

JERSEY / JUDGMENT

1999/14 - Eves v Le Main

[1999] UR 14 (22 January 1999)

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Court of Appeal 22 January 1999 Before: J M Collins Esq, QC (President) RC Southwell, Esq, QC, and Miss E Gloster, QC Between David Eves Plaintiff/Appellant And Terence John Le Main Defendant/Respondent Application for leave to appeal by the Plaintiff/Appellant against so much of the Order of the Royal Court of 30 March 1998 [1998.065] , as directed that paragraphs 1-16, inclusive, and 19 of the Order of Justice be struck out, by virtue of Rule 6/13 of the Royal Court Rules 1992, as amended. The Plaintiff/Appellant on his own behalf Advocate AJ Belhomme for the Defendant/Respondent

JUDGMENT

THE PRESIDENT: This is an application by Mr Eves, the Plaintiff, for leave to appeal against a decision of the Samedi Division of the Royal Court made on 30 March 1998, by which the majority of the paragraphs of the Order of Justice in his action were struck out on the ground that they were prescribed by limitation of time. The Order of Justice was served on the Defendant on 18 December 1997, this being the relevant date for the purpose of limitation under the terms of the Royal Court Rules, 1992, Rule 6/5. The allegations related, putting the matter in general terms, to the circumstances in which the Tourism Committee of the States came to refuse registration under the Tourism (Jersey) Law, 1948 and then to impose conditions on re-registration of the Glendale Guest House, a business owned by Glendale Holdings Ltd and formerly run by Mr Eves and his wife, who were in substance the proprietors; in addition certain of the allegations related to another business owned by the Applicant, Mr Eves, namely Blue Horizon Holidays Ltd. The allegations included assertions that the Defendant, a member of that Committee, had used his position as a member of the States wrongfully to influence the Committee to refuse registration of the Guest House, and that he had supported a kind of "Lynch Justice", had committed "an outrageous breach of conscience" and was guilty of deliberate failures to discharge his duties as a member of the States and in breach of his oath. The paragraphs in question were paragraphs 1 to 16 and paragraph 19 of the Order of Justice, the effect of which was carefully summarised in the Judgment of the Royal Court. All the allegations relate to specific dates and these dates run between 5 October 1989, and 4 June 1992, the majority relating to dates in 1989 and 1990. By Article 3 of the Law Reform (Miscellaneous Provisions) (Jersey) Law, 1960 it was provided as follows: "(1) The period within which actions founded on tort may be brought is hereby extended to three years from the date on which the cause of action accrued. (2) The provisions of this

Article shall be without prejudice to any rule of law allowing for the extension of such a period as aforesaid ..." By the Royal Court Rules, 1992 (as amended) and in particular by Rule 6/5 already referred to it was provided as follows: "The prescription of a right of action shall be interrupted on the service of a summons in the action for appearance before the Court." It was in this context that the Defendant made his application to strike out the paragraphs in the Order of Justice to which I have referred. On the face of it the allegations raised in these paragraphs had been long prescribed by 18 December 1997, the most recent of the allegations relating to 4 June 1992. The Deputy Bailiff, in his Judgment, considered in some detail whether it was open to the Court to proceed in the absence of the Plaintiff and whether he should, in fact, so proceed. In doing so he considered numerous authorities supporting the striking out of allegations plainly prescribed as being frivolous, vexatious and an abuse of the process of the Court in the exercise of the powers of the Royal Court under Rule 6/13 of the Royal Court Rules and he proceeded to make the Order appealed against. On the afternoon of 29 April 1998, the Applicant handed a Notice of Appeal to an usher on duty at the main reception desk in the States building. This was not a valid service in two respects, first in that by Rule 3 of the Court of Appeal (Jersey) Rules, 1964 every notice of appeal is to be served within one month from the date on which the judgment or order of the court below was pronounced and further by Rule 17 such a notice is required to be served through the Viscounts Department, and secondly in that it did not request leave to appeal, such leave being required in the case of an interlocutory appeal by virtue of Article 13(e) of the Court of Appeal (Jersey) Law, 1961. Service through the Viscount was effected on 5 May 1998, by which time one month had expired already since the decision sought to be appealed against. Mr Eves thereafter served an amended/supplementary Notice of Appeal on 3 September 1998, ("the amended Notice of Appeal"), again without obtaining leave; in this instance, the service of a supplementary notice is permitted if served at least fourteen days before the date fixed for the hearing of the appeal otherwise it requires leave. The amended Notice did not itself seek leave, despite the fact that by letters of 1 and 13 May 1998, the need for obtaining leave was drawn to the attention of the Applicant by the solicitors for the Defendant and despite the fact that the Judicial Greffe, by letter of 7 May 1998, likewise referred to the lack of an application for leave. This matter comes before this Court, therefore, in somewhat of an unsatisfactory state. This Court wishes to take this opportunity to make clear that compliance with the Appeal Law and the Rules both of the Royal Court and of the Court of Appeal are just as binding on a litigant in person as they are on a party with legal representation. In the case of this particular Applicant the Court takes note of the fact referred to in the Judgment of the Royal Court and within the Courts own knowledge that he is a seasoned litigant. To quote from the Judgment of the Deputy Bailiff in the instant matter: "He has appeared regularly before the Royal Court, regularly before the Court of Appeal and indeed before the Privy Council." A further departure from the Rules appears from the terms both of the Notice of Appeal and of the amended Notice, namely that Mr Eves is attempting to introduce further evidence at this stage without having requested or obtained the leave of this Court, as required by Rule 12 of the Court of Appeal (Civil) (Jersey) Rules, 1964. In the Notice of Appeal the Applicant alleges that "certain evidence was only brought to the attention of the Plaintiff in August 1995, in relation to the involvement of the Defendant in the conspiracy to put him out of business by the States of Jersey Tourism Committee." In the

amended Notice he asserts first that " the extent to which the Defendant was involved in the conspiracy to put the Plaintiff out of business did not become apparent until he received certain copies of the minutes of the Tourism Committee of 1990 on 7 August 1995, which means that the paragraphs struck out are not prescribed as are adjudged" and secondly that "the extent to which the Defendant was involved in the conspiracy to defame the Plaintiffs reputation and put him out of business was further substantiated ." I refer in this connection to the Applicants reliance on certain minutes of the Tourism Committee of the States. Not only does this constitute fresh evidence additional to that before the Royal Court, but also it is to be observed that neither of these assertions is to be found pleaded either in the Order of Justice or in the Reply. In the circumstances, therefore, in addition to requiring leave to appeal, the Applicant also technically requires leave to appeal out of time, leave to amend his Notice of Appeal and leave to put in further evidence in support of his appeal. However, whether an applicant or appellant is legally represented or not, it is nonetheless incumbent upon the Court, in circumstances such as the present, and notwithstanding that there has been these breaches of the rules, to enquire as to whether there would be a denial of justice if an applicant or appellant were not permitted to proceed with his appeal. It is for this reason that the Court has heard full argument as to the substance of the matters which the Applicant, Mr Eves, wishes to raise by way of appeal. It has done so by reference to the grounds set out in the amended Notice of Appeal that being the Notice upon which the Applicant relied in argument in place of the original Notice of Appeal and the Court has also seen the further materials which the Applicant sought to put in evidence. First, Mr Eves complains that the hearing before the Royal Court took place in his absence. This was a discretionary matter for the Royal Court and thus will only be interfered with in limited circumstances. Briefly, there was a hearing on 12 February 1998, at which hearing a date was fixed for the hearing of the summons to strike out the relevant paragraphs in the Order of Justice or, alternatively, an Order severing the trial of those paragraphs from the two remaining ones. The Applicant was given notice of this hearing but he failed to attend. Apparently he had suffered a minor accident on the day previous and he had had to attend hospital as an outpatient on 12 February itself. In a letter received on the following day Mr Eves stated that the appointment had slipped his mind in these circumstances. He then telephoned to say that he would not be able to attend on 30 March 1998, the date which had been fixed at that hearing in his absence, and then on 19 February 1998, the Advocate for the Defendant wrote to say that he would be going ahead with the applications on 30 March unless he received some cogent explanation from the Applicant as to why he would not be attending at Court on the date fixed. Mr Eves replied that he had a long standing family commitment out of the Island. The Advocate replied and asked him to amplify the description of the nature of the commitment. To that Mr Eves replied that such a request was " an invasion of my privacy and irrelevant to the matter ," although he did provide documentary confirmation of his travel arrangements to England. He then faced the Defendants Advocate with a fait accompli by leaving the Island without leaving an address at which he could be reached. Furthermore, Mr Eves made no application to the Court to adjourn or vacate the hearing date. The Royal Court considered that the explanation advanced by the Applicant for his absence was " totally inadequate " and decided to continue with the hearing. Reference was made to a previous occasion on which before this Court the Applicant had failed to attend a hearing of

applications for leave to appeal in one of the other actions in which he was involved and at which an inadequate medical certificate had been produced. The Court stated that it proceeded for two reasons, first, that not to proceed would cause extensive delay, and, secondly, because it was doubtful whether Mr Eves could assist by "adding anything at all which might help us on a question which is partially of fact, but substantially of law". The Applicants complaint as to the exercise by the Royal Court of its discretion to proceed with the hearing is, in my judgment, unsustainable. It is not a denial of justice to hear a case in the absence of one of the parties, provided he has been given proper notice of the hearing date and time. The Applicant was so notified and chose to absent himself from the Island without making any application to the Court to adjourn or vacate the date. In these circumstances it was the Applicants own doing which deprived him of the opportunity of appearing on 30 March 1998, and there is in my judgment no room for an allegation that there has been a breach of Article 6.1 of Section 1 of the European Convention of Human Rights and Fundamental Freedoms. This Court nonetheless takes the view that, in all the circumstances of this case, it would have been more sensible for the Royal Court not to have proceeded with the strike-out application in the absence of the Applicant. It was apparent that the Applicant was genuinely absent from the jurisdiction and that the inevitable result of a hearing in his absence would be an appeal or application to this Court, with the likelihood of the Applicant raising for the first time as has happened before this Court the substantive grounds of his opposition to the application to strike out. However, the fact that this Court might have exercised its discretion differently, is not a ground for setting aside the Royal Courts decision. I turn now to consider whether there is any substantive point in the grounds raised in the Applicants amended Notice of Appeal such as would entitle the Applicant to have the Order of the Royal Court striking out the relevant paragraphs of his Order of Justice set aside or alternatively to have the matter remitted to the Royal Court for a further hearing. In the original Notice of Appeal the Applicant alleged that "certain evidence was only brought to the attention of the Plaintiff in August 1995, in relation to the involvement of the Defendant in the conspiracy to put him out of business." This was a novel assertion, not raised by the pleadings and was so vague as to carry the matter no further. However, from the amended Notice of Appeal it appears that this complaint relates to the receipt by the Applicant of certain minutes of the Tourism Committee meetings of 10 and 24 May 1990, (there are two minutes for the latter date) and 16 July 1990. This Court has been shown copies of these minutes, which were sent to the Applicant by letter from Ogier & Le Masurier of 3 August 1995, with a waiver of privilege in respect of those minutes only. I find nothing in them which could on any view support the Applicants pleaded case or the case which he seeks to advance in his amended Notice of Appeal. The only mention of the Defendant is that contained in the shorter minute of 24 May 1990. This indicates that he was one of three committee members who authorised the writing of a letter of 18 May 1990, confirming that the Committee would not be prepared to register the Glendale Guest House under the Tourism (Jersey) Law, 1948, or any other premises under the control of the Plaintiff and his wife. There is nothing to differentiate the Defendant from the other two committee members and nothing to indicate any bad faith in their conduct and in the conduct of the Defendant in particular. Indeed, the absence of any false motive could be said to be supported by the following passage in the longer of the two minutes sought to be introduced and relied on (that is to say the

minutes of 24 May): "The letter (ie the letter of 18 May 1990) drew attention to the advance oral and written warnings given that the registration standards were unlikely to be achieved, to certain fire regulation shortfalls, to the lack of cleanliness, both inside and outside the premises and to the fact that Mr. Eves disappeared from the scene leaving the manager, Mr Brown, alone with no ability to make alternative arrangements for guests ." And a little later it continues: "In the letter Mr Eves was reminded that many complaints had previously been received and that should he attempt to accommodate guests at the Glendale Guest House the committee would seek an interim injunction to restrain him from doing so." This letter referred to (ie the letter of 18 May 1990), was a letter which was received by Mr Eves and so there was no secret so far as he was concerned and reference is made further in the longer minute to the reply from his then lawyer, Advocate Troy. The advice of the Attorney General was received as to the need to separate the complaints relating to the Glendale Guest House from the difficulties which were arising in connection with Blue Horizon Holidays Ltd, another of Mr Eves companies, difficulties which have been before this Court in other proceedings. Furthermore reference is made to attempts to keep the Guest House open by the appointment of trustees to administer it until it could be sold and these were the subject of discussions with Mr Troy. The Committee then laid down the terms under which it was prepared to re-register the Guest House, and again this was not kept a secret; indeed the Committee instructed its officers to communicate the conditions to the secretary of the company. Having carefully examined the contents of these minutes, I find no evidence as to any underhand or clandestine conduct on the part either of the Committee in general or of the Defendant in particular. Even if that were the test I do not consider that they would either found any fresh cause of action or provide the Applicant with any useful evidence in support of his case. I further note that no application had been made by him between 1995 and 1998 to amend his Order of Justice to add to or further explain his case by reference to these documents. In his Notice of Appeal the Applicant states that: "The law of prescription does not restrict itself to only when the misbehaviour took place but also to when evidence revealed itself of misbehaviour or corruption." This, as appears below, is not an accurate statement of the Law of Jersey on the topic, but even if it were, it is clear that the Applicant is relying on these minutes not as evidence of something which he alleges was previously not within his knowledge, but rather as further evidence of matters of which he knew at the relevant times in 1989, 1990, and 1992 and of which complaint is made in the Order of Justice. That this is so is clearly confirmed by the Reply filed by the Applicant and his wife on 18 October 1993, in proceedings brought by them against the Tourism Committee of the States of Jersey, to which this Court was referred. Those proceedings make very similar allegations against the Committee as those which are made against the Defendant in the present case. The provisions of Article 2(2) of the Law Reform (Miscellaneous Provisions) Law, 1960, quoted above preserve the rule of Jersey Law expressed in the maxim "à qui est empêché d'agir la prescription ne court point." This maxim was exhaustively considered by this Court in *Public Services Ltd -v- Maynard*

(1996) JLR 343 . In giving the judgment of the Court, Southwell JA, after a detailed historical survey of the writers and other sources, and having explained the distinction between "empêchements de droit" and "empêchements de fait" said at p351: "The principle

underlying the application of the maxim (à qui est empêché d'agir la prescription ne court point) to empêchements de fait is, in our judgment this. Prescription does not run and is suspended while the plaintiff or potential plaintiff is prevented by a practical impossibility from exercising his right to commence or to continue legal proceedings. Such a practical impossibility may exist as a result of war, civil disturbance or imprisonment, or being held hostage..." Later, in setting out a summary of the Courts conclusions the judgment concludes that mere ignorance does not take the maxim into operation; however where there is an impediment creating such a practical impossibility of which ignorance is a part then the maxim may come into operation and may prevent time running. However, the position is different, according to Terrien and Poingdestre, where the ignorance is brought about by the fraud or bad faith of the Defendant; and one refers there to the passages quoted at p352 of the Judgment in the Public Services Committee case; thus Terrien on Commentaires du Droit Civile at p321 refers to a case where the maxim applied where the ignorance of the Plaintiff resulted from "la fraude et mauvaise foi" of the Defendant. Poingdestre on Les Lois et Coutumes de l'Isle de Jersey referred to ignorance brought about by the bad faith of the Defendants. Advocate Belhomme for the Defendant accepted that, by Jersey Customary Law, prescription will not run in respect of claims founded on a concealed fraud, not otherwise discoverable by the victim with due diligence and he referred the Court in this connection to the case of Perrot -v- Le Breton (1891) 11 CR 29. Paragraphs 4, 7 and 9 of the Order of Justice contain certain allegations of fraud against the Defendant, but no allegation that such matters were concealed from Mr Eves and not otherwise discoverable by him. Moreover none of the material before this Court suggests that the Applicant was in ignorance of the matters of which he makes complaint in the Order of Justice or that such matters were concealed from him until he received the minutes in July, 1995, or had the alleged later conversation with Mr David Brown in March 1997. On the contrary, as I have stated above, it is clear from what is pleaded in the Order of Justice itself, and in the Reply in the proceedings against the Tourism Committee and furthermore from what Mr Eves told the Court in the course of his submissions it is clear that he was well aware of the matters of which he makes complaint, and which form the subject matter of his claim, at the relevant times in October 1989, 1990 and 1992 and, in any event, by not later than October, 1993. Indeed there is no apparent link between the receipt of the minutes in July 1995, and the commencement of proceedings in December 1997. Moreover, it is to be noted that the Notice of Appeal states as follows: " That the extent to which the Defendant was involved in the conspiracy to defame the Plaintiff was further substantiated ..." by the matters relied on. This indicates that the Applicant was indeed already in possession of information which he alleges substantiated a claim for conspiracy against the Defendant. Accordingly, in my judgment there are no grounds of substance raised in Mr Eves amended Notice of Appeal which would entitle him to have the Royal Court's Order striking out the relevant paragraphs of his Order of Justice set aside or to have the matter remitted to the Royal Court for a further hearing. Finally, in paragraph 5 of the amended Notice of Appeal the Applicant complained of the fact that he was in this action impugning the conduct of a member of the Committee of the States and

that the Deputy Bailiff was a colleague of the Defendant in that, by his office, the Deputy Bailiff was "the President of the States". The Deputy Bailiff was, Mr Eves asserted, in effect a judge in his own cause and this was alleged by the Applicant to be a breach of Article 6 of the European Convention on Human Rights and of the Applicant's entitlement to have a fair hearing by "an independent and impartial tribunal." In this connection the Applicant mentioned, but did not refer the Court to a recent decision of the European Commission in relation to the position of the Bailiff of Guernsey. In my judgment this ground of appeal has no substance. The Bailiff and in his place the Deputy Bailiff sit both as President and Deputy President of the States and the head of the judiciary, but this ground alone is insufficient to argue that the Deputy Bailiff should not have presided at the hearing. Although the Deputy Bailiff has duties in the States such duties do not extend to responsibility for the performance by Committees or agencies of the States or of their functions. The Deputy Bailiff had had nothing to do with the reaching of the decisions of the Committee of course and his position as Deputy President of the States is, in my judgment, no more of a bar to his hearing this matter than was the position of the Bailiff as determined in *Mayo SA & Ors -v- Cantrade Private Bank (Switzerland) (CI) Ltd & Ors* (1 December 1997, and 28 May 1998) Jersey Unreported. That case concerned a decision of the Bailiff refusing an application that he recuse himself on account of his position. We adopt the Judgment of the Hon. Michael Beloff, QC, as a correct statement of the principles to be followed when such an argument is raised. For these reasons I would refuse the applications which are made before us in this matter. SOUTHWELL, JA: I agree and have nothing to add. GLOSTER, JA: I agree Authorities Royal Court Rules, 1992 (as amended) Rule 6/5, 6/13 Law Reform (Miscellaneous Provisions) (Jersey) Law, 1960 Court of Appeal (Civil) (Jersey) Rules, 1964, Rule 12 Court of Appeal (Jersey) Law, 1961 (as amended), Article 13(e) Public Services Committee -v- Maynard

- (1996) JLR 343 *Perrot -v- Le Breton* (1891) 11 CR 29 *Wentzinger -v- Castel Esnol* (1991) 215 Ex. 112 Discussion on Costs THE PRESIDENT: Mr Eves? THE APPLICANT: Excuse me, Sir, may I address the Court on this matter, Sir? THE PRESIDENT: You can't re-argue the case. You've argued your case and we've given the decision. If you wish to ask for some further relief, then do so, THE APPLICANT: I'd like to make application for leave to appeal to the Privy Council with the intention of taking the matter to the European Court of Human Rights. I think I should refer to the Andrew Edward's Report if I may, briefly: "Time Bars. Jersey Law requires a prosecution statutory offences must be brought within three years of the date when the alleged offences were committed. The Jersey Authorities are recommending to their Parliament, rightly in my view, that all such time bars to prosecution should be repealed". THE PRESIDENT That concerns criminal matters, not civil. It is a recommendation to which I was a party and it has nothing to do with civil cases at all. It solely relates to prosecutions of criminal offences. THE APPLICANT: Well, I'd still like to make the application, Sir. THE PRESIDENT: Yes. Mr Eves, do you have anything else to say? THE APPLICANT: No, Sir. THE PRESIDENT: Well, I should tell you that one problem that you face in making this application is that this Court has on many

occasions held that it has no jurisdiction to give leave to appeal to the Judicial Committee of the Privy Council in interlocutory matters. And furthermore, this was ... by this decision we have refused leave in relation to an interlocutory matter so there's a double lack of jurisdiction in this Court. THE APPLICANT: Yes, Sir. So, can you advise me what ...? THE PRESIDENT: So, I therefore don't refuse your application because I've no - we've no jurisdiction either to grant or refuse it. But - you don't have such leave. THE APPLICANT: I understood it was within your jurisdiction, Sir, to grant leave to the Privy Council. THE PRESIDENT: Not against a refusal of leave and not against an interlocutory matter. THE APPLICANT: I believe there was a case earlier on this week, I think it was the first case of the week where permission was given to - for a client to go to the Privy Council. THE PRESIDENT: That was not an interlocutory matter. Yes? ADVOCATE BELHOMME: Excuse me, Sir. Following the Court's judgment I wonder if I could make an application for full indemnity costs. THE PRESIDENT: Why do you say indemnity costs? ADVOCATE BELHOMME: Well, Sir, I am aware in making that application that it's necessary to show some special or unusual feature about the case; or some particular reason for departing from the normal rule for taxed costs. But, Sir, in my submission this would be an appropriate case in which to depart from the normal rule. Sir, the judgment of the Court urged the applicant to be cautious before proceeding further. He nevertheless chose to do so and in doing so, Sir, he pursued a purported appeal out of time in the absence of leave. And, Sir, he was specifically placed on notice by me in my letter dated 13 May, which appears at divider 24 of the respondents bundle, that at the appropriate time if necessary I would apply for indemnity costs. Sir, finally, in my submission, the nature of the allegations made in the paragraphs which were struck out were vexatious. And for all of those reasons, Sir, I would invite the Court to find that this a case in which it could properly depart from the usual rule and make an order for full indemnity costs. GLOSTER, JA: The point that the allegations were vexatious was something you could have pursued below, but you didn't. ADVOCATE BELHOMME: I'd have to concede that's the case, Madam. THE PRESIDENT: Mr Eves, we are not minded to grant indemnity costs, but we'd like to hear you, please, as to why you shouldn't pay the costs of this matter and in particular of the appeal...? THE APPLICANT: I think you very lucidly said it in your judgment, Sir, that if the Royal Court hadn't gone ahead in my absence and I believe that I gave full and ample notice that I wasn't available on that particular time, there wouldn't have been any prejudice to the defendant or to myself if this case had come before the Royal Court in the normal way and as soon as possible after 7 April. We are ten months down the line and nothing happened in the intermediate time. THE PRESIDENT: But Mr Eves, we have held that there really wasn't any substance in anything which you had to say either then or now. THE APPLICANT: Well, that may be the case, Sir, but this is only a certain number of allegations in the Order of Justice. In that case, Sir, I would ask for the costs to be in the cause because there are other items in the Order of Justice which still have to come before the Royal Court which reflected on what's been going on. In the meantime, Sir, I would ask for costs in that case to be in the cause. THE PRESIDENT: Well, we make an Order here that Mr Eves pay the taxed costs of this appeal. BAILII: Copyright Policy | Disclaimers |

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