

JERSEY / JUDGMENT

Booth v Bults [2017] JRC 137 (31 August 2017)

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judgment

the deputy bailiff: 1. There are in effect three applications before me today with regards to a case that is due to place next week for which two and a half days has been set aside. In essence the case involves a dispute over the meaning and nature of an agreement between the plaintiff and the defendant and whether or not it was in fact a loan in itself or security for an underlying debt which ended on the settlement of that debt. 2. The first application was to use the evidence of two witnesses whose statements the Plaintiff wishes to adduce. Neither of those witnesses has anything at all to say about the factual matters in dispute in this case. Rather they are tendered to show that some years after the loan was allegedly entered into, the Defendant engaged in a course of conduct of delay, deceit, lies and excuses in two entirely different negotiations which did not come to fruition. In other words the statements go to attack the Defendant's credibility by saying that he has the propensity to lie. 3. I have been referred to the case of Stanton v Mourant

[1994] JLR 25 in which the Court said: "The rule on similar fact evidence is well stated in Phipson on Evidence, 14th ed., para. 17-24, at 373 (1990) where the learned authors state: "Subject to two exceptions stated below, evidence of facts or transactions similar to the fact or transaction directly in issue is admissible if it is logically probative, that is if it is logically relevant in determining the matter which is in issue, and is not otherwise excluded, e.g. by the rule against hearsay. The two exceptions, which apply to civil as well as to criminal proceedings, are these: to prove an act done by, or the state of mind at the time of his act of a person, evidence is not admissible (1) of similar acts done by himself, if they do no more than show a general disposition, habit or propensity to commit such acts and a consequent probability of his having committed the act, or possessed the state of mind in question, and (2) of similar acts done by others, similarly circumstanced to himself, to show that he would be likely to act as they did. If, however, evidence of similar acts done by the person whose act or state of mind is in question is such that it might lead a reasonable jury to the conclusion that the similarity could not be explained by coincidence, or conspiracy by the witnesses to make similar false allegations, or repetition as facts of things read or heard, e.g. on television, the evidence is admissible on the basis that the probative force of two or more such similar acts is greater than of one alone." The

principles of exclusion, again expressed most cogently in Phipson, are these (op.cit., para. 17-68, at 408): "As we have seen, facts which are merely similar, however and prove nothing more than the disposition or likelihood of repetition, though logically relevant, are rejected as in criminal cases on grounds of fairness, since they tend to waste time, embarrass the inquiry with collateral issues, prejudice the parties with the jury (if there be one) and encourage attacks without notice." 4. The statements which the Plaintiff wishes to use are accepted by him as having no direct relevance. They go to the character or propensity of the Defendant and they each refer to a property transaction and not to a loan. They each refer to delays in the transactions and one states that there are many emails that would support the assertions made. 5. Were I to allow these statements to be used it is clear that the Defendant would wish to cross-examine the deponents and would need discovery of the documentation that is available and consider his own discovery in connection with what is alleged in the statements. It is unlikely, in my view, that the trial dates would survive that exercise. The witness statements are submitted so that the Plaintiff can seek to show that the Defendant was less than frank with others and therefore should not be believed. In fact, as I have already said, he is saying the Defendant has the propensity to act in disingenuous ways. 6. In my view, following the principle set out in *Stanton v Mourant* such statements are not relevant and should be excluded. Even were I wrong on this point, I would in the exercise of my discretion exclude them. If I did not the trial would, to a great extent be about the matters raised in those two statements. The trial dates might be lost (which neither party wants) and the ambit of the trial would be extended to deal with matters of marginal if any relevance. I think that it would be highly prejudicial to the Defendant were I to exercise my discretion otherwise at this time. I have heard the Plaintiff and I am satisfied that he has the material and indeed the ability to challenge the Defendant in cross-examination and put inconsistent documents and matters to him and thereby seek to attack his credibility. 7. I turn now to the second application which was to amend the particulars of claim to add a new cause of action. This was based on a loan allegedly entered into in 2006, after the property that was the subject matter of the original agreement had been sold. The "new" loan originated from the proceeds of sale. 8. These proceedings started on 6 th July, 2015, and therefore this application to add a new cause of action is effectively two years late. That is, of course a significant period. It is a new cause of action because although it is linked in the sense that the loan allegedly made out of the sale proceeds of the property purchased as a result of the arrangements in the existing proceedings, it is, nonetheless, a quite separate claim. The Plaintiff says he could not sue earlier because it was only when, in 2017, he saw the Defendant's witness statement that said that the loan monies came out of the proceeds of sale that he had the complete picture and realised that he had the evidence to prove that such a loan was made. 9. It is clear, however, from the paperwork that the Plaintiff knew when the proceeds of sale were received. They were received into his own account and he himself made the payment to the Defendant which he would wish to now claim was a loan. He must have known the basis of the payment which he had paid. There is no loan documentation in existence in any event. In my view, therefore, he could have made the

claim at the time that he issued the original proceedings or, in any event, at a much earlier time than today. 10. I have heard significant argument relating to limitation.. Arguments were addressed to me as to whether or not prescription as a defence was available, whether or not it had been interrupted or indeed whether the Plaintiff was prevented by empêchement from starting his proceedings sooner. I was referred to a number of cases.

11. Firstly *Brown v Barclays Bank PLC*

[2002] JLR Note 1 was cited to me as the basic approach that I should take to all matters of adjournment and in that case it was held that: "The burden was on the applicant to show (a) why the new matters had not been pleaded before; (b) the strength of the new case; (c) that an adjournment should be granted, if one was sort. (d) that the adverse effects of the adjournment or any other additional preparations for trial that were required of the respondent, of a consequence of the amendment, could be remedied; and (e) that the balance of justice came down in his favour. The applicant could not discharge the burden and the appeal was dismissed." 12. I was also referred to *Vesier v Bellego*

[1994] JLR 75 in which at paragraph 2 of the headnote of that case it was said:- "Civil Procedure- parties-plaintiff-may amend pleadings to alter capacity in which plaintiff sues-may thereby introduce new cause of action or defeat limitation defence if new cause of action arises out of same facts as that originally pleaded" 13. I was also referred to *Chandra & Anor v Brooke North EWCA Civ 1559* in which at paragraphs 69 to 70 inclusive of the judgement it was said:- "69. This leads on to a separate and important point. If a claimant applies for permission to amend and the amendment arguably adds a new claim which is statute barred, then the claimant should take steps to protect itself. The obvious step is to issue separate proceedings in respect of the new claim. This will have the advantage of stopping the limitation clock on the date of the new claim form. If permission to amend is granted, then the second action can be allowed to lapse. If permission to amend is refused, the claimant can pursue his new claim in the second action. The two actions will probably be consolidated and the question of limitation can be determined at trial. 70. I turn now to the second option. This is for the court to determine the question of limitation as a preliminary issue at the same time as considering whether to give permission to amend. In practice, this course will seldom be appropriate. Before ordering any trial of preliminary issues, the court must carefully consider the ramifications of such an order. Will the same witnesses have to give evidence on related topics at two different trials? What will be the consequence if there is an appeal on the preliminary issue? Will the separation out of preliminary issues ultimately lead to a saving or a wastage of time and costs? Particular problems attach to an order for the trial of preliminary issues before the pleadings are complete. Having said all that, I must accept that there are some rare cases where the court will order trial of the limitation issue before deciding whether to give permission to amend." 14. It is clear from *Chandra* that Order 20 Rule 5 was seen as the equivalent to adopting similar principles to the new Order 17 of The White Book . 15. I was also referred to Order 17 Rule 4 and in particular, at paragraph 17.4.4, where it said:- "Put another way an amendment for which permission may not be given is one of which the

following three propositions are true: (1) the amendment is sought to be made outside the limitation period, (2) the amendment involves the addition of a new cause of action, and (3) the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action already pleaded." And then at paragraph 17.4.4.1: "The burden of proof as to this issue and as to the other two, falls upon the claimant. On an application to amend a claim the Court will not seek to resolve factual issue which are seriously in dispute. Thus in order to win on this issue, the claimant has to prove the defendant's limitation defence is not reasonably arguable. If the claimant disputes this issue but it is decided against them the court cannot give them permission to amend unless both of the remaining issues are decided in their favour." 16. It is clear therefore that the defendant only has to show that a limitation argument is reasonably arguable for this to be a matter in respect of which I should not give leave to amend. In my view, having heard the argument, the limitation defence is reasonably arguable and for that reason I shall not allow the amendment. It is also late and I am not satisfied that it could not have been pleaded earlier. It is true that the witnesses are the same but the documentation may well increase and there will need to be re-pleading were I to allow it, and in my view it would not be in the interests of justice to do so at this late stage. 17. I turn now to the third application. Advocate Drummond for the defendant points to the failure of the plaintiff to comply with an order of the Court relating to procuring further documentation. It is now too late to procure that documentation but he wishes to warn the defendant and to inform the Court that he will ask the Court to make adverse inferences from the plaintiff's failure. The plaintiff for his part argues that he did not actually agree to sign the letter in the sense contained in the order of the Court and that in fact the order of the Court does not really express what was agreed by the Court at the time. The fact is he did not comply with the order in the terms that it was drafted and he did not apply to vary that order. However, I am not asked for any order today and it is a matter that therefore should be left to the trial court and in the event that submissions need to be made on that at the time they will be dealt with next week. 18. The second aspect of the third matter relates to the preparation of bundles. It had been understood at the pre-trial review that the defendant, who was legally represented, could take primary responsibility for the preparation of the bundles. That happened and they were filed. The plaintiff then prepared another full set of bundles in a different form on which he wished to rely. The plaintiff's bundles were prepared in a way that is sometimes done, in other words they were themed and the documentation was separated into appropriate themes. That indeed might be a helpful way to approach the preparation of documentation and might very well on many occasions be of assistance to the Court. But that only works if both sides have agreed that the documentation under each theme is complete and relevant and there now no longer seems to be any time left in which such an agreement could be reached. Accordingly, the only way to be sure that all of the documents that might be relevant are before the Court is to use the defendant's bundle which I am informed in submissions before me contained all of the discovery in chronological order. It is a pity perhaps that the plaintiff's approach could not be adopted but in my view we must be satisfied that we have everything and, as I have said, I do not

think there is sufficient time for that exercise to be undertaken between now and the start of the trial and to provide the revised bundles to the Court for us to read in enough time.

Authorities Stanton v Mourant

[1994] JLR 25 . Brown v Barclays Bank PLC

[2002] JLR Note 1 . Vesier v Bellego

[1994] JLR 75 . Chandra & Anor v Brooke North EWCA Civ 1559. White Book 2017. Page Last

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