

JERSEY / JUDGMENT

1998/190 - Allen v Stead [1998]

UR 190 (17 September 1998)

[1998] UR 190

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JUDGMENT

GREFFIER SUBSTITUT: On 4 September 1998, I heard this summons. Because the action has been settled as between the second and third plaintiffs and the defendant, I shall refer to the first plaintiff in the original action as the plaintiff and to the defendant in the original action as the defendant.

The first question which arises is the basis of the jurisdiction in Jersey to dismiss an action for want of prosecution. The defendants summons included, in addition to the grounds set out above, grounds of striking out which correspond to Rule 6/13 (1)(c) and (d) of the Royal Court Rules 1992, as amended. However, both parties were agreed that striking out for want of prosecution in Jersey takes place under the inherent jurisdiction of the Court and that is also my view. The situation in England is explained in section 25/1/4 on page 461 of Volume 1 of the 1997 White Book, which section commences as follows:-

"

Dismissal for want of prosecution - general - Para (4) of this rule expressly empowers the Court to dismiss any action for want of prosecution if the plaintiff does not issue the summons for directions within the proper time. There are similar express provisions elsewhere in the R. S. C. e.g. in O.19, r.1 (default in service of the statement of claim); O.24, r.16 (1) (default in discovery); O. 34, r.2 (default in setting down). But in addition to these express provisions the Court has inherent jurisdiction to dismiss an action for want of prosecution if there has been default in complying with the rules or excessive delay in the prosecution of the action. Generally speaking the same principles are applied whether the Court is acting under its express power or under its inherent jurisdiction."

In Jersey, where we do not have similar rules to those quoted in the section set out above the Court exercises its inherent jurisdiction in relation to the dismissal of an action for default in complying with the rules or for excessive delay in the prosecution of the action.

In the case of *Beasant v. Pavan* (22 October 1997) Jersey Unreported, I quoted a number of relevant principles commencing on page 2 of the unreported judgment in the following paragraphs:-

"

In the case of *Skinner v Myles* [1990] JLR 89 the principles are set out clearly in the following section on page 93 of the Judgment:-

"

These cases show that there are two distinct, although related, circumstances in which an action may be dismissed for want of prosecution. They are: (a) where a party has been guilty of intentional and contumelious default (this head is not relied upon by the first defendant); and (b) where there has been inordinate and inexcusable delay in the prosecution of the action. It is under this head that the first defendant, supported by the second defendant, has asked this court to strike out the plaintiff's claim. To the requirement that there has been inordinate and inexcusable delay on the part of the plaintiff there must be added one of two additional grounds for striking out. These are: (a) that such delay will give rise to substantial risk so that it is not possible to have a fair trial of the issues in the action; or (b) is such as is likely to cause or to have caused serious prejudice to the defendants, either as between themselves and the plaintiff, or between each other, or between them and a third party. Whilst Mr White for the plaintiff drew our attention to the second head we have just mentioned, he based his main submissions on the first requirement (as claimed by defendant), namely, that the delay in this case has given rise to a substantial risk that it would not be possible to have a fair trial."

The following section from page 555 of the case of *Allen v Sir Alfred McAlpine & Sons* [1968] 1 All ER 543 is helpful:-

"It is thus inherent in an adversary system which relies exclusively on 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 be not possible."

In the headnote to the *Roebuck v. Mungovin* action [1994] 1 All ER 568 an additional principle is introduced as follows:-

"Held - Where a plaintiff was guilty of inordinate and inexcusable delay which prejudiced the defendant, subsequent conduct by the defendant which induced the plaintiff to incur further expense in pursuing the action did not constitute an absolute bar preventing the defendant from obtaining an order striking out the claim. Such conduct on the part of the defendant was a relevant factor to be taken in to account by the judge in exercising his discretion whether to strike out the claim but the weight to be attached to it depended on all the circumstances of the particular case. Applying that principle, the plaintiffs inordinate and inexcusable delay coupled

with the prejudice caused to the defendant had been such that the plaintiffs action should be struck out notwithstanding the correspondence between the parties after the delay had occurred."

In the case of *Shutun v Zalejska* [1996] 3 All ER 411 on page 428 starting in section c there is the following helpful paragraph:-

"When a case, such as the present case, depends upon conflicting oral testimony to be given about what was said or understood some 15 years earlier, the quality of the recollection of a witness is bound to be central to the trial and, in respect of the evidence of the party on whom the evidential burden lies, critical to the establishment of their case. The cross-examination of such a witness is bound to be directed primarily to attacking the reliability of the witness's recollection and testing it by reference to other evidence that may be adduced at the trial. It is unreal to expect a defendant to do more at the stage of his application for dismissal in demonstrating the existence of the substantial risk."

The 1997 White book at section 25/1/6 on page 462 of the first volume thereof contains the following helpful sections:-

"(1)"Inordinate and inexcusable delay" - The requirements are: (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 either as between themselves and the plaintiff or between each other or between them and a third party.

The forgoing statement of the law was approved in *Birkett v. James* [1978] A. C. 297 at 318; [1977] 3 W. L. R. 38;

[1997] 2 All ER 801

, H. L. But what is "serious prejudice" depends on the facts; if the plaintiff has already added to the defendant's difficulties by taking full advantage of the delay permitted by the Limitation Acts, any further prejudice beyond the minimal may be "serious".

(2)"Inordinate delay" - Time which has elapsed before the issue of the writ within the limitation period cannot of itself come within these words. Only delay after the issue of the writ is relevant. But the later the plaintiff starts his action the higher his duty to prosecute it with diligence (*Birkett v James* [1978] A. C. 297; [1977] 2 All E. R. 801, H. L.: *Tabata v Hetherington*, "The Times", December 15, 1983). Thus although time elapsed before the issue of the writ within the limitation period of itself constitute inordinate delay such as to justify dismissal of the action, once a writ has been issued the plaintiff is bound to observe the R. S. C. and to proceed with reasonable diligence; accordingly inordinate delay by a plaintiff within the limitation period can be relied upon to support a defendant's application to strike out after the expiry of the limitation period (*Ruth v. C. S. Lawrence & Partners* [1991] 1 W. L. R. 399, C. A.; [1991] 3 All E. R. 679). But delay (in the particular case of some 28 years) in commencing an action for personal injury on the part of a plaintiff under a disability was irrelevant when the action was begun within the limitation

period and called for no explanation no matter what prejudice may have been caused to the defendant, *Headford v Bristol and District Health Authority*; "The Times" November 30, 1994, C. A. See further "Subsidiary points - Limitation Act", para 25/1/7 below.

Where a long delay before the issue of the writ causes the defendant prejudice, he has to show only something more than minimal additional prejudice as the result of any post-writ delay to justify the action being struck out (*Department of Transport v Chris Smaller (Transport) Ltd* [1989] 1 All E. R. 897, H. L.)

"Inordinate" means "materially longer than the time usually regarded by the profession and Courts as an acceptable period" (*Birkett v. James*, above). It is easier to recognise than to define.

(3)"Inexcusable delay" - This ought to be looked at primarily from the defendant's point of view or, at least, objectively; some reasonable allowance, for illness and accidents may, be made. But the best excuse is usually the agreement of the defendant or difficulties created by him.

The absence of legal aid in libel proceedings should be treated sympathetically where it is asserted by the plaintiff that the delay was caused by lack of finance, *Gillberthorpe v Hawkins*, "The Times", April, 3, 1995.

The fact that an action has been stayed by order of the Court pending the giving by the plaintiff of security for the defendant's costs does not excuse delay if the plaintiff could, at any time during the relevant period, have caused the stay to be lifted by giving the security or by making an appropriate application to the Court (*Thomas Storey Engineers Ltd v Wailes Dove Bitumastic Ltd*, "The Times", January, 21, 1988, C. A.).

(4)Prejudice to the defendant - This is a matter of fact and degree and has been discussed in *Allen v McAlpine* [1968] 2 Q. B. 229; [1968] 1 All E. R. 543, C. A. and in a large number of reported cases. The effect of the lapse of time on the memory of witnesses or, in the course of such time of their death or disappearance are the most usual factors. Their importance depends upon the circumstances, the issues and the other evidence that can be given. Thus the lapse of time may be very prejudicial if the circumstances of an accident or oral contracts or representations are in issue, but it is of much less importance in a heavy, well-documented commercial action (*National Insurance Guarantee Corp. Ltd v. Robert Bradford & Co. Ltd* (1970) 114 S. J. 436, C. A.). In a case of prolonged culpable delay following long delays in serving of proceedings, the Court may readily infer that memories and reliability of witnesses has further deteriorated in the period of culpable delay; *Benoit v. Hackney Council*, February 11, 1991, C. A. Transcript No 91/0116 unrep. bald assertion of prejudice or of a substantial risk that a fair trial was not possible are insufficient. There has to be some indication of prejudice, e.g. that no witness statement was taken at the time so that a particular witness who would have been called on a particular issue had no means of refreshing his memory or that a particular witness was of advanced age and no longer wished to give evidence or had become infirm or unavailable in the period of inordinate and inexcusable delay; *Hornagold v. Fairclough Building Ltd* [1993] P. I. Q. R. 400; "The Times" June 3 1993, C. A. See further *Rowe v Glenister*, "The Times", August 7, 1995 and *Slade v Adco*, "The Times", December 7, 1995 (both C. A.) reiterating the requirement of some evidence to support the

inference of prejudice in the form of lost or less cogent recollection.

The prejudice to the defendant must be caused by delay since the issue of the writ; the defendant cannot rely upon prejudice relating wholly from earlier delay. Evaluation of the degree of prejudice caused by delay since issue of the writ, however, is likely to require consideration of the context of such delay and, thereof, of the effect of the total lapse of time since the events giving rise to the dispute (*James Investments (I. O. M.) Ltd v. Phillips Cutler Phillips Troy*, "The Times", September 16, 1987, C. A.). See also *Donovan v Gwent Toys Ltd* [1990] 1 All E. R. 1018; H. L., where the House of Lords, in exercising a different jurisdiction (namely under s.33 of the Limitation Act 1980) similar view of how prejudice should be evaluated."

I add to the paragraphs quoted above the following paragraphs from section 25/1/8 on page 465 of Vol 1 of the 1997 White Book:-

"(6) Liability admitted - The Court is reluctant to dismiss an action on the ground of prejudice to the defendant if liability is not substantially in issue, particularly if there has been a payment into Court. But in some cases it is necessary to do so because the delay has made it impossible, or very difficult, to evaluate the damages (*Gloria v. Sokoloff* [1969] 1 All E. R. 204 C. A.; *Martin v Turner* [1970] 1 W. L. R. 82; [1970] 1 All E. R. 256) or if the delay has been very long indeed, e.g. 10 years (*Paxton v. Alsopp* [1971] 1 W. L. R. 1310; [1971] 3 All E. R. 370). Sometimes justice can best be done by giving the plaintiff a last chance to accept the money in Court.

(7) Both to blame - The Court will look at the conduct of both parties. If the defendant has considerably contributed to the delay or, a fortiori, has actually agreed to it, he will seldom obtain the dismissal of the action (*Austin Securities v Northgate and English Stores Ltd*. [1969] 1 W. L. R. 529; [1969] 2 All E. R. 753, C. A.; *Banco Popolare di Novara v John Livanos & Sons Ltd* (1973) 117 S. J. 509).

(8) "Sleeping Dogs" - It has been said that a defendant may properly take no action at all to stimulate the plaintiff but may "let sleeping dogs lie" in the hope that the action may die a natural death. (See Lord Salmon's speech in *Birkett v James* and his judgment in *Allen v McAlpine*, above). But it is not always easy to draw the line between proper inactivity and actual encouragement of, or contribution to, delay (see "Both to blame," above). In many cases the prospects of a successful application are much improved by one or two reminders to the plaintiff that he should either proceed with the action or abandon it."

In this particular case, the accident was a road traffic accident, the plaintiff and the defendant being the drivers of their respective vehicles, the accident occurred on 23 July 1988, and the Order of Justice was served on 14 February 1991. The action was due to come to trial on the issue of liability in May 1992, but the parties settled that issue upon the basis of an agreed apportionment of the liability between the plaintiff and the defendant. The issue of quantum continued on and there does not appear to me to have been any inordinate delay on the part of the plaintiff until after November, 1993. On 10 November 1993, the plaintiff's lawyers approached the defendant's lawyers without prejudice inviting discussion and examination of the plaintiff's records. On 22 November 1993, the plaintiff was involved in a second road traffic accident.

There was then a gap of almost 21 months until 16 August 1995, when the defendant's lawyers made a without prejudice offer.

The defendant had obtained a medical report from Doctor Ravindran on the condition of the plaintiff just before the second accident but there is a difficulty with that report inasmuch that Doctor Ravindran was the junior of Dr Clifford who produced a medical report for the plaintiff.

The second accident has complicated the action from the point of view of the assessment of damages in this case although the plaintiffs insurance claim in relation thereto has been settled. A further complication has been that since about Easter 1995 the plaintiff has been suffering from depression. A further complicating factor is that the plaintiff's degree of disability has increased with it being assessed as 35% by the Social Security Department in May 1996, and 100% by 2 March 1998.

By December, 1995, the defendants lawyers had decided that they wanted a better medical report but due to the various complications with the plaintiffs health, the parties agreed that they should not seek to obtain this until the plaintiff had obtained his own more up to date medical report.

This proved to be more complicated than at first thought and it was not until early 1997 that an appropriate report or reports were obtained. The different aspects of the medical problems of the plaintiff by this stage, including the element of depression, caused some complication and contributed to the delays.

The defendant complained that his lawyers did not know about the second accident until about the middle of 1997. However, it was not until April 1997 that Professor Shearer, the defendant's expert in England came on the scene.

The plaintiffs lawyers also experienced difficulties in finalising the plaintiffs damages claim and this was not finalised in detailed form until March 1998. Some delays were caused here by the slowness of English Counsel and some delays were caused by the need to obtain accounts on various companies for past years due to the plaintiff having been self-employed at the time of and in the period after the first accident.

The defendant complains that, with the final detailed claim for damages having only been produced in March 1998, almost 10 years had then expired from the original accident. Furthermore, the defendant points both to the period from November 1993 to August 1995 and to the general slowness in matters proceeding since August 1995. I have to decide to what extent there has been inordinate and inexcusable delay on the part of the plaintiff. There does not appear to me to have been any such inordinate and inexcusable delay prior to November 1993. The case proceeded expeditiously from February 1991 to settlement of the issue of liability in May 1992. Thereafter, the dispute on the issue of the quantum of damages proceeded at a reasonable pace. Part of the period between November 1993 and August 1995 is excusable. This is partly because the plaintiff was waiting for a response to his lawyer's letter dated 22 November 1993, partly because the second accident had an effect on the plaintiff and partly because the plaintiff began to experience depression some time in early 1995. In my view, the period of

inordinate and inexcusable delay during this period of time amounts to about 12 months. In the period from August 1995, when the defendant made the without prejudice offer, to 28 April 1998, when the summons was issued, it is fair to say that matters did not proceed as speedily as they ought. However, there were the complications of the depression, the second accident, the continuing deterioration of the condition of the plaintiff and the other delays referred to above. Furthermore, the defendant agreed to the arrangement by which the obtaining of the report of their expert would follow the obtaining of the updated reports on behalf of the plaintiff. Nevertheless, in my view there is some inordinate and inexcusable delay in this period which amounts to about a further 12 months.

However the crucial question relating to this application is as to whether the inordinate and inexcusable delay gives rise to a substantial risk so that it is not possible to have a fair trial of the issue of the quantum of damages or is such as is likely to cause or to have caused serious prejudice to the defendant as between himself and the plaintiff. That test must also be considered in the light of the greater reluctance of Courts to dismiss an action where the issue of liability has been settled, particularly if there has been a payment into Court. In this case, there has been both a payment into Court, although the defendant describes the amount paid in as being small in relation to the plaintiff's claim, and, at the same time as the present summons was issued, a further offer which has now been withdrawn.

The defendants main complaint in relation to serious prejudice and a fair trial relates to the second accident and to the fact that the defendant did not know of this for some time. The defendant says that if the action had been properly prosecuted after November 1993, then he could have obtained further medical reports on the plaintiff sooner after the second accident than has actually been the case. The defendant makes similar claims in relation to the difficulty of obtaining medical reports relating to the plaintiff's depression. The defendant also points out that there will now be difficulties at trial in relation to distinguishing between the injuries which were caused by the first accident and the injuries which were caused by the second accident. Furthermore, during the hearing, although this was not in the defendant's outline of his case in relation to this summons, Advocate Gollop began to develop a line of argument to the effect that the period of delay since the accident had occurred had led to a situation where the eventual amount of damages awarded, including claims for interest etc, would be substantially greater than it would have been if the action had been properly prosecuted.

There are a number of difficulties with the defendants submissions in relation to serious prejudice and difficulties in obtaining a fair trial. The first difficulty relates to the fact that there was not inordinate and inexcusable delay prior to the second accident occurring. Many of the difficulties of which the defendant was complaining and, in particular, difficulty in distinguishing between the injuries caused by the first accident and those caused by the second accident, would have arisen in any event even if there had been no delay in the proper prosecution of the action. The second difficulty is that the defendant was able to obtain a medical report on the plaintiff just prior to the second accident. The fact that this was obtained from a doctor who was a junior of Dr Clifford is not a matter for which the plaintiff can be blamed particularly as the defendant had

had more than five years from the accident, more than two and half years from the service of the Order of Justice, and exactly eighteen months from the settlement of the issue of liability in which to obtain a suitable report. Although the defendant might have wished, in retrospect, to have obtained a report on the condition of the plaintiff earlier after the second accident then has in fact been the case, the plaintiffs condition at that time will have been documented in the medical reports obtained by the plaintiff for the purposes of the other set of proceedings which have been settled and which were brought in relation to the second accident. It seems to me that the defendant has suffered some degree of prejudice here but the question which arises is as to whether that prejudice is sufficiently serious taking into account all the other factors.

In relation to the new argument which Advocate Gollop introduced at the hearing in relation to the expansion of the measure of damages, it appears to me that in most cases it is the defendant who is happy to delay the payment of damages upon the basis that he remains in possession of moneys and can earn interest and other profits thereon. Furthermore, in this case, the continuing deterioration of the condition of the plaintiff from 1995 onwards both physically and mentally has led to a situation in which it would have been difficult for a trial court to have come to a final assessment of damages at any stage earlier than early 1998. It does not, therefore, seem to me that there is any merit in this additional line of argument.

In this case it seems to me that the defendant bears some responsibility for the delays which have occurred and that is one of the factors which led me to the conclusion that the total period of inordinate and inexcusable delay was no more than two years.

This is a case in which the principle as set out in the *Roebuck v Mungovin* action, which is quoted above, carries some weight. During the whole of the period from August 1995 until April 1998, the defendant continued to be actively involved in the case and, indeed, the defendant's last offer of settlement was made in April, 1998.

In a situation such as this, where there are so many factors to take into account, I have to balance these in coming to my decision. In my view, the small degree of prejudice suffered by the defendant by reason of the total of two years of inordinate and inexcusable delay leading to a delay in obtaining medical reports on the plaintiff after the second accident and after the depression had commenced, is not sufficient to outweigh the reluctance of courts to dismiss an action where only the quantum of damages is in issue. The factors of the payment into Court, the offer in April 1998, the continued dealing with the case under the *Roebuck v Mungovin* principle from 1995 to 1998, the responsibility of the defendant for a degree of delay in relation to the prosecution of the case, including agreement in December, 1995, to wait for the plaintiff's medical reports before obtaining his own expert report, and the general slowness on the part of the defendant in obtaining his own first report in September, 1993, and Professor Shearer's first report in late 1997, are all factors which weigh in favour of the plaintiff.

Accordingly, I have come to the conclusion that there is not such a substantial risk that it is not possible to have a fair trial of the issue of the quantum of damages or such serious prejudice to the defendant as would justify the dismissal of this action.

Accordingly, the defendants summons is dismissed.

The plaintiff must now prosecute this action without further inordinate and inexcusable delay and it seems to me that it is in the interests of justice that both parties attend on me at an early date for a summons for directions at which I can set an appropriate timetable for the bringing of this action to trial at an early date.

Authorities

Royal Court Rules 1992 (as amended) Rule 6

Skinner (née Ball) v Myles and Public Health Committee

[1990] JLR 88

Rules of the Supreme Court (1997) Vol 1 pp.459-466

Beasant v. Pavan & Public Health Committee (22 October 1997) Jersey Unreported

Birkett v. James [1977] 2 All ER 801

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Austin Securities Ltd v. Northgate & English Stores Ltd [1969] 2 All ER 753 CA

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