

JERSEY / JUDGMENT

B -v- MR [2007] JRC 199 (22 October 2007)

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judgment

deputy bailiff: 1. This is an adjourned appeal against a decision of the Deputy Registrar to strike out the claim of the appellant. We will for convenience refer to the appellant as the husband and the respondent as the wife, albeit that the parties are now divorced. 2. The matter originally came before the Court on 29 th June, 2007. The husband had instituted two actions against the wife in relation to financial matters. The first ("the First Action") related to arrears in respect of an alleged agreement between the parties whereby the wife would pay the husband £1,000 per month. The second ("the Second Action") was an application by the husband to set aside an order made by the Royal Court upon the granting of decree nisi ratifying a separation agreement entered into between him and the wife. Both actions had been struck out by the Deputy Registrar following circulation of a list by the Master which included these two actions as matters where the husband, as plaintiff, had failed to comply with Rule 6/26(1) Royal Court Rules 2004 i.e. he had failed to issue a summons for directions within the stipulated period. 3. At the hearing on 29 th June, the Court questioned whether Rule 6/26 had any application to the Second Action because of the provisions of Rule 6/1. Accordingly the application in respect of the Second Action was adjourned for further research by counsel. However, the appeal in respect of the First Action went ahead. The Court allowed the appeal and reinstated the First Action. The Court gave reasons for its decision in a judgment dated 17 th July. In that judgment the Court set out the procedural history of both actions and the related contact proceedings concerning the children in some detail. We do not propose to repeat the factual background. We incorporate paragraphs 2 - 17 of that judgment by reference. Rule 6/26 4. The matter came before the Deputy Registry on a summons by the husband asking that the two actions should be permitted to continue notwithstanding a failure to comply with Rule 6/26(1), namely the issue of a summons for directions. 5. Both counsel now accept that, for the reasons set out in paragraph 18 of the July judgment, Rule 6/26(1) has no application to the Second Action because of the terms of Rule 6/1, which 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 . It is now accepted that the Second Action is caught by this provision because it is seeking to discharge or vary the order of the Court which ratified the separation agreement. Accordingly there was no jurisdiction in the Master to include the Second Action in the circular listing matters for dismissal for breach of Rule 6/26(1) and it further follows that the decision of the Deputy Registrar (which followed on from that circular) cannot stand. 6. However, as explained in the July judgment, the decision in *Lescroel v*

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[2007] JRC 091 , which sets out the correct test in relation to the dismissal of actions pursuant to Rule 6/26(13), had not been decided when the matter came before the Deputy Registrar. She applied the test set out in *Kinsella v Lido Bay Hotels (Jersey) Limited*

[2001] JLR 247 which is of course the well established three-limbed test for dismissal under the inherent jurisdiction of the court for want of prosecution. 7. Advocate Thompson argued that we should simply allow the appeal on the basis that the Deputy Registrar's decision cannot stand because Rule 6/26 has no application to the Second Action and leave it to the wife, if she so wishes, to issue a new summons for dismissal for want of prosecution under the inherent jurisdiction. But, as Advocate Le Quesne pointed out, this would be a pointless exercise. The Deputy Registrar has already decided the matter on the basis of the *Kinsella* test and the parties have prepared their skeleton arguments on the basis that that is the appropriate test to consider today. To insist on the wife issuing a new summons when all parties are ready to deal with the matter on the merits today would be to incur additional and unnecessary time and expense. We therefore granted leave to the wife forthwith to issue a summons for dismissal for want of prosecution under the inherent jurisdiction and proceeded to hear argument on the basis that that was the matter before the Court. 8. On such an application the Court must ask itself three questions:- (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 it such as is likely to cause or to have caused serious prejudice to the defendant? In order for a defendant to succeed, he must persuade the Court to give a positive answer on all three matters. Discussion 9. As described in the July judgment, the Second Action was begun by order of justice issued on 14 th October, 2004. The wife filed an answer on 22 nd December, 2004. No further formal step in the proceedings had been taken by the husband by 4 th September, 2006, when the Master issued his list. There had been some correspondence in relation to the matter. On 24 th March, 2006 the husband's advocates, Ogiers, had written to the wife's advocates, 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 Ogiers sent a reminder on 4 th May. On 20 th July they sent Viberts an affidavit of the husband setting out his evidence in respect of the First Action and the Second Action. Technically, this was not a step in the actions as it is not something envisaged by the Rules. At the same time they raised the possibility of mediation but there is no evidence of any reply. It follows that there was a delay of some 15 months (December 2004 to March 2006) when nothing happened at all and some 20 months (December 2004 to the beginning of September 2006) when no formal steps were taken in the Second Action. 10. We have no difficulty in finding such a delay to be inordinate and indeed Mr Thompson very realistically did not contend to the contrary. 11. The next question is whether such a delay is excusable. The husband's grounds for submitting that it is are exactly the same as in

relation to the First Action. These are described at paragraphs 29 - 34 of the July judgment. In briefest outline the husband's case is that his first priority was to re-establish contact with his children. He wanted to concentrate on achieving that objective. 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 beginning these financial claims would affect the position. He says that the contact issue appeared (wrongly, as it turned out) to have been resolved by a 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 contact matter had been finalised, they were proposing to restore the husband's two sets of financial proceedings. Mr Thompson accepted that there had been no positive progress after the March letter but 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. 12. In the July judgment, the Court accepted that the failure by the husband to issue a summons for directions in relation to the First Action between April 2005 and September 2006 had been excusable. Its reasons were set out in paragraph 36(ii) and (iii) which for convenience, we quote in full:- "36 (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." 13. Mr Thompson accepted that this was a different court which must reach its own conclusion. He also accepted that there was a technical difference between the two cases in that, in the First Action, the question pursuant to the test in *Lescroel* was whether the failure of the husband to issue the summons for directions was excusable whereas, in the present case, the question was whether the delay on the part of the husband was excusable. Nevertheless, he said that, given the fact that the period of delay in the two cases occurred at the same time and of was very similar length, that the reason for the delay in each case was identical (in that it related to his fear of prejudicing the outcome of the proceedings in relation to the children), and that the question to be asked in each case, although not identical, was extremely similar, it would be a strange outcome if the Court were to decide that the husband's conduct in relation to the First Action was excusable but that in relation to the Second Action it was inexcusable. 14. Mr Le Quesne accepted that, if the situation in the two cases were identical, he would expect a similar outcome in relation to excusability. However he submitted strongly that it was not. Firstly the delay in the present case was some 20 months whereas the delay in the First Action - where the wife's amended answer was filed on 23 rd February, 2005 but, allowing for the period permitted for issuing the summons for directions, the period of delay did not begin until mid-April - was just under 17 months. Secondly, and more importantly, the Court had to consider the nature of the action and the delay in instituting it when considering whether any post-action delay was excusable. He referred in particular to *Garfield-Bennett v Phillips* (Jersey Unreported 2002/214) at paragraph 12 where the Court stated:- "(i) It is clear that the later a plaintiff starts his action, the higher his duty to prosecute it 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 that has already passed before proceedings were issued. (See Lord Diplock in *Birkett -v- James* at 322). This is particularly important in the context of the lengthy limitation period of ten years under Jersey law. The need for a plaintiff to act with diligence and expedition in such circumstances is that much more necessary in Jersey." 15. He pointed out that the separation agreement was signed in September 2000 and was ratified by the Court on decree nisi in March 2001. The husband had therefore delayed some four years from the signing of the agreement before commencing proceedings to set it aside. This was quite different from the First Action where the husband had waited only 15 months before claiming for breach of the alleged agreement by the wife to pay an allowance. There was therefore a much greater need for the husband to get on with the Second Action. Furthermore, he submitted, the nature of the claim was relevant. The First Action was a simple claim for a breach of contract. The Second Action sought to set aside the financial arrangements ratified by the Court. If this were successful, there would be a fully contested hearing as to what, if any, financial provision the wife should make for the husband some seven or eight years after the event. Greater justification for delay in such a case was required. He pointed out that, in the July judgment, the Court had said that the husband had "come within a hair's breadth of his action being struck out". Not much, therefore, was required to tilt the balance in favour of the wife. 16. In reply, Mr Thompson

pointed out that the First Action had been decided on the Lescroel test. As the Court had made clear at paras 19

- 23 of the July judgment, the Lescroel test was somewhat stricter (from a plaintiff's point of view) than the Kinsella test. It was easier for a defendant to get a case struck out under Lescroel than under Kinsella. There was logic in this because, in the former case, a plaintiff had disregarded a particular rule requiring a summons for directions to be issued within a specified period whereas, in the latter case, a plaintiff had simply allowed matters to drift; there had not been any disobedience of a Rule. He submitted that it would be a surprising outcome if the husband's conduct were held to be excusable under the stricter test in the First Action and inexcusable under the lesser test in this Second Action. Decision 17. As with the First Action, this is a finely balanced matter. However we have concluded that the husband's delay in the Second Action is excusable. We would summarise our reasons as follows:- (i) As in the First Action, 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 believed that pushing forward with the financial claims would inflame matters and would render it more difficult to make progress on the contact front. Indeed, since the hearing in relation to the First Action, the Royal Court, presided over by the Bailiff, has issued a judgment on 8 th August in which it has concluded with reluctance that the children's attitude was such that it could not even order supervised direct access, despite the fact that all the expert advice was that the father posed no risk whatever to the children, that he had the ability to have safe and appropriate contact and that he had endeavoured to maintain indirect contact through the regular writing of letters. The Court held that the wife had allowed this attitude to develop through the children becoming aware of her anxieties and anger. The Court went on to hold that it was only the wife who could bring to an end that very sad state of affairs. (ii) Again, as the Court accepted in the July judgment, we accept that it is normal for claims in relation to finances and children to move forward together and that delay is the enemy of justice just as much in the Family Division as it is elsewhere. Nevertheless, we continue to regard this case as exceptional and we can understand why the husband felt 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. (iii) We accept Mr Le Quesne's argument that we must take into account the fact that the husband had allowed four years from the date of the separation agreement to elapse before commencing the Second Action as compared with some 15 months in the First Action and that accordingly the husband was under a correspondingly higher duty to get on with matters, so that a pace which might have been excusable in relation to the First Action would be inexcusable in the Second Action. Conversely, we also accept Mr Thompson's argument that the Lescroel test is somewhat stricter than the Kinsella test and that the husband had a higher hurdle to surmount in order

to show that his delay was excusable in the First Action than he does in the Second Action. In our judgment these two factors broadly cancel each other out. (iv) We note Mr Le Quesne's argument that the consequences of setting aside the ratification of the separation agreement would be to open up a financial dispute between the parties many years after the event. However, what we are concerned with at this stage is whether the husband's application to set aside the order should be struck out. If we allow the matter to continue, it will be for the Court which hears the application to decide in its discretion whether to grant his application. Only if it does will the prospect of a full dispute over property matters arise. Our task is to consider whether the husband's delay in pursuing his application was excusable. For the reasons given, we hold that it was. 18. In view of our finding that the delay by the husband was excusable, we do not need to go on to consider the third limb of the Kinsella test. 19. We would add the following observation. In the July judgment and again today, the Court has endorsed the statement by the Deputy Registrar that delay is the enemy of justice just as much in the Family Division as it is elsewhere and that it is normal for claims in relation to finances and children to move forward together. Practitioners will therefore in future have no excuse for not being aware of the need to press on with both aspects, where these exist. It follows that any argument along the lines of those which have been successful on the part of the husband in this case will face an uphill struggle on any future occasion. 20. In the circumstances we allow the appeal against the Deputy Registrar's decision and we dismiss the wife's application to dismiss the Second Action for want of prosecution under the inherent jurisdiction of the Court. We remit the matter to the Deputy Registrar so that she may give directions for the speedy progress of this matter to trial. Authorities Royal Court Rules 2004. Matrimonial Causes (Jersey) Law 1949. Lescroel v Le Vesconte

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