

ENGLAND AND WALES / JUDGMENT

Gregory v Benham [2012] EWHC 2971 (QB) (26 October 2012)

[2012] EWHC 2971

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Neutral Citation Number: [2012] EWHC 2971 (QB) Case No: QB/2011/0710 IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION Royal Courts of Justice Strand, London, WC2A 2LL 26 October 2012 B e f o r e : THE HONOURABLE MR JUSTICE EADY

Between: KEVIN GREGORY Appellant/ Claimant

- and - ROBERT BENHAM Respondent/ Defendant

John Benson QC (instructed by Tilbrook's) for the Appellant/Claimant Kate Wilson (instructed by Gregory Rowcliffe Milners) for the Respondent/Defendant Hearing date: 10 October 2012

HTML VERSION OF JUDGMENT

Crown Copyright © Mr Justice Eady : Mr Gregory complains of emails sent by Mr Benham to six people in January 2010. Although the claim alleges that the emails were sent on 25 January, in fact they are now known to have been sent on 27 January. The proceedings were issued, based upon both libel and malicious falsehood, on 25 January 2011. Thus, they were issued just within the 12 month limitation period applying to both of those causes of action. The particulars of claim are lengthy and prolix, containing a good deal of irrelevant material primarily directed towards complaints against other people. The matter came before me on 10 October 2012 by way of appeal from an order of Master Leslie made on 16 November last year. He then refused Mr Gregory's application for an order extending time, retrospectively, for the service of the particulars of claim. These were sent on 15 July 2011 and were, as is accepted, nearly two months late. In the light of his refusal, the Master struck out the claim. His determination clearly involved the exercise of the court's discretion. As is well known, it would be necessary to show that, in doing so, he stepped outside "the generous ambit within which reasonable disagreement is possible": see e.g. *G v G*

[1985] 1 WLR 647 , 652, per Lord Fraser. Mr Gregory now appeals against the decision with permission from Bean J granted on 21 March 2012. Mr Gregory first obtained a copy of the offending email on 1 March 2010. There was then a failure to comply with the pre-action protocol or indeed to notify Mr Benham by any other means of his complaint. Mr Benham, therefore, had to wait some 16 and a half months before he was sent the particulars of claim identifying the complaint. It is submitted on Mr Gregory's behalf that this is a somewhat artificial way of looking at matters, since he was presumably well aware of the allegations he had made and to whom he had sent them. That will very often be the case, however, and cannot in itself be relied upon as excusing compliance with the modern requirements of notification. Following the issue of the proceedings on 25 January 2011, Mr Gregory applied unnecessarily for an extension of time for the service of his claim form. In fact, he had four months from the date of issue within which to serve it. That is to say, he was required to serve it by 24 May 2011. Nevertheless, Master Eyre gave him what purported to be an extension until 16 May of that year. Eventually, the Appellant served the claim form on 9 May. Thereafter, he would have had 14 days within which to serve the particulars of claim but, as I have already noted, he in fact purported to serve them on 15 July. It seems that the solicitors instructed by Mr Benham were unaware of Mr Gregory's breach of the rules and must have assumed that an extension had been obtained for service of the particulars of claim. Under this misapprehension, a defence was served on 10 August 2011. It was not until 7 September last year that Mr Benham's solicitors queried whether or not the particulars of claim had properly been served. The application to extend time for service, retrospectively, was made by Mr Gregory on 14 November of that year. Ms Wilson, appearing on behalf of Mr Benham, points not only to the failure to comply with the pre-action protocol but also to a breach of the requirement in PD 53, para 2.2(1), that details of the claim should be set out in the claim form itself. It had done no more than simply list the two causes of action to which I have referred. The question arises, therefore, whether the Master's decision was "wrong": CPR 52.11(3)(a). Did he err in fact, in law or in the exercise of his discretion? If he did, it will then be for me to consider whether or not, in exercising the court's discretion afresh, I should come to a different conclusion. My attention was drawn to the judgment of Rix LJ in *Aktas v Adepta*

[2010] EWCA Civ 1170 , in which he pointed out that proceedings are commenced when issued and not when served. Yet it is not until service that a defendant is given proper notice of the proceedings in question. Accordingly, he regarded the additional time between issue and service as being, in a way, an extension of the limitation period. He continued: "A claimant can issue proceedings on the last day of the limitation period and can still, whatever risks he takes in doing so, enjoy a further four month period until service, and his proceedings will still be in time. In such a system, it is important therefore that the courts strictly regulate the period granted for service. If it were otherwise, the statutory limitation period could be made elastic at the whim or sloppiness of the claimant or his solicitors. For the same reason, the argument that if late service were not permitted, the claimant would lose his claim, because it would become time barred, becomes a barren

excuse. But even where the claimant is well within the limitation period despite his delay in serving, there is a clear public interest in rules and the courts curtailing the efficacy of a claim form which, because it has not been served, is not very different from an unposted letter. Therefore, the strictness with which the time for service is supervised has entirely valid public interest underpinnings which are quite separate from the doctrine of abuse of process. It is sufficient for the rules to provide for service within a specified time and for the courts to require claimants to adhere strictly to that time limit or else timeously provide a good reason for some dispensation." There seems to have been a misunderstanding on the Master's part: "The publication had taken place on 25 th January 2010. Although it is not entirely clear, it appears that the claim form was also issued on 25 th January 2011, that is over one year after publication. The last day for issue was in fact 24 th January 2011, but no point has been taken by the Defendant on that, and I put it to one side." I have recorded that the publication in fact took place on 27 January 2010 and the claim form was thus issued just within the limitation period. A little later, the Master made the general observation that " ... it behoves a claimant who leaves it until the last minute for whatever reason, good or bad, to get on with it". Even though the claim was not issued outside the limitation period, it is still reasonable to describe Mr Gregory as having left it "until the last minute". In any event, the consequence was, as the Master accurately described it, that he had "bought himself another four months in which to serve his particulars of claim". There then appears to have been another misunderstanding on the Master's part in the following passage: "He did not get on with it, and it was not until nearly three months after that that the particulars of claim were served." As I have noted, the claim form was actually served on 9 May 2011 and, accordingly, the particulars of claim were served (approximately) two months late rather than three. Ms Wilson argues that these inaccuracies are not sufficient to vitiate the exercise of discretion by the Master. The substance of his criticism is to be found in the following passage: "It seems to me that this is a case in which the rules have simply been ignored, and when I say ignored I mean probably the people acting have been in ignorance of the rules rather than simply ignoring rules that they knew. The position is very clear from the rules. The policy behind those rules as applied in defamation cases is clear. Swift vindication is what is needed. I appreciate that there is some prejudice to the Claimant arising out of this decision, but if I were to exercise my discretion in his favour first of all I would, in my judgment, be flying in the face of authority, that is to say previous decisions in this particular area of procedure in defamation cases, and moreover I would be depriving the Defendant of his accrued rights, which accrued to him as a result of a wholesale failure to comply with the rules. In those circumstances the court is driven to refuse the application to say that the case is badly constituted, and as a result must be struck out, probably as an abuse because the rules have not been complied with, and I shall so order." It is said that there are further errors contained within this paragraph. First, was the Master to be taken as concluding that he was bound by "authority" to strike out the claim and thus deprived of any discretion in the matter? It seems to me that he was referring to the numerous cases in which it has been urged, specifically in claims for defamation, that claimants should act

with expedition. That simply reflects the one year limitation period adopted by Parliament in claims of this kind. It is idle to suppose that the Master truly believed that he had no discretion and was bound to strike the claim out. He was merely pointing out, in my view, that there had been "a wholesale failure to comply with the rules" and that there was no proper explanation as to why this was. In other words, he had no such explanation to take into account when weighing the competing factors. When he referred to "depriving the Defendant of his accrued rights", was the Master harking back to his earlier mistaken belief that the proceedings had been issued outside the limitation period? It seems unlikely in view of the comment that "no point has been taken by the Defendant on that". I am not sure what the Master meant by "accrued rights": it may have been a loose use of language in the course of an extempore judgment. He may simply have meant that Mr Benham was entitled to point to the fact that Mr Gregory needed the indulgence of the court to escape the consequences of his late service of particulars. In this instance, there was nothing to justify granting that indulgence other than what Rix LJ had described as the "barren excuse" that Mr Gregory would otherwise lose his claim. In referring to the "wholesale failure to comply with the rules", which the Master undoubtedly took into account in the exercise of his discretion, I would take him to have had in mind the three factors already identified; namely, (i) the failure to comply with the pre-action protocol, (ii) the omission of the details required on the claim form by PD 53, para 2.2(1), and (iii) the long delay in serving the particulars of claim. I consider that the Master was entitled to characterise the failures as he did. I have come to the conclusion that the Master did not err in law or in fact, in any material sense, in such a way as to vitiate the exercise of his discretion. Nor can it be said that he stepped outside the bounds of "the generous ambit within which reasonable disagreement is possible". I pause nonetheless, in case I have wrongly interpreted the Master's comments, and he did make a mistake in law in one or other of the passages I have quoted. If I were to exercise the court's discretion afresh, would I come to a different conclusion? Like the Master, I have some sympathy with Mr Gregory who was not always represented by lawyers, but nonetheless it is necessary to have well in mind the policy considerations applicable generally to litigation since the adoption of the CPR and, in particular, those applying in the field of defamation and malicious falsehood – where claimants are indeed required to "get on with it". There was long delay here and no adequate justification put forward. From March 2010, Mr Gregory had all he needed in order to formulate a claim and to plead his particulars. He failed to do so until July 2011. There is thus nothing except the "barren excuse" referred to by Rix LJ (i.e. that he would "lose his claim" unless the court granted him the necessary indulgence). In the circumstances I conclude not only that the Master made no material error of law, or mistake of fact, but that he also exercised his discretion correctly. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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