Date: 20020517
Docket: CA175644

NOVA SCOTIA COURT OF APPEAL
[Cite as: *Clarke v. Ismaily*, 2002 NSCA 64]

Glube, C.J.N.S.; Saunders and Oland, JJ.A.

BETWEEN:

STEPHEN CLARKE

Appellant

- and -

RAHEEM ISMAILY

Respondent

CA175708

BETWEEN

STEPHEN CLARKE

Appellant

- and -

KAREEN ISMAILY, LILLIAN ISMAILY and SAFAR ALI ISMAILY

Respondents

REASONS FOR JUDGMENT

Counsel:	David P.S. Farrar for the appellant Glenn R. Anderson for the respondent Raheem Ismaily Michael E. Dunphy, Q.C. and Michael Messenger for the respondents Kareen Ismaily, Lillian Ismaily and Safar Ali Ismaily
Appeal Heard:	March 28, 2002
Judgment Delivered:	May 17, 2002
THE COURT:	Appeal allowed per reasons for judgment of Saunders, J.A.; Glube, C.J.N.S. and Oland, J.A. concurring.

SAUNDERS, J.A.:

[1] The appellant, Stephen Clarke, was injured 13 years ago when his vehicle was struck from behind while stopped at a traffic light on Portland Street in Dartmouth on July 9, 1989. Two years later, on July 9, 1991, his lawyer brought an action against Alexander Sherman identified as the motorist responsible by the police officer who investigated the accident. In 1992 the appellant's lawyer was suspended from the practice of law. His lawyer's files were administered by the Nova Scotia Barristers' Society. The lawyer resigned from the practice of law in 1993. Mr. Clarke subsequently moved to Ontario and a law firm there took over his file and the conduct of the litigation. In July 1995 it was discovered the appellant's car had, in fact, been struck by a vehicle owned by the respondents Lillian and Safar Ali Ismaily and believed to have been driven by their son "Kareen" (sic) Ismaily. These three persons were joined as defendants. Initially Kareen Ismaily was misidentified as the driver of the motor vehicle, a fact not discovered until the Ismailys filed a defence in January 1996.

[2] The Ismailys alleged that Raheem Ismaily, another son, had taken the keys of their motor vehicle without permission. He was added as a defendant. This triggered the involvement of Judgment Recovery (N.S.) Limited. Throughout the almost 13 years that have spanned this litigation, communications ensued, various steps were taken and contact maintained among counsel or insurance representatives for the various parties.

[3] On July 5, 2001, Raheem Ismaily brought an application for the dismissal of the appellant's claim for want of prosecution pursuant to **Civil Procedure Rules** 2.01(2)(a), 14.25(1), and 28.13. On August 14, 2001, the Ismailys filed their own application to dismiss the appellant's claim for want of prosecution pursuant to the same **Rules**. The applications to dismiss were heard in Chambers on August 29, 2001, by Justice C. Richard Coughlan of the Nova Scotia Supreme Court. He reserved and on August 31 gave an oral decision dismissing the appellant's claims. The order dismissing Mr. Clarke's suit against Raheem Ismaily was issued November 22, 2001. The order dismissing his suit against the Ismailys was granted November 28, 2001.

[4] Mr. Clarke now appeals alleging that the Chambers judge erred in law in his interpretation and application of the test for dismissal of a claim for want of prosecution.

[5] Although the respondents initially applied to dismiss the appellant's claim under **C.P.R.** 2.01(2)(a), 14.25(1) and 28.13, the joint applications

proceeded and were determined pursuant to **C.P.R.** 28.13. The **Rule** provides as follows:

> **Dismissal for want of prosecution**
>
> **28.13** Where a plaintiff does not set a proceeding down for trial, the defendant may set it down for trial, or apply to the court to dismiss the proceeding for want of prosecution and the court may order the proceeding to be dismissed or make such order as is just.

[6] The authorities governing such an application are well known. There is no dispute here as to the principles that ought to be applied. In **Martell v. McAlpine (Robert) Ltd.** (1978), 25 N.S.R. (2d) 540 (N.S.S.C., App. Div.), Cooper, J.A., writing for the majority, (MacKeigan, C.J.N.S. concurring with brief separate reasons, Macdonald, J.A. dissenting) set out the following test at p. 545:

> I now direct my attention to the principles which should govern the exercise of a judge's discretion in deciding whether or not an application for dismissal of an action for want of prosecution should be granted. There must first have been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and, secondly, as put by Russell, L.J., in **William C. Parker Ltd. v. Ham and Son Ltd.**, [1972] 3 All E.R. 1051, at p. 1052:
>
> > ... 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. ...

[7] More recently in **Hurley v. Co-op General Ins. Co.** (1998), 169 N.S.R. (2d) 22, Flinn, J.A., after noting Justice Cooper's two-fold test in **Martell** went on to approve the reasons of Lord Justice Salmon in **Allen v. McAlpine (Sir Alfred) & Sons Ltd., et al.** by observing:

> 30 These principles are set out in helpful detail by Lord Justice Salmon in **Allen v. Sir Alfred McAlpine & Sons Ltd. et al**, [1968] 1 All E.R. 543, at p. 561, and cited with approved by Justice Hallett in **Moir v. Landry** (1991), 104 N.S.R. (2d) 281 (N.S.C.A.) at p. 282:
>
> > A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the **Rules of the Supreme Court** or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes

> under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show:
>
> > (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.
> >
> > (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
> >
> > (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the time.
>
> If the defendant establishes the three factors to which I have referred, the court, in exercising its discretion, must take into consideration the position of the plaintiff himself and strike a balance. If he is personally to blame for the delay, no difficulty arises. There can be no injustice in his bearing the consequences of his own fault. If, however, the delay is entirely due to the negligence of the plaintiff's solicitor and the plaintiff himself is blameless, it might be unjust to deprive him of the chance of recovering the damages to which he could otherwise be entitled.

[8] Thus, to summarize, in order to succeed the onus is upon a defendant to show: first, that the plaintiff is to blame for inordinate delay; second, that the inordinate delay is inexcusable; and third, that the defendant is likely to be seriously prejudiced on account of the plaintiff's inordinate and inexcusable delay. If the defendant is successful in satisfying these three requirements, the court, before granting the application must, in exercising its discretion, go on to take into consideration the plaintiff's own position and strike a balance - in other words, do justice - between the parties.

[9] An order dismissing an action for want of prosecution, while discretionary on its face, is a "final" order for the purposes of determining the standard of review on appeal. As this court observed in **Hurley**, **supra** at ¶ 27:

> 27 The proceeding which is the subject of this appeal is an interlocutory proceeding involving a discretionary order. However, since the order of the trial judge is a final order, which dismisses the appellant's action, the decision of the Chambers judge is not given the same deference usually afforded by this Court when dealing with interlocutory matters involving the exercise of discretion.

[10] When the effect of the order is to terminate an action and bring an end to the rights of the parties, the standard of review to be applied by this court is as stated in **Frank v. Purdy Estate** (1995), 142 N.S.R. (2d) 50 at ¶ 10: "whether there was an error of law resulting in an injustice." See, as well**, Canada (Attorney General) v. Foundation Company of Canada Ltd. et al** (1990), 99 N.S.R. (2d) 327 (C.A.); and **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143 (C.A.).

[11] After carefully considering the record as well as the written and oral submissions of counsel I have concluded that the trial judge erred in granting the respondents' applications striking out Mr. Clarke's actions for want of prosecution. I would allow Mr. Clarke's appeal, strike out the two orders dismissing his claims against the respondents and direct that his claims proceed. I will now give my reasons.

[12] The learned Chambers judge's decision begins with a clear and accurate reference to the appropriate jurisprudence including the decisions of this court in **Martell, supra**; **Moir v. Landry** (1991), 104 N.S.R. (2d) 281; **Hurley**, **supra**; and the House of Lords in **McAlpine**, **supra**. However, and with respect, it does not appear to me that those principles were properly applied to the facts of this case.

[13] Let me say at the outset that I agree with the Chambers judge's conclusion that this is clearly a case of inordinate delay. The nature of the suit under review is obviously relevant to the issue of delay. See for example **Savoie v. Fagan** (1998), 165 N.S.R. (2d) 276 (C.A.). It is self evident that an interval of 12 years between a relatively minor motor vehicle accident and finalizing arrangements for discovery examinations constitutes extreme delay out of all proportion to what is reasonable. In such circumstances the burden is upon the plaintiff to show that the defendant has not been seriously prejudiced by the inordinate delay. As MacKeigan, C.J.N.S. stated in **Martell**, **supra**, at p. 542:

> The law is clear that when a plaintiff has delayed so long, here nearly 10 years, he cannot successfully resist an application to have the action dismissed for want of prosecution unless he can satisfy the Court, and the onus is on him to do so, that the defendant has not been seriously prejudiced by witnesses becoming unavailable or their recollections becoming "eroded" ... or by documents having been lost.

[14] However, to find extreme or inordinate delay was only one step in the inquiry. In light of my conclusion that the Chambers judge erred in failing to address the last principle articulated by Lord Salmon in **McAlpine**, that is to take into account the plaintiff's own position and blameworthiness and attempt to strike a balance between the interests of the parties, it is not necessary for me to accept the Chambers judge's findings that the inordinate delay was inexcusable or that the respondents were likely to be seriously prejudiced on account of that delay.

[15] Assuming without deciding that the Chambers judge was correct in finding that the appellant had failed to rebut the presumption "of prejudice" (which must of course constitute "serious prejudice", **McAlpine**, **supra**) the judge erred by failing to go on to consider, in the exercise of his discretion, the position and degree of blameworthiness of the appellant, and to strike a balance between the parties. All the judge said was that he found the appellant's affidavits wanting in that they did not:

> ... contain adequate explanation for the delay ...

nor provide:

> ... sufficient evidence to rebut the presumption of prejudice for what I find is an inordinate delay.

[16] I can find nothing in the portion of the reasons just quoted, nor any other part of the judgment from which one might infer that Mr. Clarke's own conduct and interests and position - to be contrasted with the degree of blameworthiness attached to his previous solicitors - were ever taken into account. There is no process or chain of reasoning that might be discerned from which it could be concluded that this essential inquiry was undertaken.

[17] Neither do the concluding portions of the judge's decision suggest that this critical question was addressed. Rather, after mentioning the appellant's argument that the applications striking his claim should fail in that Judgment Recovery (N.S.) Ltd. had taken several fresh steps in the ongoing litigation

and was, therefore, estopped from exercising its rights, the judge quoted a portion of the judgment of the House of Lords in **Roebuck v. Mungovin**, [1994] 2 A.C. 224 but without any indication how the portion quoted specifically applied to the circumstances before him. The Chambers judge simply stated:

> [13] Considering the facts of this case, including the actions of the defendants, I find the test to be met in an application pursuant to Civil Procedure Rule 28.13 has been satisfied.
>
> [14] I, therefore, allow the applications to dismiss pursuant to Civil Procedure Rule 28.13.

[18] With respect, this statement is nothing more then a conclusion without any indication of the reasons or facts which led to it. There is nothing upon which the soundness of the conclusion might be tested. It lacks the required analysis that recognizes the distinct positions of the appellant and the respondents and would explain whether and to what extent the appellant's own conduct or tardiness in advancing his litigation was such that it would deny him the right to have his case heard, for all time.

[19] It was incumbent upon the Chambers judge to carefully analyze the evidence presented by the parties, consider the extent of the appellant's own blameworthiness, and in the exercise of his discretion strike a fair and just balance between the appellant's position and that of the respondents. In failing to conduct this essential inquiry the Chambers judge fell into error.

[20] Where the carriage of Mr. Clarke's case had been in the hands of various lawyers for almost 12 years, he was entitled to know upon reading the decision that each of the necessary principles required to justify a dismissal of his claim had been addressed. Here, for reasons I will explain, I believe critical issues were overlooked and as a result the Chambers judge erred in law. His decision should therefore be overturned enabling the appellant to advance his claim with, I would add, all necessary dispatch.

[21] Of necessity, I have, therefore, gone on to conduct my own detailed review of the evidence before the Chambers judge in order to assess Mr. Clarke's own conduct and strike a fair and just balance between the parties. Having done so I cannot conclude that Mr. Clarke is personally to blame for the delay. Much of it can be explained from the fact that his first lawyer took a full two years to commence the action; he was then suspended from the practice of law; the action was initially misconceived in that the true

defendants were not discovered; and that after 1996, once Judgment Recovery (N.S.) Ltd. and other counsel were engaged, the claim was not pursued as aggressively as one might have hoped. That said there can be no doubt that there ensued substantial, fairly regular and meaningful exchanges of information and documentation among the parties and their counsel in recent years. Importantly, this has included an exchange of lists of documents such as employment records, hospital documentation and physicians' files and reports. All parties have filed their pleadings. The parties have voluntarily participated in case management conferences, the first held by Davison, J. on June 29, 2000, and the second on March 1, 2001, at which time the parties agreed that discoveries of the named parties would be held by July 31, 2001. In fact, arrangements for discovery examinations of the parties and some of the plaintiff's experts were initially scheduled for July, 2001, in Ottawa and in London, Ontario. Despite these initiatives to move the litigation forward and some indications in 1999 by counsel for Raheem Ismaily that he anticipated making an application to strike on the basis of delay, it was only in July and August 2001 that the respondents applied to strike the plaintiff's claim for want of prosecution. Having regard to these circumstances and other similar features that are apparent from the record, I am of the opinion that it would be unjust to visit upon the appellant consequences that were not of his own making thereby depriving him of the chance to recover the damages for his injuries to which he would otherwise be entitled.

[22] As Mr. Farrar acknowledged in argument, much of the delay in moving this litigation forward is attributable to Mr. Clarke's solicitors and not to him personally. This distinction is clearly a relevant question to be taken into consideration so that Mr. Clarke is not unfairly deprived of his day in court.

[23] I agree with Mr. Farrar - the appellant's counsel on appeal and not responsible for the management of his file over the last 13 years - that many of the respondents' allegations of prejudice do not arise out of any delay by the appellant. There must be a causal connection between the delay and the prejudice before Mr. Clarke's claim can be legitimately dismissed. See for example **Ross v. Canada (Attorney General) et al.** (1999), 180 N.S.R. (2d) 266 (C.A.). In my respectful view, the Chambers judge's decision lacks the necessary analysis linking the alleged "serious prejudice" to the respondents to any blameworthiness on the part of Mr. Clarke. In my opinion a great many of the respondents' present complaints of prejudice are

exaggerated or not fairly laid at the feet of the appellant. I will give several examples to illustrate my point.

[24] The whereabouts of the investigating police officer, Constable Todd, should be easily determined by the respondents if they believe the officer is a necessary witness for the defence of their case. They have known his name for many years and that he was originally based in Dartmouth. It is not the appellant's responsibility to produce this witness in the course of pursuing his claim against the defendants. The accident was a rear end motor vehicle collision while he was stopped at a red light. Liability, insofar as Mr. Clarke is concerned, is hardly a seriously contested issue. While there may be disagreement among the defendants on the question of consent to drive and who ultimately may be expected to pay damages, that is not a question that need concern the appellant. Even if liability were a live issue involving Mr. Clarke and the defendants, Constable Todd was not an eye witness to the accident. This is not to suggest that a dispute among the respondents over their own liability is immaterial. Rather, we are here concerned with balancing the respective interests of the parties so as to do justice.

[25] For the same reason I do not see the loss of the police report as resulting in serious prejudice to the respondents. They were already provided with the automobile accident report and other pertinent documents in the course of document production and it is obvious that Judgment Recovery was notified of the potential claim before the police records were destroyed. Similarly, I do not consider the fact that the appellant's Section B insurer's file was destroyed in 1996 as constituting serious prejudice to the respondents. Even if there were medical documentation in the Section B file, I am satisfied that the respondents were sufficiently aware of the appellant's medical history through hospital reports, physicians' files and other documents previously provided to them.

[26] The respondents complain that they no longer have available to them certain of Mr. Clarke's pre-accident employment records. However, as is clear from Mr. Clarke's affidavit, his former employer, Fisherman's Market, ceased business before the date of the accident. Thus there was no causal relationship between any delay on his part in pursuing his claim and the alleged prejudice suffered by the defendants as a result of his employment records being available. Further, the respondents have information about Mr. Clarke's income and his claims for EI and Social Assistance through information provided on his tax returns.

[27] The fact that two of the appellant's treating medical practitioners, Dr. Canham and Larsen, are now living in the United States is not a serious prejudice attributable to any delay on Mr. Clarke's part in pursuing his claim. Their residing out of this jurisdiction is an inconvenience, but arrangements to question them - should they have any relevant evidence to give - are hardly unique in cases of this kind. Further, the fact that parties to the action now live in Ontario simply means that discoveries will likely be conducted there and that the party witnesses will have to travel to Nova Scotia for trial. Such inconvenience does not amount to a serious prejudice traceable to the appellant. Extra steps or added expense on account of it can be dealt with by way of costs in due course.

[28] Mr. Clarke says that he is unable to work on account of the injuries suffered in the accident. The respondents say that whatever his complaints or long term difficulties, they were not caused or exacerbated by the accident but more likely arose from a constellation of different injuries, diseases or conditions.

[29] I do not accept the respondents' characterization that should the appeal be allowed it will be "virtually impossible to have a fair trial". The appellant is obliged to prove his claim. Entitlement under the various heads of damage is subject to proof.

[30] A review of the lengthy correspondence and productions between the appellant's counsel and the Ismailys' lawyers and insurance representatives confirms that the respondents have had available to them for many years an extensive compilation of documents related to Mr. Clarke, his employment and his medical history, both pre- and post-motor vehicle accident, and have had access to the records of an array of physicians who have treated the appellant for a variety of complaints going back to the mid 1980's.

[31] It also seems to me that the appellant's Ontario counsel used reasonable efforts in attempting to respond - insofar as the sought after materials were under his control or available to him - to the frequent demands for information made of him by the respondents' lawyers.

[32] Therefore, any causal connection between delay on the part of the appellant and the unavailability of his medical records is tenuous, as is any related complaint of serious prejudice. The fact is that much of Mr. Clarke's prior medical history is recorded in other medical documents. This is evidenced by the fact that in her affidavit the manager of Judgment Recovery canvasses in considerable detail the appellant's entire medical history both pre-and post-accident. Certainly Judgment Recovery believed it had enough

information on Mr. Clarke's medical condition and prognosis in order to quantify his claim and make a sizable settlement offer to him in January, 2000.

[33] In resisting the application to strike his claim Mr. Clarke filed his own lengthy affidavit, sworn August 16th, 2001, and as well an affidavit of Jeanette Jupp, a secretary in his Ontario lawyer's firm, to each of which were attached several exhibits. This material provides reasons for delay in advancing Mr. Clarke's suit such that it is difficult to understand the basis for the Chambers judge's conclusion, quoted earlier:

> The affidavits filed in support of the plaintiff's position do not contain adequate explanation for the delay in the conduct of the action. There is not sufficient evidence to rebut the presumption of prejudice for what I find is an inordinate delay.

[34] The Chambers judge does not make any reference in his decision to the actual evidence in the affidavits of Mr. Clarke or Ms. Jupp. He only makes the general statement just quoted that there was "insufficient evidence". Given, as I have illustrated, that there is no causal connection between much of the alleged prejudice suffered by the respondents and delay on the part of the appellant, Mr. Clarke's evidence merited explicit consideration.

[35] I agree with Mr. Farrar that the evidence was relevant not only to the question of explanation for the delay and presumption of prejudice, but also to the obligatory inquiry into the respective positions of the parties, thus striking a balance producing a just result in all of the circumstances. Such is not to "double count" the reasons advanced as mitigating factors for the delay in pursuing litigation. Rather, in situations where the reviewing judge accepts that the delay was inordinate and inexcusable and that serious prejudice has resulted as a consequence, then it is appropriate to at least consider the appellant's reasons for delay under this last step in the test when weighing the respective positions of the parties and striking a balance.

[36] Several other features of this case were relevant to that inquiry. I think it significant that the respondents waited more than two years to bring their application for want of prosecution. Judgment Recovery continued to request document production from Mr. Clarke for more than two years after Raheem Ismaily was formally added as a party to the action. Judgment Recovery made a substantial offer to the appellant to settle the case in January 2000. All of the parties voluntarily participated in two case management conferences with Justice Davison, the first in 2000 and the

second as recently as March 2001. Discoveries of the named parties and the plaintiff's experts were scheduled for July 2001. Without presuming to decide whether this conduct constituted "fresh steps" thereby estopping the respondents from bringing their application to dismiss Mr. Clarke's claim, they were certainly relevant to this stage of inquiry requiring striking a balance between the parties' positions. Having conducted my own analysis as explained in these reasons, I am satisfied that the balance clearly favours Mr. Clarke's position in carrying on with his litigation.

[37] Before leaving the subject of the evidence before the court I wish to deal briefly with a procedural matter. Some weeks before the appeal counsel for the respondents objected to certain documentation being contained within the appeal books filed by the appellant. They brought an application in Chambers for an order requiring the appellant to abridge the appeal books, objecting to material being filed with this court "that was not before the Chambers judge on the motion". Justice Bateman chose not to hear the application brought in the late stages of these proceedings and directed counsel to make their positions known to the panel assigned to hear the appeal.

[38] The background leading up to the preparation of the appeal books is set out in a very helpful memorandum dated March 15, 2002, filed by Ms. Chantal Richard, co-counsel with Mr. Farrar on this appeal. She explained that the appeal book was prepared in part from the court file as she did not have a complete copy of the file from Mr. Stephen Yormak, the appellant's Ontario counsel. Mr. Yormak represented the appellant at the hearing convened by teleconference in August 2001. The appeal book was filed on January 16, 2002. On January 26, Ms. Richard and Mr. Farrar realized that the Chambers judge's oral decision was not included as part of the appeal book. On January 28 they requested from the court a transcribed copy of Justice Coughlan's oral decision and then advised counsel for the respondents that they would have to file a supplementary appeal book.

[39] By letter dated January 28 Mr. Anderson, counsel for Judgment Recovery (N.S.) Ltd., informed Mr. Clarke's counsel that he objected to the inclusion of the transcript of the hearing held August 29, 2001. He also asked that three additional documents be included as pleadings in the appeal book:

1. Originating Notice, July 9, 1991;
2. Amended Originating Notice, July 13, 1995; and
3. Interrogatories, February 1, 2001.

[40] By letter dated January 29, Mr. Dunphy, counsel for the respondents Kareen Ismaily, Lillian Ismaily and Safar Ali Ismaily, advised that he objected to the inclusion of the documents found at Tabs 7 through 25 of Part I of the Appeal Book. He made no reference to the inclusion of the transcript of the hearing conducted by teleconference before Coughlan, J. on August 29, 2001. The 19 documents found at Tabs 7 - 25 to which Mr. Dunphy took exception consisted mainly of pleadings, for example, amended statements of claim, defences, orders and notices as well as certain affidavits filed during the earlier stages of these same proceedings.

[41] By letter dated February 1 counsel for Mr. Clarke wrote to Mr. Anderson to inform him that they were prepared to include the three documents he requested, but because of the nature of some of the submissions to Justice Coughlan at the August 29, 2001 hearing, they were not prepared to exclude the transcript from the appeal book. Mr. Clarke's counsel filed their supplementary appeal book on February 6, 2002. The appellant's factum was filed February 11 and the respondents' facta were filed respectively on February 28 and March 1.

[42] At the commencement of the hearing we advised counsel that having considered their written submissions on this point we would reserve our disposition of it, go on to consider the merits of the appeal and resolve both issues in our written reasons.

[43] For the purposes of this appeal it will not be necessary for me to consider at length the respondents' various arguments urging us to take a very restricted view of "the pleadings" and "Evidence", under for example, **Civil Procedure Rule** 62.14. Given the type and substance of the materials to which the respondents objected and the nature of the applications before the Chambers judge, I would have been quite prepared to receive it had it been necessary in disposing of the appeal. However, such a step was not required as Mr. Farrar was very careful in argument to restrict his submissions to that portion of the record which had not been challenged by the respondents. This uncontested material was sufficient for me to dispose of the appeal on its merits.

[44] I will say, however, that I see nothing objectionable to the materials filed by counsel for Mr. Clarke in their supplementary appeal book. Every pleading, document and order had been filed with the court during earlier steps in these same proceedings. One presumes that they were open for inspection in the public file maintained by the Prothonotary. The hearing was convened by teleconference and recorded just as it would have been had all counsel

appeared in open court. In this case or in any other what is said in court is available to us from the audio taped record of the proceedings digitally inscribed and accessible on our computers. This is a very useful tool when checking, for example, to see whether a particular point or argument was raised during the hearing; or when recollections are unclear to verify who said what to whom; or to ascertain whether a submission is a novel one, made for the first time on appeal.

[45] Where, as here, the Chambers judge's ruling effectively deprived Mr. Clarke of all recourse against the parties for his injuries, I see nothing wrong in placing before the appeal panel, as Ms. Richard put it "the whole picture" derived from the pleadings filed with the court as well as a transcript of the hearing. It would seem to me to be a most curious result if someone were to suggest that we sitting on appeal ought not to consider such material.

[46] For all of these reasons I find that the learned Chambers judge erred in his application of the test for dismissal of an action for want of prosecution. Accordingly, Mr. Clarke's appeal should be granted. No costs were awarded to any party on the initial application. I would award him his costs on appeal of $1,500.00 payable forthwith and to be split evenly; $750.00 payable by the respondent Raheem Ismaily in CA No. 175644; and $750.00 payable by the group of respondents Kareen Ismaily, Lillian Ismaily and Safar Ali Ismaily in CA No. 175708.

Saunders, J.A.

Concurred in:

Glube, C.J.N.S.

Oland, J.A.