v James*** (supra) were followed and applied by our Court of Appeal in **Wee Siew Noi v Lee Mun Tuck (administrator of the estate of Lee Wai Leng, decd)** [1993] 2 SLR 232 . There, the plaintiff was the administrator of the estate of his brother (`Lee`) who died in an accident on 25 July 1979, while travelling as a passenger in a motorcar driven by the first defendant. On 20 July 1982, a few days before the expiration of the limitation period, the plaintiff took out a writ against the first defendant and her employer (the second defendant), claiming damages on behalf of Lee`s estate under the Civil Law Act. On 29 June 1983, after the expiration of the limitation period, the writ endorsed with a statement of claim was served on the first defendant but not the second defendant. Thereafter, no further step was taken, except that on 19 August 1989 the defendant`s solicitors were served with the notice of change of the plaintiff`s solicitors. It was only on 14 April 1990 that the plaintiff`s solicitors filed a notice of intention to proceed. The second defendant applied on 2 May 1990 to strike out the plaintiff`s claim for want of prosecution. His application was dismissed by the High Court, whereupon he appealed to the Court of Appeal, which dismissed the appeal. The court, in arriving at its decision, applied the principles stated by Lord Diplock in ***Birkett v James*** (supra). Warren Khoo J delivering the judgment of the court said at p 235:

> *As the learned judge rightly said, an order dismissing an action for want of prosecution is a draconian one, and will not be lightly made. The general principles that guide the court in the exercise of this inherent jurisdiction were laid down by the English Court of Appeal in the **Allen** case [**Allen v Sir Alfred McAlpine & Sons** [1968] 2 QB 229]. In the House of Lords case of **Birkett v James**, Lord Diplock, who had been a party to the decision in **Allen**`s case, summarized the principles as there laid down as follows. He said that the power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendant either as between themselves and the plaintiff or between each other or between them and a third party.*

It appears to us that over the last few years in England the approach adopted by the courts in applying the principles in ***Birkett v James*** (supra) in dealing with an application for striking out an action has undergone a slight change. In **Grovit v Doctor** [1997] 2 All ER 417[1997] 1 WLR 640, the plaintiff in 1989 initiated proceedings against several defendants for defamation. In July 1990, on an application for striking out the statement of claim, the judge ordered that the question whether the words complained of were capable of a defamatory meaning be tried first as a preliminary issue. The plaintiff took no further step or action for about two years, despite the fact that in March 1991 and again in September 1991, the defendants` solicitors wrote to the plaintiff`s solicitors inviting them either to proceed with or abandon the case. No action apparently was taken by the plaintiff, and in October 1992, the defendants took out an application for an order to strike out the action. This was heard before the deputy judge who struck out the action on the ground that there had been inordinate and inexcusable delay which had caused the defendants sufficient prejudice to justify the striking out. The judge also held that the plaintiff `had literally no interest in actively pursuing this litigation`. The plaintiff appealed and his appeal was dismissed by the Court of Appeal. He further appealed to the House of Lords, which dismissed the appeal. Lord Woolf, who delivered the main speech of the House, referred to the two principles governing the application for striking out an action

as laid down by Lord Diplock in ***Birkett v James*** (supra) and said ([1997] 2 All ER 417 at 419; [1997] 1 WLR 640 at 642):

> *In **Birkett v James** their Lordships were concerned only with the application of principle (2). In this case the courts below have been concerned with both principles (1) and (2) ...*
>
> *...*
>
> *Although principle (1) links abuse of process with delay which is intentional and contumelious, the prevention of abuse of process has by itself long been a ground for the courts striking out or staying actions by virtue of their inherent jurisdiction irrespective of the question of delay and Lord Diplock`s statement of the principle does not affect this separate ground for striking out or staying proceedings.*

His Lordship finally concluded thus ([1997] 2 All ER 417 at 424; [1997] 1 WLR 640 at 647):

> *... I am satisfied that both the deputy judge and the Court of Appeal were entitled to come to the conclusion which they did as to the reason for the appellant`s inactivity in the libel action for a period of over two years. This conduct on the part of the appellant constituted an abuse of process. The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff`s inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in **Birkett v James**. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.*

Thus, in his Lordship`s view, an abuse of process operated independently, and once it was established that there was an abuse of process, the court would be justified in striking out the action, and it was not necessary to invoke either of the limbs of the principles laid down in ***Birkett v James*** (supra).

Grovit (supra) was considered by our Court of Appeal in **The Tokai Maru** [1998] 3 SLR 105 . The facts there were quite different from the present case and were briefly these. The parties were ordered to file their respective affidavits of evidence-in-chief and exchange their affidavits within a certain time. The defendants failed to do so within the stated time. Only after a lapse of about nine months did they proceed to file their affidavits but the plaintiffs refused to exchange the affidavits with them. The defendants thereupon applied to court for a retrospective extension of time for filing and exchanging the affidavits and the plaintiffs applied to strike out the defence. Both applications were heard together and the judge made an order striking out the defence. The defendants appealed and this court allowed the appeal. Among others, the issues considered were (i) whether the nine

months` delay was justified and (ii) if not, whether the delay had caused any prejudice to the plaintiffs. On the first issue, the court held that the explanation given by the defendants for the delay was unsatisfactory and in the circumstances the delay was unjustified. Turning to the second issue, the court found that the delay had caused the plaintiffs no prejudice. The court also considered whether the delay in the circumstances could amount to an abuse of process and in so doing referred to ***Grovit*** , and came to the conclusion that the delay did not amount to an abuse of process. Tan Lee Meng J, in delivering the judgment of the court, said at [para]37 and 39:

> *37 The power to strike out an action for abuse of process is thus to be exercised only in cases of an exceptional nature. We are of the view that the delay in the instant case cannot be characterised as an abuse of process, as was contended by the respondents.*
>
> *...*
>
> *39 In conclusion, we found that while the appellants` solicitors had displayed a lack of diligence and were by no means blameless, the delay had caused no prejudice to the respondents. Nor were the circumstances so exceptional as to warrant dismissing the appellants` application for an extension of time. The appellants` application for an extension of time to file their affidavit of evidence-in-chief should therefore have been granted ...*

The next leading case on the point is **Arbuthnot Latham Bank v Trafalgar Holdings** [1998] 2 All ER 181[1998] 1 WLR 1426 which was decided by the Court of Appeal in England some eight months after the decision of the House of Lords in ***Grovit*** (supra). The judgment of the Court of Appeal was delivered by Lord Woolf who was then the Master of the Rolls. There were actually two cases before the Court of Appeal, and as they raised the same issue, they were heard and decided by the court together. In the first case, the plaintiff bank instituted proceedings in August 1989 against one A and his wife on the guarantee which they had issued to the bank guaranteeing the liabilities of their company. Their own liability under the guarantee was secured by a legal charge over their property. The claim brought against them was based purely on their personal obligations under the guarantee and was not an action to enforce the charge. The pleadings and discovery were completed in June 1991 and thereafter for a period of nearly five years nothing appeared to have been done by the plaintiff to bring the case on for trial. Mr and Mrs A in May 1996 took out an application to strike out the action for want of prosecution. By then the period of limitation applicable to the personal claim on the guarantee had expired, but that applicable to the claim to enforce the charge had not. It was shown that the delay was due to the fact that the bank had assigned the debt due to them to a debt collection company, which had a very large portfolio of bad debts for collection, and the company gave a low priority to the claim against Mr and Mrs A, because their liability under the guarantee was secured. The judge found that there had been inordinate and inexcusable delay, but he dismissed the summons as the bank could commence a fresh action based on the charge. The defendants appealed. The Court of Appeal allowed the appeal.

In the second case, the plaintiff firm of accountants took proceedings against the defendant in July 1986 for recovery of their professional fees and interests. The sums due were secured by a charge on the defendant`s property. Two further actions for fees were also commenced. In December 1992, the actions were struck out but were subsequently reinstated in October 1993. In August 1996, on the defendant`s application all the three actions were struck out by the master and on appeal the judge

affirmed the master`s decision. The plaintiff then appealed to the Court of Appeal, which dismissed the appeal.

In delivering the judgment of the court, Lord Woolf MR made some general observations touching on the matter of inordinate delay as a ground for striking out an action. Having referred to the principles laid down by Lord Diplock in ***Birkett v James*** (supra), Lord Woolf MR said ([1998] 2 All ER 181 at 187-188; [1998] 1 WLR 1426 at 1431-1432):

> *The House of Lords in **Birkett v James** were not, however, by setting out these principles, acquiescing in delay. They indicated that the court should exercise such powers as they have to ensure that an action is pursued with due diligence ...*
>
> *In **Birkett v James** the House of Lords also explained why whether the limitation period has expired is so significant. The reason is that in the absence of some conduct which means that a second action could be stayed, it would not benefit the defendant to have the first action struck out since this would only result in further proceedings which would inevitably cause more expense and delay.*
>
> *If however the limitation period has expired, the same logic does not apply. It also does not apply where the defendant to the fresh action is able to show that it is `open to doubt and serious argument whether the cause of action asserted ... would be time-barred if fresh proceedings were issued`. In such circumstances the interests of justice may be best served by dismissing the action and leaving the party whose action has been struck out to bring fresh proceedings if he chooses to do so ...*
>
> *The fact that the limitation period has not expired, does not figure to the same degree in a case where there has been contumelious conduct on behalf of a plaintiff or where the proceedings which are being struck out constitute an abuse of process (see **Grovit v Doctor** [1997] 2 All ER 417[1997] 1 WLR 640). In such circumstances, the plaintiff may well find that if he brings fresh proceedings after the original proceedings are struck out they are stayed because of his conduct.*

His Lordship then concluded thus ([1998] 2 All ER 181 at 191-192; [1998] 1 WLR 1426 at 1436-1437):

> *It is already recognised by **Grovit v Doctor** [1997] 2 All ER 417[1997] 1 WLR 640 that to continue litigation with no intention to bring it to a conclusion can amount to an abuse of process. We think that the change in culture which is already taking place will enable courts to recognise for the future, more readily than heretofore, that a wholesale disregard of the rules is an abuse of process as suggested by Parker LJ in **Culbert v Stephen Westwell & Co Ltd** (Unreported) at P55-P56. While an abuse of process can be within the first category identified in **Birkett v James** it is also a separate ground for striking out or staying an action (see **Grovit v Doctor** [1997] 2 All ER 417[1997] 1 WLR 640) which does not depend on the need to show prejudice to the defendant or that a fair trial is no longer possible. The more ready recognition that wholesale failure, as such, to comply with the rules justifies an action being struck out, as long as it is just to do so, will avoid much time and expense being incurred in investigation questions of prejudice, and allow the striking out of actions whether or not the limitation period has expired. The question whether a fresh action can be commenced will then be a matter for the discretion of the court*

> *when considering any application to strike out that action, and any excuse given for the misconduct of the previous action (see **Janov v Morris** [1981] 3 All ER 780[1981] 1 WLR 1389). The position is the same as it is under the first limb of **Birkett v James**. In exercising its discretion as to whether to strike out the second action, that court should start with the assumption that if a party has had one action struck out for abuse of process some special reason has to be identified to justify a second action being allowed to proceed.*

Thus, an abuse of process of the court, although subsumed in the first principle of ***Birkett v James*** (supra), can operate independently as a separate ground for striking out an action and is not dependent on whether there is any prejudice sustained by the defendant or whether a fair trial is no longer possible. Nor is the question whether the limitation period applicable to the claim has expired a relevant consideration. In an earlier case, **Culbert v Stephen G Westwell & Co** (Unreported) at P65-P66, Parker LJ said:

> *An action may also be struck out for contumelious conduct, or abuse of the process of the court or because a fair trial of the action is no longer possible. Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court. In my view however a series of separate inordinate and inexcusable delays in complete disregard of the rules of the court and with full awareness of the consequences can also properly be regarded as contumelious conduct or, if not that, to an abuse of the process of the court. Both this and the question of fair trial are matters in which the court itself is concerned and do not depend on the defendant raising the question of prejudice.*

Arbuthnot Latham Bank (supra) was considered by our High Court in **QCD (M) (in liquidation) v Wah Nam Plastic Industry** [1999] 2 SLR 381 . There, the plaintiff claimed against the defendant for the price of goods sold and delivered. The defence put up was one of bare denial. The plaintiff applied for summary judgment and succeeded before the assistant registrar. The defendant appealed and the judge hearing the appeal allowed it and gave the defendant unconditional leave to defend. Thereafter, the plaintiff took no action until a lapse of some 16 months when it filed a notice of its intention to proceed. In response, the defendant took out an application to strike out the action for want of prosecution. In support of the application, it alleged that it had been prejudiced in that its main witness had passed away. The plaintiff explained that the delay arose because it took time to re-assess its position vis-.-vis the defence, and in that connection it had to obtain all the necessary documents for discovery. The registrar allowed the application and struck out the action for want of prosecution. The plaintiff appealed to a judge-in-chambers. The appeal came before Judith Prakash J who allowed the appeal. The learned judge considered the principles stated by Lord Diplock in his speech in ***Birkett v James*** (supra) and also the judgment of Lord Woolf MR in ***Arbuthnot Latham Bank*** (supra). Reverting to the case before her, the learned judge said at [para]17 and 18:

> *17 I do not consider the facts in this case to fall within the first limb of the first rule of **Birkett v James** . Although the plaintiff was slow to act, its conduct cannot be characterised as contumelious which word imports an element of scorn and flagrant disregard of court procedures. The plaintiff here was just slow. This slowness might have been contributed to by the fact that the plaintiff is a foreign company managed by receivers and not conversant with Singapore court procedures. There was no evidence of any intention on the part of the plaintiff to delay the trial.*

> *18 It cannot be denied, however, that there has been a delay of approximately 16 months. If the summons for directions had been taken out by the plaintiff in January or February 1997, the trial itself could very well have been held in July or August 1997. In that context the plaintiff`s delay must be considered inordinate. It was also inexcusable in that the plaintiff should have put more effort into recovering the documents relevant to the action within a reasonable time. The transactions involved had been carried out while the plaintiff was in receivership and the receivers therefore would have had charge of the documents and should have been able to retrieve them fairly speedily.*

She then turned to consider whether the defendants had suffered prejudice, and in this connection she said at [para]19:

> *When a defendant seeks to strike out on the ground of inordinate and inexcusable delay, he must show that he has sustained prejudice by reason of the delay ...*

and having reviewed the facts before her the judge found that the defendant had not been prejudiced by the delay. She therefore held that the case did not fall within either of the two principles in ***Birkett v James*** (supra).

Judith Prakash J next turned to consider whether the action should be struck out on the ground of an abuse of court process on the part of the plaintiff and came to the conclusion that mere delay is not an abuse of process and there must be something more, such as wholesale disregard of the rules of court. In other words, the plaintiff must be contumacious of the court or the court procedure. She said at [para]22:

> *I now have to consider whether the action should be struck out on the basis that there was an abuse of process within the further principle established by the **Arbuthnot Latham Bank** and **Choraria** cases. The facts of this case are very far from those which obtained in **Choraria**. As the court in **Arbuthnot Latham Bank** pointed out, mere delay is not an abuse of process. There must be something more. There must be wholesale disregard of the rules of court. The plaintiff, in short, must be contumacious. In this case the plaintiff did not disobey any order of court, peremptory or otherwise. It was simply inactive for some time. There was no evidence either that the plaintiff had started the action without any genuine intention of prosecuting it to its natural conclusion. In fact the plaintiff itself filed its notice of intention to proceed without any prompting from the court or the defendant and followed this up in due course with the issue of the summons for directions. This action is significant even though it was taken after the defendant`s application to strike out was filed as it showed the plaintiff`s sincerity in proceeding.*

On the basis of these authorities which we have considered, the principles laid down in ***Birkett v James*** (supra) and adopted by our Court of Appeal in ***Wee Siew Noi*** (supra) apply in dealing with an application to strike out an action for want of prosecution. At the risk of repetition (adopting the words of Lord Woolf MR in ***Arbuthnot Latham Bank*** ([1998] 2 All ER 181 at 187; [1998] 1 WLR 1426 at 1431), they may be stated as follows:

(1) An action should only be struck out or dismissed for want of prosecution (a) where the plaintiff`s default has been intentional and contumelious, such as disobedience to a peremptory order of court or conduct amounting to an abuse of the process of the court; or (b) where there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyer giving rise to a substantial risk that a fair trial is not possible or giving rise to serious prejudice to the defendant.

(2) Before the expiry of limitation period applicable to the action, an action will not normally be struck out for inordinate and inexcusable delay if fresh proceedings for the same cause of action could be initiated.

In addition, an action would be struck out on the ground of abuse of court process, such as wholesale disregard of the rules of court or flagrant disregard of the court procedure, and in this connection the fact that the period of limitation applicable to the action has not expired is irrelevant. Nor, in such application, is there a need to show that the defendant will suffer prejudice or that a fair trial is no longer possible.

Intentional and contumelious default

We now return to the facts of this case and consider the arguments addressed to us. The first issue is whether the case falls within the first principle laid down in ***Birkett v James*** (supra), ie whether there has been any intentional and contumelious default on the part of the respondent. The appellant submits that, soon after the decision of the Court of Appeal in ***Goh Chok Tong v Jeyaretnam Joshua Benjamin*** (supra), the respondent should have applied to the court for a fresh date for the trial of the action, but the respondent had not done so for a long period of well over two years. This default or inaction on the part of the respondent was intentional and contumelious. Not only did the respondent fail to bring the case forward for trial, he also failed to give any explanation why he did not do so, and in the absence of any explanation, there is a presumption that the respondent `intentionally decided not to take any step in the proceedings until the end of 2000`. The appellant further argues that the respondent`s failure to offer any explanation is in itself contumacious of the court in that the respondent did not consider that he had to explain anything to the court, but that he can proceed as he wills and that the court will grant his application. The respondent therefore has shown a `complete contempt` for the court and the court`s known practice and directions for the expeditious disposal of cases before it.

On the other hand, Mr Davinder Singh, counsel for the respondent, submits that there was no intentional and contumelious conduct in any respect with regard to the proceedings before the court. His client had, throughout all the stages of the proceedings below, complied with all the orders and directions of the court and also the Rules of Court, and the appellant has not been able to show any contumelious conduct on the part of the respondent. All the preparatory steps necessary to get the case ready for trial had been done and completed and the case was, at the material time, and is now ready for trial. Next, counsel submits that the mere failure or inaction or even delay on the part of the respondent in applying for a fresh date for trial does not amount to intentional and contumelious conduct. In support, counsel relies on the decision of Judith Prakash J in ***QCD (M) (in liquidation) v Wah Nam Plastic Industry*** (supra).

Counsel also refers to the case of **Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani** [1999] 1 SLR 750 . However, we do not find this case of any relevance for our purpose. There, the defendant failed to comply with an `unless order` and his counterclaim was accordingly struck out. He appealed to the Court of Appeal which allowed the appeal and reinstated the counterclaim on the ground that the failure to comply with the `unless order` was not contumelious.

We are unable to accept the appellant`s arguments. We accept that soon after the decision of the Court of Appeal, the respondent should have applied for a fresh date for the trial of the present action, which he did not. But, in our opinion, such default or inaction alone was not contumelious conduct. While it is true that no explanation has been given as to why no action was taken to ask the court to restore the present action for hearing, such absence of explanation per se does not give rise to an inference of intentional and contumelious conduct. Contumelious conduct, in our view, involves an element of scorn and intentional disregard of the rules of court or court order. `Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court`, and `a series of separate inordinate and inexcusable delays in complete disregard of the rules of the court and with full awareness of the consequences can also properly be regarded as contumelious conduct` (per Parker LJ in ***Culbert v Stephen G Westwell & Co*** (supra at P65-P66). We are unable to find any evidence, and the appellant has not shown us any, that the respondent has in any way so acted. The judge below found that there was no evidence of any intentional and contumelious default on the part of the respondent; nor was there any evidence of disobedience of any court order or the rules of court or of the court procedure. We agree.

We now turn to the second principle of ***Birkett v James*** (supra). In respect of this rule there are two requirements to be satisfied. The first is the requirement of inordinate and inexcusable delay and the second is a substantial risk of the impossibility of a fair trial or serious prejudice to the appellant. In considering this issue of delay, it is important to bear in mind that in civil litigation the initiative to bring the case on for trial lies with the plaintiff and the pace at which he proceeds with various steps of the proceedings is fully within his control. The defendant is not to be faulted for not taking any step in advancing the progress of the action, unless his inaction or default has caused or contributed to the delay. In **Allen v Sir Alfred McAlpine & Sons** [1968] 2 QB 229[1968] 1 All ER 543, Diplock LJ (as he then was) said:

> *As regards the position of the defendant, the Rules of the Supreme Court give to the plaintiff the initiative in bringing his action on for trial. The pace at which it proceeds through the various steps of issue and service of writ, of pleadings and discovery, of order for directions and setting down for trial is in the first instance within his control. The rules also provide machinery whereby the plaintiff can compel the defendant to take promptly those steps preparatory to the trial which call for positive action upon his part and provide an effective sanction against unreasonable delay by the defendant. They enable the plaintiff to sign judgment against the defendant in default and so obtain forthwith the remedy for which the action was brought ...*
>
> *It is thus inherent in an adversary system which relies exclusively upon the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the court to dismiss the plaintiff`s action for want of prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible.*

This passage was approved and quoted in ***Wee Siew Noi*** (supra) at p 236. In delivering the judgment of the court, Warren Khoo J said at p 237:

> *The defendant, in whom the carriage of the proceedings does not lie, can properly refrain from taking any action and wait for the opportune moment to*

apply to dismiss the plaintiff`s action for want of prosecution, assuming in the meanwhile the risk of a default judgment.

This same point was re-affirmed subsequently by the Court of Appeal (which was differently constituted) in **Yeo Hock Chuan v Wong Chong Weng** [1997] 2 SLR 752 . That was an extreme case. The plaintiff on 28 February 1989 commenced an action against the defendant claiming that he was a tenant of rent-controlled premises and that the defendant had demolished the premises while he was away from Singapore. He also obtained a Mareva injunction against the defendant. On 15 March 1989, the High Court on application by the defendant discharged the injunction. Since that date the plaintiff took no further step to prosecute the action; nor did the defendant proceed with his defence. In fact, no defence was filed. Five and a half years later, the Registry of the Supreme Court made enquiry as to the status of the action, but no reply was forthcoming from either the plaintiff or the defendant. The registrar therefore called for a pre-trial conference. This prompted the defendant to take out an application to strike out the plaintiff`s action for want of prosecution. The registrar heard the application and struck out the action. The plaintiff appealed and the judge allowed the appeal and directed the action to go to trial. In allowing the appeal, the learned judge said at [para]8 and 9:

8 By definition, want of prosecution is the plaintiff`s default in complying with the rules or excessive delay in the prosecution of the action. Accordingly if a defendant has failed to take the step which is condition precedent to the plaintiff presenting the action, he should not be allowed to take advantage of his own failure or heard to complain of a prejudice to him. So the court will look at the conduct of both parties. So, if the defendant has substantially caused or contributed to the non-prosecution of the action he should not be given the advantage of stymieing the plaintiff and then dismissing the action for non-prosecution with the case not being heard on its merits. Each party therefore is under an obligation to do his part in advancing the matter so that there can be a fair trial.

9 The position before me was that the defendant having not filed his defence had no ground to complain. He was not concerned whether the action went to trial because he failed to file his defence. He failed to explain the prejudice he suffered. He relied on a ground which did not exist. I therefore restored the action so that the plaintiff could apply for judgment or if the defendant decided to take the next step of filing a defence, the action could proceed to trial.

The defendant appealed and the Court of Appeal allowed the appeal and struck out the action. Karthigesu JA, delivering the judgment of the court, said at [para]13:

*13 It seems to us that the learned judge in this case has taken the same view as the judge in **Wee Siew Noi v Lee Mun Tuck** , a view which the Court of Appeal said was erroneous. Whilst the Court of Appeal accepted that the dilatory conduct of the defendant applying to dismiss the action for want of prosecution was a relevant issue thus accepting Lord Diplock`s approach in **Allen v McAlpine** , it held that the conduct did not refer to conduct simpliciter but rather ` **any conduct of the defendant which is inconsistent with his***

application to dismiss for want of prosecution *` ...*

and at [para]15:

> *15 We are in total agreement with and fully endorse the principles stated by the Court of Appeal as constituted in* ***Wee Siew Noi v Lee Mun Tuck*** *. It is difficult to find a case so closely similar to* ***Wee Siew Noi v Lee Mun Tuck*** *as this one. Plaintiff`s counsel`s attempt to distinguish it was wholly without merit and failed to persuade us. Suffice it to say that it could not be said that the defendant had induced in the plaintiff a reasonable belief that he intended to exercise his right to proceed to trial. He remained totally inactive from 15 March 1989 when the Mareva injunction was discharged. The defence he filed on 13 May 1996 was after the learned judge had restored the action on 9 May 1996. The plaintiff could have at any time after 15 March 1996 and when the time for filing a defence had expired entered an interlocutory judgment for damages to be assessed against the defendant.*

In this case, it is for the respondent as the plaintiff to apply to court for a fresh date for the trial of this action. This initiative lies squarely with him. The appellant as the defendant is not to be faulted for not having taken any step or action in this respect.

We now turn to consider the arguments on this issue of delay. The appellant submits that there had been inordinate and inexcusable delay on the part of the respondent. The decision of the Court of Appeal was given on 17 July 1998 and since that time there was a lapse of about two years and four months before the respondent`s solicitors took any step in relation to the action. Added to this was the fact that there was no explanation for such delay.

We do not think that it can be denied that since the decision of the Court of Appeal on 17 July 1998 there was a lapse of about two years and four months in which no action appeared to have been taken by or on behalf of the respondent with a view to restoring the case for trial. All the preparatory steps necessary to bring the action for trial had been completed and the action was ready for trial as far back as June 1997. All that was necessary was for the respondent to apply to court for a fresh date to be fixed for the trial of the present action or seek a pre-trial conference to be held with a view to fixing a suitable date for trial. It is true that before doing so, it was necessary for the respondent to apply to court under O 14 r 12 for determination of the meaning of the words complained of as found by the Court of Appeal. But there is no reason why the application could not have been made with reasonable dispatch soon after the court`s decision. This application was not made, however, until 14 December 2000, after a lapse of a long period of well over two years.

We find that no contention has been advanced on behalf of the respondent on the issue of inordinate and inexcusable delay. Nor was there any contention put forward on his behalf in the respondent`s case. Further, there was nothing in the record of appeal which showed that any affidavit had been filed by or on behalf of the respondent in the proceedings below, deposing to and explaining what had transpired during this long period when nothing appeared to have been done by him or on his behalf in relation to the present action. Mr Davinder Singh said from the bar that the reason why the respondent did not apply to court to restore the present action for trial was that, at all material times, the appellant was facing actions and bankruptcy proceedings initiated by other parties, and

that the respondent did not wish to put undue pressure on the appellant by seeking a date for the trial. We are unable to consider the merits of this explanation. The reason is that what counsel said and urged us to accept are purely matters of fact and not law. Being matters of fact, they should be supported by evidence properly adduced. In this respect, no affidavit had been filed in the proceedings below in support of what counsel claimed to be the position, and what he said therefore is not admissible before us for consideration. Thus, on the facts, there had been a long delay of well over two years and no reason or explanation has been provided as to why no application was made to court for a fresh date for the trial of the present action. In the circumstances, the inescapable conclusion is that there had been inordinate and inexcusable delay on the part of the respondent, and we so find.

Fair trial and prejudice to appellant

We now turn to the second requirement, ie that the delay will give rise to a substantial risk that a fair trial is not possible or to serious prejudice to the appellant. In this respect, the claim and the defence of the parties are relevant. The claim of the respondent against the appellant is for damages for defamation in respect of certain words uttered by the latter on 1 January 1997. There is no dispute that the words complained of were made by the appellant and the meaning of the words has already been determined by this court. An order that the determination of this meaning be binding on the parties has been obtained. The only issues, so far as the claim is concerned, are (1) whether the words complained of are referable to the respondent and (2) if that is established, the quantum of damages to be awarded to the respondent. In resisting the claim, the appellant raises the defences of justification and qualified privilege. In respect of none of these issues will the appellant be prejudiced by the delay that has transpired. Nor will the delay prejudice a fair trial of any of the issues involved. The judge below found that there was no substantial risk that it was not possible to have a fair trial, and she further found that there was no prejudice caused to the appellant. We agree.

Both before the judge and before us, the appellant complained that owing to the delay he was prejudiced in that he could not now avail himself of the services of the late Mr George Carman QC or the services of another counsel, Mr Charles Gray QC. Mr Carman passed away early this year and Mr Gray has been elevated to the Bench. We do not accept that the unavailability of the services of these two eminent counsel amounts to a prejudice. The appellant can always engage another eminent counsel to represent him, and in any event, the appellant has not shown that, since the death of Mr Carman and the elevation to the Bench of Mr Gray, he has not been able to engage a comparable counsel from London or elsewhere to represent him. It is significant that in his affidavit filed in support of the application to strike out the present action, the appellant did not say anything about such prejudice or any other prejudice that he has sustained by reason of the long delay.

Abuse of process

We now turn to consider whether the inordinate and inexcusable delay on the part of the respondent amounted to an abuse of process. Reverting to the facts of the instant case, all that transpired was a lengthy period (of two years and four months) in which the respondent failed to apply for a fresh date for the trial of the present action. The was no breach of or non-compliance with any order of the court or rules of court or disregard of any court procedure. In our opinion, in this case, the fact that the delay was inordinate and inexcusable did not amount to an abuse of court process. On this issue there are two cases decided by the Court of Appeal in England which are of assistance.

The first is **Barclays Bank plc v Maling** (Unreported) , 23 April 1997). There, the bank in 1985

commenced an action to enforce a charge on the property against its customer, Mr Maling, to recover the sum of money due from him. Mr Maling did not dispute the charge, but there was a claim by Mrs Maling that she and her husband each had an equitable interest in the property. In February 1986, at a pre-trial hearing, the case against Mr Maling was adjourned with liberty to restore but Mrs Maling was directed to file a fully pleaded defence. Mrs Maling filed and delivered the defence and also a counterclaim and, subsequently, following a request from the bank she delivered further and better particulars of the defence and counterclaim. Thereafter, there was no further development and the action went to sleep. All this time, Mr and Mrs Maling continued to reside in the property. On 20 July 1992, Mrs Maling died leaving her half share in the property to her son. The bank learnt of Mrs Maling`s death only in 1994 and thereafter they regained interest in pursuing the claim, and after some unsuccessful negotiations for a settlement they requested the action to be restored for hearing. The action was accordingly set down for hearing on 7 March 1996. By then nearly 11 years had elapsed since the start of the action. Mr Maling then took out an application to strike out the action for want of prosecution. The application was allowed by the district judge and on appeal the judge affirmed the decision. The judge held that the intentional delay amounted to an abuse of the process of the court and that there were in that case circumstances justifying striking out the action, notwithstanding that the claim was not statute-barred. The bank appealed to the Court of Appeal and the court disagreed with the courts below and allowed the appeal. Aldous LJ, who delivered the main judgment ofthe court, said at p 6 of the transcript:

> *[M]ere delay, whether or not caused by incompetence, cannot amount to an abuse of the process which will enable an action to be struck out. What is needed is disregard of the court`s orders. It may be that deliberate, as opposed to negligent, disregard may not be required (see **Hytec Information Systems Ltd v Coventry Council**, The Times, 31 December 1996 at page 755.)*

In conclusion the learned judge said at p 7 of the transcript:

> *In my view the judge came to the wrong conclusion. Having decided that the action was not statute barred and that Mr Maling had not been prejudiced by the very long delay, he rightly concluded the action could not be struck out for want of prosecution. He should have gone on to conclude that there was no abuse of the court`s process as delay was not sufficient, nor was the reason he gave, namely the Bank had led Mr Maling to believe that the action was being pursued. No doubt the Bank had allowed the action to sleep pending termination of Mrs Maling`s rights, but I do not believe they can be faulted for acting in the way that they did. The course suggested by Mr Maling would have resulted in costs being incurred and a suspended order for possession against Mr Maling. That would not have benefited him or the bank.*

The second case is **Miles v McGregor** (Unreported) , 23 January 1998). That was a case of a claim by the plaintiff for damages for personal injuries caused by the alleged negligence of the defendant in 1990. After the incident giving rise to the claim there was a good deal of communication between the two parties and their respective solicitors and the action was commenced in 1993, which was shortly before the expiry of the limitation period. Thereafter, the action did not proceed with reasonable dispatch and the delay was to a large extent caused or contributed by the plaintiff or his solicitor. In July 1996, which was about three years after the writ was issued and six years after the accident, the defendant applied to strike out the action. The application was heard before the district judge and he struck out the action. The plaintiff appealed to a judge. Mrs Justice Steel, who heard the appeal, found that there had been inordinate and inexcusable delay on the part of the plaintiff but

that there was no substantial risk of the impossibility of a fair trial and the prejudice to the defendant was minimal. She therefore allowed the appeal. The defendant appealed. The Court of Appeal was disposed to agree with the judge`s findings. However, during the hearing of the appeal before the Court of Appeal, counsel for the appellant raised another argument on behalf of the defendant, namely, that the action should be dismissed as an abuse of process. In support, counsel relied on the very recent decision of the Court of Appeal in **Choraria v Sethia** [1998] 142 SJLB 53 and in particular the following passage of the judgment of Nourse LJ at p 12 of the transcript:

> *The law, as it applies to this case, may be stated thus. Although inordinate and inexcusable delay alone, however great does not amount to an abuse of process, delay which involves complete, total or wholesale disregard, put it how you will, of the rules of court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action would be struck out or dismissed on that ground.*

The Court of Appeal rejected this argument holding that inordinate and inexcusable delay was not an abuse of process. Auld LJ in his judgment (with which Robert Walker LJ agreed) said at p 6 of the transcript:

> *The emphatic articulation and the application by the court in **Choraria** of this quite separate power to strike out proceedings for wholesale disregard of procedural rules because it constitutes an abuse of the process of the court should not, however, be taken as a ready alternative to the court`s power to strike out an action for inordinate and inexcusable delay. The abuse of process route is for cases of an exceptional nature where the conduct of the party in default amounts to an affront to the court and its rules.*

He came to the conclusion that the circumstances of the case were not exceptional and could not be characterised as an abuse of process as applied to such an issue by the decision of the court in ***Choraria*** .

Limitation period

The last point we should consider is that the limitation period in respect of the respondent`s claim against the appellant for defamation has not expired. The words complained of were spoken by the appellant on 1 January 1997 and the period of limitation will expire only on 31 December 2002. Hence, if this action is struck out, the respondent is clearly at liberty to bring fresh proceedings based on the same cause of action. Thus, such striking out is of no benefit to the appellant; it would only result in further costs and expenses being incurred.

Conclusion

In the result, we dismiss this appeal with costs. The deposit in court, with interest, if any, is to be paid to the respondent or his solicitors to account of costs.

Outcome:

Appeal dismissed.