

JERSEY / JUDGMENT

B -v- M-R [2007] JRC 139 (17 July 2007)

[2007] JRC 139

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judgment

the deputy bailiff: 1. This is an appeal against the decision of the Deputy Registrar of the Family Division striking out the Appellant's claim because of a failure to comply with Rule 6/26(1) of the Royal Court Rules, which requires a plaintiff to issue a summons for directions within one month of the close of the pleadings. For convenience, despite the fact that they are divorced, we shall refer to the Appellant as the husband and the Respondent as the wife. We announced our decision at the conclusion of the hearing and now give our reasons. The background 2. The parties commenced a relationship in 1984 and married in 1993. In the early part of their relationship they lived in London but thereafter they lived in Jersey where the wife had a house. There are two children of the marriage born in 1994 and 1998 respectively, so that they are now 13 and 9. The parties separated in 2000 when the husband returned to live in London. Initially he continued to visit Jersey approximately once a month to see the children. 3. On 18th September 2000 the husband signed a separation agreement which had been drawn up by the wife's advocates. It provided for joint custody of the children with care and control to the wife and reasonable access to the husband. It also provided that neither party would make any claim for maintenance, lump sum or other financial relief against the other. 4. A decree nisi was granted to the wife on 21st March 2001 at which time the separation agreement was ratified by the Court so that it became an order of the Court. 5. Thereafter problems began to arise in connection with access by the husband to the children. In January 2003 he was granted legal aid in the United Kingdom in connection with such matters. There were a number of hearings. The wife was enjoined from removing the children from the United Kingdom but breached this by returning to Jersey. There were subsequent proceedings in the Family Division of the High Court and eventually on 12th March 2003, at a hearing before Bennett J, it was agreed that the wife could return to Jersey with the children and that access proceedings would continue here. The husband alleges that, on the same occasion, the parties agreed that the wife would recommence voluntary monthly payments of £1,000 which she had been making to the husband but which she had stopped some time before that hearing. This was endorsed by counsel on their briefs. 6. The husband obtained legal aid in Jersey on 17th March 2003 to pursue the question of access in Jersey and shortly afterwards issued a summons seeking access. There were then a number of hearings before the Registrar and the production of a number of reports. Although initially an order was made for direct access, more difficulties arose and that was changed in June 2004 to an order for indirect access pending a further hearing. After further hearings and further reports

the Registrar referred the matter to the Royal Court on 16th May 2005. There followed a directions hearing before the Bailiff on 20th June 2005, the production of affidavits by the parties and a report by Doctor Glaun. Eventually, on 20th January 2006 a consent order was approved by the Bailiff. This contained detailed provisions and in essence it provided for indirect contact with the stated long term goal of developing face to face contact when the children were ready; there were detailed provisions about the method of indirect contact and the wife agreed to continuing to encourage contact with the husband as it developed. 7. Sadly the consent order did not have the desired effect and from February 2007 onwards there have been further directions hearings with a final two day hearing on the issue of contact now fixed for August. At a directions hearing on 8th February 2007 the Bailiff said this:- "Well the longer one leaves it the more impossible it becomes, and I mean we have reached the stage when we almost have to acknowledge that the court system has failed Mr B actually, and I am really very unhappy that this has taken so long and that we have made so little progress in the four years that it has been before the Court. Either we accept that the judicial system has failed the father and he can have no contact with his children at all, or something more robust has to be done...." 8. Naturally, this Court has no knowledge of the rights and wrongs of the contact dispute which is for consideration by a differently constituted court in August. The only reason for referring briefly to the history of the contact proceedings is that the husband argues that his failure to comply with the required timetable in the present proceedings is attributable to the existence of the contact proceedings and accordingly it has been necessary to describe the factual background in this respect. The financial proceedings 9. In November 2003 the husband was granted legal aid in Jersey in relation to matrimonial finance. A further certificate was issued in August 2004. He has now issued two sets of proceedings in this connection. 10. The first was an Order of Justice ("the First Action") issued in the Samedi Division on 3rd August 2004 in which he claims arrears of the £1,000 monthly payment described in the endorsement on counsel's brief referred to at paragraph 5 above. The amount claimed as at the date of the Order of Justice was £17,000. There was some preliminary skirmishing and the husband in due course agreed to amend the Order of Justice so as to make it clear that the endorsement did not form any part of the order of Bennett J but was merely referred to on counsel's brief. The wife filed an amended answer on 23rd February 2005. 11. Rule 6/26(1) provides that a plaintiff must issue a summons for directions within one month of the time limited for filing pleadings has expired. Allowing 21 days for the possible filing of a reply, the husband should have issued a summons for directions by the middle of April 2005. He failed to do so. We shall return to the history of the matter after we have described the second set of proceedings. 12. On 14th October 2004 the husband issued a second Order of Justice ("the Second Action") in the Samedi Division seeking an order that the separation agreement should be declared null and void and the Order of the Court ratifying it on 21st March 2001 to be set aside or varied on the basis that the wife had made no disclosure of her financial position, that the husband had not had any legal advice; alternatively that he had been under the undue influence or duress of the wife or there had been an inequality of bargaining power. 13. There was some correspondence between the parties' advocates, with the wife's advocates contending that proceedings of this nature had to be brought in the appropriate form in the Family Division in accordance with the relevant Matrimonial Causes Rule, not by way of Order of Justice in the

Samedi Division. However, nothing came of this and in due course an answer was filed by the wife on 22nd December 2004. Allowing again for the possibility of a reply, this means that the husband should have issued a summons for directions by the middle of February 2005. No such summons was issued. 14. No further step was taken by the husband in either of these two actions until 20th July 2006 when Ogier sent Viberts an affidavit of the husband setting out his evidence in respect of the two actions. Technically, this was not a step in the action as it is not something envisaged by the Rules. There had been some earlier correspondence in that, on 24th March 2006 Ogiers had written to Viberts to the effect that, now that the children's matters had largely been finalised, they were preparing to restore the husband's financial proceedings. They said that they had not wanted to advance these until the children's matters were finalised. The letter also dealt with some belongings and they sent a reminder on 4th May before sending the affidavit on 20th July as already referred to. In that letter Ogiers also raised the possibility of mediation, but again there is no evidence of any reply. 15. The next thing that happened was that on 4th September 2006 the Master issued one of his periodic circulars listing those cases which he was minded to dismiss under Rule 6/26(13) (because of the failure to issue a summons for directions) and informing parties that, if they objected to an action being dismissed, they must issue a summons within 28 days to show cause why the action should be allowed to continue. Both of the husband's actions were on the list attached to the circular. 16. The husband duly issued appropriate summonses. He sought orders not only that the actions be permitted to continue but also that they be consolidated and transferred to the Family Division. On 22nd November 2006, by consent, the Master made an order transferring the actions to the Family Division and ordering that the husband's summonses to be allowed to continue the actions should be heard before the Registrar of the Family Division. 17. The summonses duly came before the Deputy Registrar and on 4th January 2007 she struck out both actions. It is against those decisions that the husband appeals. 18. At the commencement of the appeal the Court raised with counsel the issue of whether Rule 6/26 could apply to the Second Action. This was on the basis that Rule 6/1 states specifically that Part 6 of the Royal Court Rules does not apply to matters referred to in Article 3 of the Matrimonial Causes (Jersey) Law 1949 ("the 1949 Law") and that the Second Action (although not described as such in the Order of Justice) could in fact only be an application under Article 27(1) and/or Article 33 of the 1949 Law because it was seeking to discharge or vary an existing Order of the Court as well as the separation agreement itself. Both counsel said that they would like time to consider this point and it was agreed that it would be wrong to proceed without counsel having such an opportunity. Accordingly the appeal in respect of the Second Action was adjourned. The rest of this judgment is therefore concerned only with the First Action. The Law 19. The Deputy Registrar applied the well known three limbed test established in cases of dismissal for want of prosecution under the inherent jurisdiction of the Court. The test was conveniently summarised in *Kinsella v Lido Bay Hotel (Jersey) Limited*

- [2001] JLR 247 . Thus the Court asks itself:- (i) Has there been inordinate delay; (ii) is that delay inexcusable; and (iii) if so, does such delay give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action, or is such as is likely to cause or to have caused serious prejudice to the defendant? 20. However, since the Deputy Registrar's decision, the Court has held in *Lescroel v Le Vesconte*
- [2007] JRC 091 that the test to be applied when considering whether to dismiss an action under Rule 6/26(13) is somewhat different. At para 25 of *Lescroel* the Court said that in such cases the Master should consider the following three questions:- (i) Has the plaintiff satisfied him that, apart from the failure to issue a summons for directions as required by Rule 6/26, he (which includes his advisers) has prosecuted his case with at least reasonable diligence? That does not mean that there is no room to criticise any aspect of his conduct of the case but that overall he is innocent of any significant failure to conduct the case with expedition, having regard to the particular features of the case. If the plaintiff has not so satisfied the Master, that will point strongly towards dismissal of the case. Clearly the weight to be attributed to this particular factor may vary depending on whether the matter comes before the Master shortly after the expiry of the permitted two-month period or much later. (ii) Has the plaintiff satisfied the Master that, in all the circumstances, his failure to apply for a summons for directions is excusable, i.e. should be forgiven? If he fails to satisfy the Master in this respect, this again will point towards dismissal. (iii) Has the plaintiff satisfied the Master that the balance of justice indicates that the action should be allowed to continue? If not, then again, this will point towards dismissal." 21. Mr Le Quesne pointed out quite correctly that the Court in *Lescroel* was not referred to *Kinsella* or the line of cases from which it derived and that the result of *Lescroel* was to lead to a difference of approach on different applications as follows:- (i) Where a defendant applied for the Court to dismiss the plaintiff's claim for want of prosecution under its inherent jurisdiction, the *Kinsella* test applied. (ii) Where the Court was considering whether to dismiss an action of its own volition under Rule 6/25(1) (on the ground that no further steps had been taken for five years after the action had been adjourned sine die) or under Rule 6/25(2) (on the ground that the trial had not been completed three years after the matter had been set down on the hearing list) the *Kinsella* test would also apply. (iii) Conversely, where the Court was considering whether to dismiss under Rule 6/26(13) (on the ground that the plaintiff had not issued a summons for directions within the two-month period laid down by Rule 6/26(1)) the *Lescroel* test would apply. 22. We agree that Mr Le Quesne accurately describes the position. However we do not think that this is surprising. In the case of dismissal for want of prosecution under the court's inherent jurisdiction and in cases of dismissal under Rule 6/25, there has not been any disobedience of a Rule by the plaintiff. The plaintiff has simply allowed matters to drift for a long period without taking any action. In those circumstances the *Kinsella* test would appear still be to be appropriate. 23. An application under Rule 6/26(13) is different. Rule 6.26(1) was introduced in order to ensure that cases could no longer fall into a black hole; hence the requirement to issue a summons for directions which enables the Master

to give case management directions to ensure the timely progress of the matter to trial. This includes ordering the parties to attend before the Bailiff's Judicial Secretary within a specified period in order to fix a date for trial. The sanction in Rule 6/26(13) of dismissing the action for non compliance with this requirement is undoubtedly something of a nuclear option but was intended to ensure compliance by plaintiffs. It follows that, on any application to dismiss under Rule 6/26(13), the plaintiff has failed to comply with a specific requirement of the Rules and it is therefore appropriate that the Court should apply a somewhat stricter test in such cases. It was clearly considerations of this nature which led the English Court of Appeal to introduce a similar approach in *Rastin v British Steel Plc*

[1994] 2 All ER 641 for dealing with a provision whereby a County Court could reinstate an action which had been struck out automatically because of a failure to apply for a hearing date within a specified period. 24. It is perhaps worth mentioning that we would envisage the existence of Rule 6/26 leading gradually to a reduction in applications to strike out for want of prosecution under the Court's inherent jurisdiction or under Rule 6/25. This is for two reasons. First, if plaintiffs comply with Rule 6/26(1), the case management directions given by the Master should ensure that cases cannot drift for long enough to render them vulnerable to dismissal under the inherent jurisdiction or under Rule 6/25(2). Conversely, if a plaintiff fails to apply for a summons for directions, then, whether pursuant to an application by the defendant under Rule 6/26(2) or of its own volition under Rule 6/26(13), the Court is likely to consider whether to dismiss the action on such ground long before enough time has elapsed to allow an application to dismiss to be brought under the inherent jurisdiction or under Rule 6/25(2). We accept that cases may still continue to arise under Rule 6/25(1) because the requirement to issue a summons for directions under Rule 6/26(1) will not arise if the matter has never been placed on the pending list. 25. We should at this stage mention one other point raised by Mr Le Quesne. He submitted that the questions posed in *Lescroel* must be considered sequentially; in other words the Court should only go on to consider the next question if the plaintiff has succeeded on the previous question. Thus, if the plaintiff fails to satisfy the Court that, apart from his failure to issue a summons, he has prosecuted his case with the least reasonable diligence, the Court should go no further and should dismiss the action. Similarly, if in relation to the second question the plaintiff fails to convince the Court that his failure to apply for a summons for directions is excusable, the Court should not go on to consider the balance of justice. 26. We do not agree with that analysis. A decision as to whether to dismiss an action without considering the merits is clearly an important discretionary decision which should be taken on the basis of all the circumstances of the particular case. It would be inconsistent with the existence of such a discretion for the Court to be bound rigidly by a series of sequential hurdles which the plaintiff has to surmount if he is to succeed. In our judgment the three questions are simply an attempt to provide some guidance as to the matters which should be considered on such an application. For example, if the plaintiff is only in default by one month when the matter comes before the Court, we think it highly unlikely that the Court would dismiss the action even if satisfied

that there was no excuse for the failure to issue a summons. The remedy of dismissal would simply be disproportionate for the breach involved. An award of costs against the plaintiff (or his advocates) coupled with the giving of directions to progress the matter would in many cases be a much fairer outcome. 27. Nevertheless the discretion must be exercised against the backdrop so clearly described by Bailhache, *Bailiff in De Freitas v Citadel Trust Limited*

[2005] JRC 035C at paragraph 25, which was quoted in *Lescroel* but which bears repetition:- "The whole purpose of Rule 6/21 [now Rule 6/26] is to ensure the diligent prosecution of the case by the plaintiff. It must be borne in mind in the future that on 31 st October 2003 the Master sent a circular letter to all members of the legal profession stating that 'The Bailiff has indicated the wish of the Royal Court to ensure that existing actions progress as quickly as is reasonably practicable. Furthermore, in relation to new actions, it is the expressed wish of the Royal Court that all parties and their advisers seek to have actions disposed of within 12 months of their commencement wherever that is possible'. That letter was followed by a further circular by the Master on 26 th February 2004 where it was stated 'It should not be assumed that the Master will readily agree to an action being allowed to continue. He will require the applicant to convince him that it is appropriate.'" Those comments were made in the context of a period of five years before the Court could strike out the case for failure to issue a summons for directions but the principle remains applicable. 28. Given that *Lescroel* had not been decided when this matter came before the Deputy Registrar, it is not surprising that she applied the *Kinsella* test. However, both parties accept that that was the wrong test and accordingly we must exercise our discretion afresh today.

Submissions

29. We received affidavits from the husband and the wife. The husband's case is simple. His first priority was to re-establish contact with his children. He wanted to concentrate on achieving that objective in priority to dealing with his financial position. The situation over contact was extremely difficult and there was considerable tension between the parties. The husband believed that pressing ahead with his two financial claims would only exacerbate the situation and make it less likely that the wife would ever agree to any compromise over contact. He believed that she was influencing the children against him and that her anger over the fact that he was bringing these financial claims would affect the position. He also believed that certain statements by or on behalf of the wife confirmed this risk. Thus in an affidavit on 5 th November 2004 in connection with the contact proceedings the wife had sworn this:- "7 That Mr B has lodged two sets of Royal Court proceedings in relation to finances, including the overturning of a consent order, which I believe has not only had an effect on my relationship with Mr B but has also effected (sic) the relationship between Mr B and the children. The children have unavoidably become aware of these proceedings. That I believe that the financial proceedings are motivated by Mr B's annoyance in relation to these proceedings and I believe they are vexatious proceedings which are intended to place myself

and the children under pressure." 30. In her answer to the Second Action the wife stated at paragraph 16(a):- "Owing to the passage of time since the agreement was ratified by the Court, the appellant is estopped from bringing this application, which has been brought in the respondent's view because the appellant is frustrated at the outcome of his application before the Court for access to the children of the marriage." 31. The wife strongly denies that, by these passages, she intended to convey any impression that pursuing the financial actions would impact in any way on the contact proceedings or affect what she said to the children about the husband. For the purposes of this hearing we are content to accept her assurance that she did not mean to convey such a message but we can understand the husband interpreting these passages in a manner which confirmed his belief that pursuing the financial actions might be detrimental to his position in the contact proceedings so far as the wife's attitude was concerned. 32. The husband asserts that the contact issue appeared to have been resolved by the consent order of 20 th January 2006 although there were immediate delays and difficulties in putting it into operation. Nevertheless things appeared to be on their way towards being satisfactorily settled by March and accordingly it was on 24 th March 2006 that Ogiers wrote to Viberts explaining that, now that the children's matters had been finalised, they were proposing to restore the husband's financial proceedings. 33. Mr Le Quesne points out that there had been nothing from Ogiers prior to 24 th March informing the wife that the financial proceedings had been put on hold pending resolution of the contact proceedings. The husband's position was therefore simply not believable. Furthermore, even after 26 th March, the husband and his lawyers had taken no step in the action until service of the affidavit on 20 th July and had indeed still not issued the summons for directions by the time of the Master's circular in September. There had accordingly been a delay of approximately 11 months from when the summons should have been issued to the March 2006 letter and a further 6 months from then until the Master's circular. 34. Mr Thompson accepts that there had been no positive progress after the March letter but he pointed out that Viberts had never replied to the March letter; that Ogiers had written a chaser on 4 th May, to which there had also been no reply; and that in the letter of 20 th July enclosing the affidavit, Ogiers had suggested mediation as a way forward but there had been no reply to this letter either. Decision 35. Mr Le Quesne was quite right to remind us of the importance which the Court attaches nowadays to parties taking all steps to progress matters expeditiously. The husband has come within a hair's breadth of his action being struck out, but we have concluded that, on balance, we should allow it to continue. 36. Our reasons are as follows:- (i) As to the first question in Lescroel , we find that the husband has not prosecuted his case with at least reasonable diligence apart from the failure to issue a summons for directions. There was no progress in the action between the close of the pleadings in early 2005 and the production of the affidavit in July 2006. (ii) The real issue relates to the second question; was the failure to issue the summons excusable? Questions of contact are extremely emotional matters. We have considered Mr Le Quesne's submissions but we accept that the husband was desperate to re-establish contact with his children and that this was of overriding importance to him. It was a tense and difficult situation with many hearings, coupled with allegations of misconduct in relation to the children against

the husband by the wife. We accept that he came to believe that pushing forward with the financial claims would inflame matters and would render it more difficult to make progress on the contact front. (iii) We accept of course, as indicated by the Deputy Registrar, that it is normal for claims in relation to finances and children to move forward together. We would not encourage any spouse engaged in a matrimonial dispute in future to read into this decision any suggestion that it is generally in order to leave a claim for financial relief outstanding pending the outcome of any dispute over custody or contact. We also agree with the Deputy Registrar that delay is the enemy of justice just as much in the Family Division as it is elsewhere. However we regard this case as exceptional and can understand why the husband felt that he had to concentrate on sorting out the very difficult and tense contact proceedings before (as he saw it) raising the temperature by pressing ahead with financial claims which were somewhat historical and would undoubtedly be seen by the wife as an attempt to go back on matters which had been dealt with some time earlier. Accordingly, in the particular and unusual circumstances of this case, we find that the husband's failure to issue a summons for directions was excusable. (iv) We must consider next the balance of justice in the context of our findings on the first two issues. We bear in mind that this is a dispute in a matrimonial context. We think that to strike out the husband from pursuing the matter simply because of his failure to issue the summons for directions would, in the particular circumstance of this case, be disproportionate. We do not think that (apart of course from having to face the claim) the wife would suffer any prejudice by reason of the delay. The First Action is a simple claim for breach of contract and was started within approximately 16 months of the first alleged breach of contract. This is not therefore one of those cases referred to in *Garfield-Bennett v Philipps* 2002/214 Jersey Unreported where it was stated that the later a plaintiff starts his action, the higher his duty to prosecute with all due speed. A pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time which has already passed before the proceedings are issued. The First Action is a simple claim for breach of contract with the witnesses being the parties, their counsel and possibly their solicitors at the time of the hearing before Bennett J. We conclude therefore that the balance of justice points in favour of the action being allowed to continue. 37. For these reasons we allow the appeal so that the action may continue. We remit the matter to the Deputy Registrar so that she may give directions for its speedy progress to trial. *Authorities Matrimonial Causes (Jersey) Law 1949. Kinsella v Lido Bay Hotel (Jersey) Limited*

[2001] JLR 247 . *Lescroel v Le Vesconte*

[2007] JRC 091 . *Rastin v British Steel Plc* [1994] 2 All ER 641. *De Freitas v Citadel Trust Limited*

[2005] JRC 035C . *Garfield-Bennett v Philips* 2002/214. Page Last Updated: 27 Mar 2017 BAILII:
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