

JERSEY / JUDGMENT

Begg -v- Raynes [2013] JRC 183A (19 September 2013)

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judgment

the master: Reasons for Master's Decision given on 19 September 1. This is an application by the plaintiff for leave to continue proceedings commenced on 21 April, 2010. 2. The plaintiff who is an Advocate of the Royal Court claims unpaid legal fees in the sum of £12,669.73. The claim is for seven invoices rendered between 31 st March, 2008, and 23 rd January, 2009. Five of these invoices were the subject of an adjudication by Advocate Colley contained in her letter dated 15 th February, 2010. This adjudication was agreed to by both parties who confirmed they would be bound by the decision. Advocate Colley's adjudication found that the fees were due. They were not paid and so the plaintiff issued his summons on 21 st April, 2010. Particulars of Claim were filed on 20 th May, 2010, and an Answer filed on 23 rd June, 2010. No further steps have been taken in the proceedings since the Answer was filed. In particular the plaintiff failed either to issue a summons for directions or to take any other step in response to the Answer filed. The plaintiff also did not apply for summary judgment. 3. I refer to the lack of an application for summary judgment because when the plaintiff issued his summons for leave to continue the present proceedings, he also sought summary judgment. However, the parties agreed that this part of the summons should be left over pending my decision on the first part of the plaintiff's summons. 4. The plaintiff's summons was issued in response to a circular dated 26 th April, 2013, issued by the Deputy Judicial Greffier. The circular states:- "Any party objecting to an action being dismissed must do so by issuing a summons to show cause why the action should not be struck out. Any such summons must be issued before the expiry of 28 days of this notice with a view to the summons being heard before the Master of the Royal Court at the earliest opportunity. It is not sufficient to write to the Judicial Greffier requesting that the action be allowed to continue. A summons must be issued within the specified time otherwise the action will be dismissed." 5. I refer to the wording of the circular because the plaintiff gave notice of an application to fix a date for the hearing of the present summons on Friday, 24 th May, 2013, requiring the defendant to attend to fix a date for his summons on th May, 2013, at 9:30am. The letter of 24 th May, 2013, was sent within the 28 day period referred to in the circular; however the date fix appointment occurred outside the 28 day period. A preliminary point therefore arose as to whether the plaintiff's application was out of time. Royal Court Practice Direction RC05/10 describes the process for fixing a date for the hearing of a summons before the Master or the Judicial Greffier.

It is clear from paragraph (c) of that Practice Direction that a summons can only be served following the fixing of a date. In this case the plaintiff took longer than 28 days to be in a position to serve a summons because the summons was not issued until signed by a Greffier Substitute which only occurred after the required 28 day period. 6. However, the plaintiff had started the process of issuing a summons within the 28 day period referred to in the circular. While I am of the view that the plaintiff failed to issue the summons within the 28 day period because the process of issuing and serving a summons was not completed within that time period, in exercise of the discretion vested in me pursuant to Royal Court Rule 1/5, I extended the 28 day period so that the plaintiff's substantive application could be determined. My reasons for doing so were firstly because the plaintiff had started the process of issuing a summons within the 28 day period even though this had not been completed. Secondly the period of time required to complete the process was only a few days. Thirdly although the summons was issued on 30 th May, 2013, it only came for determination before me on 19 th September, 2013, for reasons beyond the parties' control. Nevertheless, in future where parties are issuing a summons in response to a notification of consideration by the Court of a dismissal of proceedings, the process of issuing a summons must be completed within the 28 day period referred to in the circular. In other words a date fix appointment and service should occur before expiry of the 28 day time limit. If a party is going to be out of time an application to fix a date on short notice should be made. 7. I now turn to consider the substantive application. The basis of the Court's jurisdiction in this case to consider striking out proceedings arises by reference to Royal Court Rule 6/26(13) which permits the Royal Court of its own motion to order that an action be dismissed where two months have elapsed from close of pleadings and no summons for directions has been issued. The onus to issue a summons for directions falls primarily on a plaintiff. 8. In this case as noted above the Answer was filed on 23 June, 2010. It was open to the plaintiff to file a Reply by 14 th July, 2010. The plaintiff should have issued a summons for directions by 14 th August and therefore fell into default of Rule 6/26(13) on 14 th September, 2010. A further two years seven months passed before the Deputy Judicial Greffier's circular was distributed to the legal profession in April 2013. The plaintiff has therefore taken no steps for two years and ten months and for two years and eight months he was in breach of the Royal Court Rules. At the time the summons came to be heard (I make no criticism of the parties for this delay) a further four months had elapsed. 9. The approach I have to take in relation to an application under Royal Court Rule 6/26(13) is well known and derives from the cases of *Lescroel-v-Le Vesconte*

[2007] JLR 273 and *B-v-MR*

[2007] JLR N 48 and

[2007] JRC 139 . In relation to the questions formulated in these decisions, the plaintiff conceded in his skeleton argument that the delay was both inordinate and inexcusable. As noted in *Lescroel* and confirmed in *Crill Canavan-v-MacKinnon*

[2012] (2) JLR N 17 an inordinate delay points strongly towards the dismissal of an action. Similarly a delay that is inexcusable also points towards dismissal. 10. The only explanation advanced in argument as to why the plaintiff failed to act at all was that he

simply forgot about the proceedings. I find that surprising. The plaintiff is an experienced advocate who appears regularly before this Court and is aware of its practices and approach in relation to case management. In addition, all members of the Jersey legal profession are required to keep client monies separate from their own funds and produce an annual confirmation by an auditor to the Law Society to that effect. The plaintiff is also obliged to file Income Tax returns with the Comptroller of Taxes. Both of these matters require book-keeping systems which should identify what bills have and have not been paid. 11. The argument advanced before me was that because the defendant agreed to an adjudication by the Law Society there was in effect no defence to the plaintiff's claim. Therefore it was contended that when I consider the balance of justice test and look at matters in the round as I am required to do, which I accept is the correct test, I should not strike out the plaintiff's claim. 12. That argument however does not apply to those fees where there was no adjudication. I say this because the plaintiff's invoice No.8226 dated 31 st March, 2008, in the sum of £1,601.65 and his invoice No.8676 dated 23 rd January, 2009, in the sum of £3,444.41 were not the subject of adjudication by the Law Society. The argument raised by the plaintiff does not therefore apply to these fees and I have no hesitation in striking out that part of the plaintiff's claim. This matter has gone on far too long bearing in mind how the Court expects litigation to be conducted. There is nothing to rebut the inordinate and the inexcusable delay which points strongly towards dismissal. That is so in particular because the plaintiff is an experienced advocate as I have noted and fully aware of decisions of this Court and what is required in terms of proper case management. 13. I also consider that it is stressful for the defendant to have this litigation hanging over him for a long period of time. The Court of Appeal made such an observation in *McGorin-v-Pascoe*

[2002] JLR N 24. During argument I was referred to the case of *Garfield-Bennett-v-Phillips*

[2002] JLR N 42 and 2002/214 where the Court stated at paragraph 11 (v) that " ... the Court should only in exceptional cases treat the anxiety which accompanies all litigation as alone being sufficient to justify dismissing an action ". *McGorin-v-Pascoe* although predating *Garfield-Bennett* was not apparently referred to the Royal Court in the latter case. 14. In this case the defendant deposed in his affidavit to difficulties he suffered both as a result of being dyslexic and following a very traumatic car accident when he was 17 years old. In relation to this defendant I need not resolve any distinction between *McGorin-v-Pascoe* and *Garfield-Bennett* because in applying either test I am satisfied by reference to the defendant's evidence that the prospect of having any legal action against him pending for a significantly longer period than contemplated by the practice of this Court does amount to prejudice. 15. In relation to the remaining fees that were the subject of adjudication by the Law Society this is a much more finally balanced question. I note that in his Answer the defendant admits that a binding adjudication occurred as pleaded at paragraphs 13 of the Particulars of Claim. However, paragraph 13 of the Answer avers that the defendant was not given due opportunity to put forward his case in breach of basic principles of fairness and the decision taken by Advocate Colley was therefore flawed.

This followed an exchange of correspondence between the plaintiff and Advocate Clark then of Messrs Appleby representing the defendant in 2010. Advocate Clark in her letter of 25 th June, 2010, complained on behalf of the defendant that the defendant was not given due opportunity to put his case. She also complained that the work the plaintiff was instructed to carry out was not completed and that the defendant had to instruct another lawyer to complete the proceedings leading to the defendant having to pay further fees. 16. Paragraph 6 of the letter of adjudication dated th February, 2010, noted "the central tenet of Mr Raynes' disquiet as described appears to be that Advocate Begg (a) did superfluous work and (b) left the job part undone having failed to prepare adequately for a hearing and then advising his client to 'win' an adjournment by changing lawyers." 17. Advocate Colley then addressed both these criticisms and found that fees in the sum of £8,239 were due to the defendant. 18. During submissions there was a discussion as to the scope of the Law Society adjudication process and whether it was restricted to assessing quantum of fees or whether it extended to addressing complaints of negligence made by a client. Both counsel felt that the adjudication process was only meant to be an assessment of the quantum of fees and that any allegations of negligence were matters for the Court. Both also regarded the current guidelines as not being clear. I refer to this issue expressly in my decision in order to invite the Law Society to consider whether to clarify the guidance currently available on its website and to consider whether the adjudication is only to extend to the amount of fees or if it extends to matters of negligence. It would also be helpful for the Society to consider the legal basis of the adjudication process and whether it I intended to be a binding arbitration or an expert

determination.

19. What is clear is that following the correspondence from the defendant's Advocate in June 2010 to which I have referred and the filing of the defendant's Answer nothing further occurred. The plaintiff could either have taken the matter to trial by issuing a summons for directions or could possibly have applied for summary judgment. 20. The plaintiff's assertion put eloquently on his behalf by Mr Scholefield is that the defendant had no defence to the fees which were the subject matter of the adjudication and also had failed to take the proper steps required to challenge the adjudication. Those steps might have been either an application under the arbitration law if the adjudication is seen as an arbitration or alternatively by an application for judicial review. The criticism of the defendant is that he did neither of those things and therefore should not now benefit from the claim being struck out. 21. However, the plaintiff did not do anything either. The plaintiff could have taken the steps I have referred to above. If he felt the matter was a binding arbitration he could also have issued an application to enforce Advocate Colley's decision. He did none of these things. Yet he was aware that his fees were disputed. In my judgment once a plaintiff has issued proceedings his duty is to progress those proceedings to trial or a conclusion within the time frames contemplated by the Court's Rules and practice. This plaintiff was well aware of the Rules and that practice. If the plaintiff was correct then he would be entitled to

conduct his claim at whatever pace he thought fit so long as his claim was no longer out of time. This is almost an argument seeking to resurrect Birkett-v-James

[1978] AC 297 by the back door notwithstanding the respectful burial of that case in Ybanez & Anor-v-BBVA Privanza Bank (Jersey) Limited

[2007] JLR N 45. The fact that the claim might be a chose jugée is not enough to save the plaintiff. A defence to the claim had been advanced which was capable of being argued because either the adjudication was procedurally flawed or the adjudication was ultra vires in resolving allegations of negligence. It was for the plaintiff therefore to progress matters to pursue his claim. 22. In reaching my decision I have also taken into account again the stress of the litigation for the defendant referred to at paragraphs 13 and 14 above. Having disallowed parts of the claim, the amount remaining (that is the amount which was subject to adjudication) is not a significant sum in the context of the Royal Court's jurisdiction. Indeed, it is now a sum which would ordinarily fall within the jurisdiction of the Petty Debts Court. For all these reasons I am not therefore persuaded by the plaintiff that it is in the interests of justice to allow this action to continue. 23. I therefore dismiss the plaintiff's summons and strike out these proceedings pursuant to Royal Court Rule 6/26(13). 24. In relation to the issue of costs, I make no order as to costs. While the defendant was successful in resisting the plaintiff's summons, in the exercise of my discretion I do not consider it fair for a plaintiff who cannot now seek to recover fees to be visited with additional costs. Authorities Royal Court Rules 2004. Lescroel-v-Le Vesconte

[2007] JLR 273 . B-v-MR

[2007] JLR N 48. B-v-MR

[2007] JRC 139 . Crill Canavan-v-MacKinnon

[2012] (2) JLR N 17. McGorin-v-Pascoe

[2002] JLR N 24. Garfield-Bennett-v-Phillips

[2002] JLR N 42. Garfield-Bennett-v-Phillips 2002/214. Birkett-v-James [1978] AC 297. Ybanez & Anor-v-BBVA Privanza Bank (Jersey) Limited

[2007] JLR N 45. Page Last Updated: 16 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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