

JERSEY / JUDGMENT

Cannon v Nicol [2004] JRC 191 (02 November 2004)

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judgment

the MASTER: 1. The factual background to this action is set out in a number of somewhat complicated pleadings comprising an Amended Order of Justice, an Amended Answer and Counterclaim, a Reply and a Rejoinder. Notwithstanding the complexity of the pleadings the factual matters in issue are reasonably straightforward. 2. The plaintiff claims that by oral agreement he entered into partnership with the defendant in or about March 1994 in a business called "Total Skip Services" and "Total Recycling" which carried on the business of the collection and recycling of material and rubbish, the hiring of labour and the hiring and collection of the skips. The plaintiff says that the arrangements between the parties were that the defendant would provide an initial capital investment of £25,000 and would handle the financial dealings of the partnership. The plaintiff would manage and provide labour to the business and only draw the sum of £100 a week from the partnership until such time as the financial position of the business improved and the defendant's investment had been repaid. Once the respective parties' capital accounts were equal, partnership profits and assets would be split 60% as to the plaintiff and 40% as to the defendant. The plaintiff goes on to contend that in or about October 1997 he found a building plot at Rue des Pres suitable for the business and introduced the vendor to the defendant who negotiated the purchase of the premises for the partnership. The plaintiff says that the purchase of the property and the buildings subsequently erected thereon were for the benefit of the partnership and were a partnership asset. During the construction of the buildings the plaintiff acted as a site agent for the partnership and also provided various labour and equipment used in connection with the development. 3. The plaintiff alleges that the defendant has acted in breach of the partnership agreement in failing to inform the plaintiff of the financial state of the partnership, failing to distribute profits and requiring the plaintiff to quit the premises acquired for the partnership and to remove all equipment from those premises. Furthermore, the plaintiff alleges that the defendant told him that there were no funds to pay employees of the partnership and in the circumstances the defendant has either converted the monies generated or has failed to account properly to the plaintiff for the same. The plaintiff claims damages for breaches of the partnership including a profit share estimated to be £178,400 plus unspecified amounts for providing labour for the building mentioned above and also partnership capital account distributions and loss of business and goodwill. 4. The defendant denies that any partnership

existed. She says that she agreed with the plaintiff to provide financial support to the plaintiff in connection with his setting up a recycling business in his own name. The plaintiff agreed to provide financial record keeping services for this purpose and also made a number of loans to enable him to carry on the business. A number of advances were made to the plaintiff for this purpose and there were also various payments made on behalf of the plaintiff such as payments of wages when the plaintiff was not in a position to meet his obligations. Furthermore, the defendant says that she purchased the property alleged to be a partnership property in the name of herself and her son (the party cited in this action) as a separate investment which had nothing to do with the plaintiff. He was allowed a licence to occupy those premises rent-free for some time but ultimately he refused to vacate the premises when requested to do so. 5. The defendant denies the existence of any partnership and counterclaims for the sum of £62,957.81 in respect of loans made by her to the plaintiff and other financial obligations of the plaintiff which the defendant met on his behalf. She asks, therefore, that the plaintiff's action be dismissed and judgment be entered in her favour on the Counterclaim. The Reply and Rejoinder filed join issue on various matters and raise a number of other factual disputes as between the parties. 6. A brief procedural history of the action is as follows. An Order of Justice containing interim injunctions restraining the defendant and the party cited (her son) from dealing with the property alleged to be partnership property was issued on 25th November, 1999. By consent, the action was adjourned sine die when it came before the Royal Court on 17th December in that year. An Answer and Counterclaim were filed and served by the defendant on 17th May, 2002 and following one amendment the parties agreed that the defendant file a revised Amended Answer and Counterclaim. A consent order to this effect was issued on 3rd April 2003. In due course an Amended Reply and Answer to the Counterclaim was filed by the plaintiff in May, 2003. Following a request for Further and Better Particulars issued in March, 2003 the plaintiff answered (in part) that request on 22nd May, 2003. The defendant filed a Rejoinder to the plaintiff's Amended Reply and Answer to Counterclaim on 27th June, 2003. 7. There was no further procedural activity until August this year. On 17th August, the plaintiff issued a summons for directions in the form required under Rule 6/21 of the Royal Court Rules 1992, as amended ("the Royal Court Rules"). A week later the plaintiff issued a summons asking that the action be dismissed for want of the plaintiff issuing a summons for directions in due time (i.e. within a month of the close of pleadings) or alternatively that the claim be struck out in its entirety on the grounds specified in Rule 6/13(1) of the Royal Court Rules or alternatively that paragraph 9 of the plaintiff's Order of Justice (in which the plaintiff alleges that the defendant converted sums of money allegedly belonging to the partnership) be struck out on the grounds that it disclosed no reasonable cause of action or was scandalous, frivolous or vexatious or might prejudice, embarrass or delay a fair trial of the action or was otherwise an abuse of process of the Court. Both summonses were fixed to be heard by me on 27th September, 2004. 8. At the hearing before me the plaintiff was represented by Advocate J. S. Dickinson and Advocate R. J. Michel represented the defendant. It was agreed that I would hear the defendant's summons first and subsequently proceed, if appropriate, to adjudicate on the summons for directions. At the hearing the parties agreed the terms of any directions which should be given if I refused the defendant's application to strike out the proceedings. 9. Both parties filed detailed skeleton arguments in support of their respective

positions together with comprehensive bundles of authorities and related documentation. On behalf of the plaintiff an Affidavit sworn by Mr. C. B. Austin, a legal assistant at Bedell Cristin exhibiting a chronology and various correspondence was also filed. Full oral submissions were also made to me. 10. Having received detailed submissions from both parties on 27th September, 2004 I reserved my decision on the defendant's application and the summons for directions. I now give that decision together with my reasons for it. 11. Rule 6/21 of the Royal Court Rules 1992 contains provisions regarding summonses for directions. Paragraphs (1) and (2) of that Rule provide as follows:- "(1) With a view to providing an occasion for the consideration by the Court of the preparations for the trial of an action so that -

- (a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and
- (b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof, the plaintiff shall, within one month after the time limited for filing pleadings has expired, issue a summons for directions to be heard at least fourteen days, and no more than forty-two days, thereafter in the form (or substantially in the form) prescribed in the Seventh Schedule to these Rules. (2) If the plaintiff does not issue a summons for directions in accordance with paragraph (1) of this Rule, the defendant or any other party to the action may do so or apply for an order to dismiss the action." 12. It is common ground between the parties that a summons for directions was not issued by the plaintiff (or indeed by the defendant) within the time specified within the Rules. It should also be noted that the plaintiff did not, when belatedly issuing his summons for directions, apply under Rule 1/5 of the Royal Court Rules for an extension of time within which to issue the summons (as he should have done). 13. In the course of his submissions, Advocate Michel on behalf of the defendant invited me to lay down the principles to be applied where there had been default by a party in complying with the requirements of Rule 6/21. In the course of detailed argument by both parties (and in the context of Advocate Michel's request) my attention was drawn to the various authorities recently established in Jersey which lay down the principles to be applied in considering whether an application should be struck out for want of prosecution. Those cases are well known and it is not necessary to review them in detail. I was also referred to an extract from the 1999 Edition of The Supreme Court Practice ("The White Book") on the subject of want of prosecution (namely paragraphs 25/L/1 to 25/L/22 at pages 500 to 505). 14. It is unfortunate that I was not also referred to paragraph 3/5/12 of The White Book which deals with applications for extensions of time. The relevant extract of that paragraph states as follows:- "Dismissal for want of prosecution - In *Costellow v. Somerset County Council* [1993] 1 W. L. R. 256; [1993] 1 All E. R. 952, CA, the Court of Appeal (Sir Thomas Bingham M. R., Stuart-Smith and Simon Brown L. JJ.) gave the following guidance for courts confronted by a situation where a defendant applies to have an action dismissed because of a failure by the plaintiff to take some step in the proceedings within the time required by the rules and where the plaintiff at the same time applies (or indicates that he will apply) for an extension of time under O.3, r.5 to take the step in question. Two principles are to be considered. The

first is that the rules of court and the associated rules of practice devised in the public interest to promote the expeditious dispatch of litigation must be observed. The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. Neither principle is absolute, but the court's practice has been to treat the existence of such prejudice as a crucial and often decisive factor. In the great majority of cases, it will be appropriate for the court to hear both summonses together so that the case is viewed in the round. A rigid mechanistic approach is inappropriate and accordingly there can be no general rule that the plaintiff's application should be heard first with dismissal of his action as an inevitable consequence if he fails to show a good reason for his procedural default

- the approach adopted by another Court of Appeal in *Price v. Dannimac Ltd* (1990) The independent, August 3. On the other hand, cases involving procedural abuse or questionable tactics may call for special treatment as will cases of contumelious default or where a default is repeated or persisted in after a peremptory order. But in the ordinary way and in the absence of special circumstances, a Court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant. A similar approach should govern applications made under Orders 19, 24, 25, 28 and 34. So far as O.3, r.5 is concerned, therefore, save in special circumstances it should rarely be appropriate to deny the plaintiff his extension (where denial would stifle his action) because of a procedural default which even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs." 15. Equally, I was not referred to the case of *Costellow v. Somerset County Council*

[1993] 1 All E. R. 952 which is referred to in the extract from The White Book to which I have just referred. In my view, this case is the one which sets out the appropriate principles which should be applied in relation to summonses for directions. I was also not referred to a decision of mine which addresses extension of time (namely, *de Gruchy v. Planning and Environment Committee*

(2001) JLR 196) and sets out the relevant principles to be applied in considering to grant an extension of time. 16. The relevant extract of the head note in the *Costellow v. Somerset County Council* states (at pages 952 and 953) as follows:- "Held - In the ordinary way and in the absence of special circumstances, such as procedural abuse, questionable tactics, contumelious and intentional default or where a default was repeated or persisted in after a peremptory order, the court should not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of the proceedings had caused at least a real risk of prejudice to the defendant. A similar approach should govern applications to dismiss on failure to comply with a time limit under Ords 19, 24, 25, 28 and 34. Furthermore, the approach to applications to extend the time limit under Ord 3, r 5 should in most cases not be very different and save in special

cases or exceptional circumstances it would rarely be appropriate to refuse the plaintiff an extension because of a procedural fault where the overall justice of the case required that the action be allowed to proceed." 17. The judgment of Sir Thomas Bingham MR (as he then was) in the *Costellow v. Somerset County Council* case analyses the decision of the Court of Appeal. The principles in issue are addressed (at paragraph c of page 959 to paragraph d of page 960) of his judgment in the following way:- "As so often happens, this problem arises at the intersection of two principles, each in itself salutary. The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit: Ord 19, r 1, rd 24, r 16(1), Ord 25, r 1(4) and (5), Ord 28, r 10(1) and Ord 34, r 2(2) are examples. The principle is also reflected in the court's inherent jurisdiction to dismiss for want of prosecution. The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by Ord 3, r 5, a discretion to be exercised in accordance with the requirements of justice in the particular case. It is a principle also reflected in the liberal approach generally adopted in relation to the amendment of pleadings. Neither of these principles is absolute. If the first principle were rigidly enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiff's default had caused prejudice to the defendant. But the court's practice has been to treat the existence of such prejudice as a crucial, and often a decisive, matter. If the second principle were followed without exemption, a well-to-do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred by Ord 3, r 5, and would indeed involve a substantial rewriting of the rule. The resolution of problems such as the present cannot in my view be governed by a single universally applicable rule of thumb. A rigid, mechanistic approach is inappropriate. Where, as here, the defendant seeks to dismiss and the plaintiff seeks an extension of time, there can be no general rule that the plaintiff's application should be heard first, with dismissal of his action as an inevitable consequence if he fails to show a good reason for his procedural default. In the great mass of cases, it is appropriate for the court to hear both summonses together, since, in considering what justice requires, the court is concerned to do justice to both parties, the plaintiff as well as the defendant, and the case is best viewed in the round. In the present case, there was before the district judge no application by the plaintiff for extension, although there was before the judge. It is in my view of little or no significance whether the plaintiff makes such an application or not: if he does not, the court considering the defendant's application to dismiss will inevitably consider the plaintiff's position and, if the court refuses to dismiss, it has power to grant

the plaintiff any necessary extension whether separate application is made or not. Cases involving procedural abuse (such as *Hytrac Conveyors Ltd v Conveyors International Ltd* [1982] 3 All ER 415, [1983] 1 WLR 44) or questionable tactics (such as *Revici v Prentice Hall Inc* [1969] 1 All ER 772, [1969] 1 WLR 157) may call for special treatment. So, of course, will cases of contumelious and intentional default and cases where a default is repeated or persisted in after a peremptory order. But in the ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant. A similar approach should govern applications made under Ords 19, 24, 25, 28 and 34. The approach to applications under Ord 3, r 5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under Ord 3, r 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed." 18. In the present case no evidence was put forward on behalf of the defendant in support of the application under Rule 6/21. Having reviewed the material put before me I am satisfied that there are not special circumstances upon which I would be entitled to exercise my jurisdiction to strike out the action for want of prosecution and, furthermore, no evidence has been put before me to show that there was real risk of prejudice to the defendant. In all the circumstances, I therefore reject the application contained in paragraph 1 of the defendant's summons. In so doing, I have applied the principles set out in the *Costellow* case as I consider these to be the appropriate ones to which I should have regard. 19. Although paragraph 2 of the defendant's summons relies on the grounds set out in Rule 6/13 of the Royal Court Rules 1992 I consider that this part of the application was in reality ancillary to the first paragraph of the summons which I have just addressed. Again, there is no evidence before me to suggest that there is a real risk of prejudice to the defendant. Furthermore, there is no evidence to suggest that the delays which have ensued are such as to be likely to prejudice a fair trial of the action. In the absence of such evidence I decline to answer the three questions which I would be required to consider in a general application for striking out an action for want of prosecution namely:- (i) Has there been inordinate delay? (ii) Has that delay been inexcusable? (iii) Is such delay such as to give rise to a substantial risk that it was not possible to have a fair trial of the issues in the action or such as was likely to cause or have caused serious prejudice to the defendant? As stated above there was no evidence before me to enable me to consider and answer the question posed in (c) above. In those circumstances it seems futile to address also the questions raised in (a) and (b). I therefore decline to do so and refuse the application set out in paragraph 2 of the defendant's summons. In any event I consider that matters are best determined by me in applying the principles set out in the *Costellow* case and this is what I have done. 20. The final question raised in the defendant's summons is whether

paragraph 9 of the plaintiff's Order of Justice should be struck out on the grounds set out in Rule 6/13(1) of the Royal Court Rules . Paragraph 9 of the Order of Justice states as follows:- "9. In the circumstances the defendant has either converted the monies generated by the Business to her own use or has failed properly to account to the plaintiff for the same." In the request for Further and Better Particulars issued by the defendant which I have previously referred the defendant requested the plaintiff to particularise the circumstances referred to in paragraph 9, and to state with particularity all such conversions of money alleged and all such failures to account properly to the plaintiff for any monies as alleged. The plaintiff declined to answer the first two questions on the grounds that they were already adequately pleaded in the Order of Justice and other pleadings and said that he would provide full particulars of the third question following discovery. The defendant did not take issue with that position until the issue of the present summons. 21. Advocate Michel, on behalf of the defendant, contended that the allegation of conversion or a failure to account properly for partnership assets is to allege dishonesty. In those circumstances it is an absolute requirement, if the allegation is to stand, that the facts and matters giving rise to the allegation must be stated precisely and with full particulars. In this regard he cited the case of Makarenko -v- CIS Emerging Growth 2001 JLR 348 where at paragraph 5 the Royal Court stated:- "5. We would remind practitioners of a fundamental rule of pleading, namely, that general allegations of fraud are not permitted. Any pleading which alleges fraud must set out the facts, matters and circumstances relied upon to show that the party charged has or was actuated by a fraudulent intention. The acts alleged to be fraudulent must be stated fully and precisely, with full particulars. Furthermore, it is of course the duty of counsel not to enter a plea of fraud on the record unless he or she has clear and sufficient evidence to support it. In fairness to Mr Benest, we should add that he assured us that he had not forgotten this latter duty and had carefully considered the evidence produced to him before launching the proceedings ." 22. In response, Advocate Dickinson called in aid the case re Guidon Investments Limited reported at 1978 JLR 29 . He contended that conversion could and should properly be distinguished from fraud for the reasons set out in that case. In all those circumstances he argued that the requirements as to the pleading of fraud were not relevant to the present issue. He did concede, however, that the word "intentionally" could probably be inserted before the word "converted" in paragraph 9 of the Order of Justice. 23. Be that as it may I think that the allegations contained in paragraph 9 are such that particulars should be given in the manner requested by the defendant in her request for Further and Better Particulars. I therefore order that those particulars be provided with 14 days failing which paragraph 9 of the Order of Justice shall be struck out without further order. 24. In the light of my findings as set out above it is appropriate for me to give directions as requested by the plaintiff in his summons. As previously mentioned, the directions have been agreed by the parties and I therefore give directions in the form set out in the Schedule annexed to the Act of Court which I have issued today. I do so notwithstanding that the plaintiff has not sought an extension of time under Rule 1/5 of the Royal Court Rules to issue the summons for directions nor has he provided directly

evidence to justify the failure to comply with the Rules. I am satisfied on balance, however, that I should allow the action to continue and give appropriate directions. 25. Having heard the parties I ordered that the plaintiff pay the costs of the defendant on the standard basis in relation to my decision set out in paragraph 23 above and that all other costs of both the strike-out summons and the summons for directions shall be costs in the cause. Authorities De Gruchy v Planning & Environment Committee

[2001] JLR 196 Makarenko v CIS Emerging Growth

[2001] JLR 348 Royal Court Rules 1992, as amended Rule 6/21 Costellow v Somerset County Council

(1993) 1 All E. R. 952 The Supreme Court Practice (1999 Edition) - paragraph 3/5/12 Page Last Updated: 15 Oct 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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