

JERSEY / JUDGMENT

Crow v Fresh Dough Company Ltd and Anor [2024] JRC 012 (16 January 2024)

[2024] JRC 012

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judgment

the MASTER: 1. This is my judgment in relation to an application by the Plaintiff to strike out the First and Second Defendant's Answers on the basis of an alleged abuse of process, and to give judgment for damages to be assessed.

Background

2. The First Defendant, Fresh Dough Company Limited, is owned by Mr Pinzari and is the tenant of a café at 26, Les Quennevais Parade, St Brelade (the "Property") under a lease from the Second Defendant, Hightide Investments Limited. 3. According to an affidavit of discovery sworn by Advocate Hoare on behalf of the Second Defendant, Voisin Hunter Limited (now Maillard & Co.) were agents appointed by the Second Defendant to manage a portfolio of properties, including the Property. Voisin Hunter Limited were also the property agent of the Quennevais Parade Association, which is the Co-Ownership Association responsible for the common parts of the Quennevais Parade Precinct of which the Property forms a part. 4. The Plaintiff, Mr Crow, is a painter and decorator. He was engaged by Voisin Hunter Limited to undertake redecoration of the Quennevais Parade Precinct. The Defendants submit that this was on behalf of the Quennevais Parade Association, rather than either of the Defendants personally. 5. On 2 August 2019, the Plaintiff was working at the Property when he attempted to close a single-glazed basement window, hinged at the bottom and secured by a latch at the top, by using his left hand and "normal force" to push an area covering the latch and the top of the pane. The glass broke and his hand went through the pane, and he suffered injuries. 6. Mr Pinzari, the owner of the First Defendant, was made aware of the accident at the time and notified his insurers. Thereafter, on the basis of his unchallenged affidavit, events had the following chronology: (i) In July 2020, Mr Pinzari's insurers wrote to Mr Crow stating that they were investigating liability for the accident. That same month, Mr Pinzari was told by his insurers that he should keep them updated on arrangements to replace the window and should retain the window for inspection. (ii) On 6 August 2020, Mr Pinzari sent a text message to a window company to obtain a quote to replace the window and by 18 August 2020 a price had been agreed to replace the window. (iii) By a text message sent on 18 August 2020 to the window company,

Mr Pinzari informed them that the window needed to be retained for inspection, and he asked them to put the old window in a box and to give it back to him. (iv) On 28 August 2020 Mr Livesey, a surveyor instructed by the First Defendant, inspected the window in situ and took various photographs of it. (v) On 30 September 2020, the Plaintiff's lawyers sent a letter to the First Defendant's insurers notifying them of the Plaintiff's claim and enclosing photographs of the window at the time of the accident; there was no request in that letter for permission to inspect the window nor for it to be retained. (vi) On 29 October 2020, Mr Pinzari received a message from the window company stating that they were going to replace the window that day, which they did. Mr Pinzari was not on site when the window was replaced and states that "[a]s it had been several months since the request to retain the broken window, I did not remember to remind them whilst the work was being undertaken." (vii) Mr Livesey's report is dated 3 February 2021 and provides his expert opinion about the form of construction and condition of repair of the metal framed, single glazed window through which the Plaintiff put his arm. The report: (a) exhibits photographs taken on 28 August 2020 and show amongst other things, a broken window, in situ, covered with plastic and cardboard, along with detailed photographs of the frame and the window mechanism; (b) sets out Mr Livesey's opinions as to the overall state of the frame and mechanism (section 2); how the accident happened (section 3); the defects in the glass (section 4); measures that could have been taken by Mr Crow to avoid the accident (section 5); whether the window was fit for purpose (section 6); whether the incident correlates to the damages and what caused the window to smash (sections 8 and 9) (there being no section 7). (viii) On 11 July 2022, a letter of claim was sent to the Second Defendant. (ix) The following day, on 12 July 2022, nearly 3 years after the accident, proceedings were issued by the Plaintiff against the Defendants. Those proceedings allege that the First Defendant and the Second Defendant (insofar as it was liable to maintain the windows at the Property) breached their statutory duties under the Health and Safety at Work (Jersey) Law 1989 and/or their duties as occupiers of the Property. Subsequently, Answers were filed by each of the Defendants denying liability and alleging contributory negligence on the basis that the Plaintiff pushed on the glass rather than using the latch and/or otherwise failed to take adequate care for his own safety. Each Defendant has also brought a third-party claim against the other alleging that the other was contractually responsible for the maintenance and repair of the window. (x) A directions hearing was held in March 2023 at which the First Defendant was given permission to rely upon Mr Livesey's report and directions were given to progress the case. (xi) On 29 June 2023, as part of his enquiries for the purposes of discovery, Mr Pinzari enquired of the window company what they had done with the original window; they replied saying that they "believe it was left on site"; Mr Pinzari says that neither he nor his staff are aware of any window having been left on site and he does not know what has happened to it. (xii) On 23 August 2023, the Plaintiff's advocate wrote to the Defendants' advocates indicating that he would be seeking his own expert report to address the issue of contributory negligence and seeking an explanation as to whether the window was available and if not, why not. (xiii) On 12 October 2023, the Plaintiff issued an application to strike out the Answers of the First and Second Defendant pursuant to RCR

6/13(d) on the basis that: "...to allow the case to proceed following the failure of the First Defendant and/or the Second Defendant to preserve evidence that is directly relevant to the Plaintiff's case, in particular determination of liability and the issue of contributory negligence, constitutes an abuse of the process of the Royal Court; as a result of the failure to preserve evidence it is no longer possible for the Plaintiff to receive a fair trial." 7. That application is not supported by any affidavit or other evidence, and in particular there is no report, draft or otherwise, from any expert joining issue with Mr Livesey's report and/or stating how and why that expert is or might be prejudiced in opining. The Parties' Submissions 8. Despite some initial suggestions in the Plaintiff's Skeleton Argument that the First Defendant had wilfully destroyed the window, Advocate Preston for the Plaintiff was clear that he was not alleging any impropriety on the part of the Defendants. His submissions were that to allow the case to proceed in the circumstances now presenting, where a critical piece of evidence had been destroyed, would amount to an abuse of process and/or be unfair. 9. Advocate Preston further submitted that: (i) whilst there are aspects of Mr Livesey's report that support his case, there are parts which do not and which he might wish to challenge; (ii) he cannot now get a report from an expert who will have seen the glass and therefore the Plaintiff has been put at a disadvantage and cannot have a fair trial; (iii) unless there are exceptional circumstances, where prejudice has been suffered that is sufficient to justify a strike out; (iv) if the Court was not minded to strike out the Answers, it should order Mr Livesey's report to be edited or redacted and should give directions to manage his evidence at trial to ensure that it does not stray into redacted areas. Alternatively, no party should be allowed to rely on it. 10. Advocate Corbel for the First Defendant submitted that the Plaintiff had to establish that there was an abuse of process if the Court was to strike out the Defendants' Answers and there was no basis upon which such a finding could be made given the absence of foul play. She also submitted that: (i) at its highest, there had been an accidental destruction of the window; (ii) the Plaintiff issued the proceedings in July 2022 on the basis that the window had been poorly maintained and/or was inherently unsafe yet did not ask either Defendant to retain it or to inspect it until August 2023; (iii) whilst her client had offered to remove section 3 of Mr Livesey's report which dealt with contributory negligence, together with any subsequent references, the Court should not itself embark on such an exercise of redacting the report in the absence of proper evidence as to the issues; (iv) there is no evidence upon which the Court could find that a fair trial is no longer possible. 11. Advocate Hoare for the Second Defendant submitted that: (i) whilst Voisin Hunter Limited may have been aware of the accident from a very early stage, there is no evidence that they were acting on behalf of the Second Defendant as opposed to on their own behalf and/or on behalf of the Quennevais Parade Association when they became aware of it; (ii) in particular, there is no evidence that the Second Defendant was aware of any claim until it received the letter of claim in July 2022, after the First Defendant had disposed of the window; (iii) the First and Second Defendants must be considered separately, and the Court should not hold the Second Defendant liable for any failings on the part of the First Defendant; (iv) however, the Court deals with this issue, it must not unjustifiably or inadvertently favour any party at the expense of another;

(v) attempting to redact the report will inevitably prejudice one party or another and accordingly, the Court should prevent any party from relying on the report. Relevant Law 12. Practice Direction RC 17/07 provides that: "3. As soon as a party is aware that litigation is contemplated, that party must immediately take all reasonable steps to ensure that potentially discoverable documents are preserved." 13. Unlike the position in relation to potentially discoverable documents, there is no express provision under either the Royal Court Rules or any associated Practice Directions requiring potential parties to litigation to preserve physical, non-documentary, evidence which might be relevant for the purposes of future proceedings. Yet all parties are agreed that this is what should have occurred in this case. 14. In my judgment: (i) although there is no express obligation to preserve physical, non-documentary evidence, parties must act reasonably; (ii) if a party to contemplated litigation wishes to ensure that physical, non-documentary evidence not in their possession is preserved, they must engage with the party that has possession and seek confirmation that the item will be preserved; if such confirmation is not forthcoming, they may have to apply for injunctive relief (there being no similar provision in the Royal Court Rules to CPR 25.5 which provides a power for the English Courts to order inspection of property before commencement of proceedings or against a non-party); (iii) if one party to contemplated litigation thinks that physical, non-documentary evidence in their possession (the window in this case) should be examined, the Court would ordinarily expect them to consider whether it is possible for any examination to be carried out in such a manner as to ensure that "so far as is practicable" all other parties to that contemplated litigation are on an equal footing. This might involve for example, retaining the items to facilitate future examination, liaising with the anticipated parties before proceedings are issued or indeed, postponing any destructive testing until after proceedings have commenced. If justification for such an approach be required, parties to litigation have an obligation to help the Court further the Overriding Objective which includes ensuring that all parties are on an equal footing (RCR 1/6(6)(a)) and as applied in *N. E. Masefield Limited v Gleeson*

[2023] JRC 161, the Overriding Objective should form part of any pre-action considerations by parties to potential litigation. 15. Whilst a conditional obligation to preserve physical, non-documentary evidence is a lesser obligation than that imposed on parties under Practice Direction RC 17/07, none of the parties have been able to identify any authority dealing with the destruction of such material. Accordingly, I think it of assistance to consider the position in relation to the destruction of potentially discoverable documents. 16. Discovery is a singularly important part of the litigation process. The obligation imposed by Practice Direction RC17/07 is similar to the obligation imposed in England and Wales under paragraph 7 of Practice Direction 31B of the CPR. 17. In the English decision of *Douglas v Hello*

[2003] EWHC 55 (which has been cited in Jersey on numerous occasions, albeit not on this issue), *Morritt V. C* was considering an application to strike out defences on the grounds that, amongst other things, the defendants had deliberately destroyed or disposed of documents both before, and after, the commencement of proceedings. He held at

paragraph 86 that: "There is, however, a distinction to be drawn between those which were destroyed or disposed of before these proceedings were commenced and those which were destroyed or disposed of thereafter. With regard to the former category it is established in the very recent decision of the Court of Appeal for the State of Victoria in *British American Tobacco Australia Services Ltd v Cowell and McCabe*

- [2002] V. S. C. A. 197, paras [173] and [175] that the criterion for the Court's intervention of the type sought on this application is whether that destruction or disposal amounts to an attempt to pervert the course of justice. There being no English authority on this point I propose to apply that principle, not only because the decision of the Court of Appeal for the State of Victoria is persuasive authority but because I respectfully consider it to be right." 18. The decision of the Court of Appeal for the State of Victoria in *British American Tobacco Australia Services Ltd v Cowell and McCabe*
- [2002] V. S. C. A. 197 concerned proceedings for personal injuries against *British American Tobacco Australia Services Ltd* ("BATASL") where the plaintiff's complaints about BATASL's discovery crystallised into an application to strike out BATASL's defence on the basis that, amongst other things: "the conduct of the defendant its servants and agents, including its solicitors, in the destruction of documents relevant or potentially relevant to apprehended litigation has created, circumstances where this plaintiff is unable to obtain a fair or proper trial." 19. That complaint related to the destruction of documents by BATASL, at a time when the Court found BATASL "considered that further proceedings were not merely likely, but a near certainty, although it did not know the identity of any proposed litigant". The Court was required to determine between two competing positions, namely that the court should strike out a defence where the defendant, by its conduct, denies the plaintiff a fair trial (the plaintiff's position) and that advanced by the defendant that any party was free, in an adversarial system, to do what it liked with its own documents before the commencement of litigation and the only remedy was one of adverse inferences. The Court held (at paragraph 145), that each of these positions was too extreme and went on to state that: "173 As indicated at the outset, it seems to us that there must be some balance struck between the right of any company to manage its own documents, whether by retaining them or destroying them, and the right of the litigant to have resort to the documents of the other side. The balance can be struck, we think, if it be accepted that the destruction of documents, before the commencement of litigation, may attract a sanction (other than the drawing of adverse inferences) if that conduct amounts to an attempt to pervert the course of justice or (if open) contempt of court, meaning criminal contempt (inasmuch as civil contempt comprises wilful disobedience of a court order and will ordinarily be irrelevant prior to the commencement of proceedings). Such a test seems to sit well with what has been said in the United States as well as what has been said in England. Whether contempt, even criminal contempt, is possible before any proceeding has been instituted need not be examined on this occasion... Certainly, there can be an attempt to pervert the course of justice before a proceeding is on foot, as *R. v. Rogerson* demonstrates, and that, we think, provides a satisfactory criterion in the present instance.

The standard of proof is the civil rather than the criminal standard, bearing in mind also the seriousness of the allegation... Both attempting to pervert the course of justice and contempt of court (in the relevant sense) are criminal offences, but where a civil sanction is sought a civil standard of proof suffices... There is considerable force, we think, in Mr. Myers' submission that the rule of law is endangered if intervention by the court, for conduct occurring before the commencement of litigation, were to be grounded otherwise than on illegality, albeit illegality proved to the civil standard... Accordingly, there being no authority directly in point, we consider that this court should state plainly that where one party alleges against the other the destruction of documents before the commencement of the proceeding to the prejudice of the party complaining, the criterion for the court's intervention (otherwise than by the drawing of adverse inferences, and particularly if the sanction sought is the striking out of the pleading) is whether that conduct of the other party amounted to an attempt to pervert the course of justice or, if open, contempt of court occurring before the litigation was on foot. We say nothing about the drawing of adverse inferences because that is not raised for consideration on this appeal..." 20. In reaching this conclusion, the Court of Appeal for the State of Victoria considered and applied the principles set out in the English decisions of *Logicrose Ltd v Southend United Football Club Ltd* (The Times, March 5, 1988) and *Arrow Nominees Inc v Blackledge*

[2001] BCC 591 . Those decisions were considered, and applied, by Birt, B., in *Leeds United Football Club v Admatch*

[2011] JRC 016A when determining the circumstances in which striking out might be appropriate. In my judgment, the principle set out by the Court of Appeal for the State of Victoria in *British American Tobacco Australia Services Ltd v Cowell and McCabe* is cogent and based on principles which have been adopted in Jersey such that it reflects the appropriate test to be applied in Jersey in relation to the destruction of documents occurring before the commencement of litigation. 21. As to the jurisdiction to strike out following destruction of documents occurring after commencement of proceedings, the position is a little clearer. In *Alhamrani v Alhamrani*

[2009] JLR 301 , Beloff JA. reviewed the English decisions, including *Logicrose Ltd v Southend United Football Club Ltd* and *Arrow Nominees Inc v Blackledge* , and held that: "24 As this analysis indicates, the principles extracted from English cases are not altogether coherent; the jurisprudence is a developing one and new situations have provoked new solutions but, in my view, these propositions, at least, could be adopted as the law of Jersey:

- (i) the jurisdiction exists to serve the ends of justice; (ii) the jurisdiction is a discretionary one; (iii) the discretion can be exercised before or during a trial; (iv) the jurisdiction is not a penal one; and

- (v) without prejudice to (ii), if a litigant's conduct puts the fairness of the trial at unacceptable risk (so that any judgment in favour of a litigant would be regarded as unsafe), a court is bound to refuse that litigant to take further part in the proceedings and (if the litigant is a claimant) to determine the claim against him. I prefer the phrase "unacceptable risk" to "in jeopardy" used in *Arrow Nominees Inc. v. Blackledge*
- (1) or the epithet "at real" or "substantial" risk, concepts also found in the same judgments and I myself would reserve the position as to whether this jurisdiction can, in Jersey, properly be exercised for any ground short of that, for example where the conduct of the litigant is (without preventing a fair trial) detrimental to the administration of justice generally..." 22. The decision in *Alhamrani* was further considered by Birt, B. in *Leeds United Football Club v Admatch* in which he held that: "35. I draw from the above authorities the conclusion that it is a strong thing to strike out a defence and there must be an abuse of process such as to render further proceedings unsatisfactory or prevent the court from doing justice or, to quote Page Commissioner, a party must have flouted or ignored the Court's orders or persistently conducted himself in a way that evinces an unwillingness to engage in the litigation process on an equal footing with the other parties." 23. The draconian nature of striking out was again emphasised in *Consolidated Resources Armenia v Global Gold Consolidated Resources Limited & Ors*

[2017] JRC 151 , where the Master was addressing the consequences of an abuse of process and a want of prosecution in relation to the proceedings before the Court: "24. The difficult question is whether the above conclusions should lead to an automatic dismissal of the plaintiff's claims as set out in the amended order of justice.

25. To strike out a claim must be proportionate to the breach involved and is also a remedy of the last resort. The Court has to consider whether what sanctions should be applied to enable justice to be done between the parties (see *Viera v Kordas*

[2014] JRC 042) at paragraph 19 as follows:- "19. We come now to the question as to what sanction should be applied in the light of the first two findings. Having regard to the Article 6 Convention rights of the parties, we note and accept the proposition that we should not apply the most severe sanction of striking out the plaintiff's claim if there are other sanctions which could be applied which would enable justice to be done between the parties. Illustrations of the type of sanctions - costs orders, orders that no interest be due on any sum awarded and so on - are canvassed in some of the other cases. On the other hand, if the court were to be of the view that it is now no longer possible to have a fair trial of the action, then there would undoubtedly be prejudice to the defendant, and it would not be right to allow the action to proceed." 24. As set out above, a conditional obligation to preserve physical, non-documentary evidence is a less onerous obligation than that imposed on parties in relation to documents under Practice Direction RC 17/07 but that does not justify the imposition of less onerous thresholds than those set out in relation to documents destroyed before, or after, commencement of proceedings; quite the contrary. However, in the absence of any submissions as to what might constitute more onerous

thresholds, I proceed on the basis that for the Court to strike out the Defendants' Answers following the destruction of the window: (i) if destruction occurred before the issue of proceedings, it would require the Court to be satisfied, to a civil standard, that the Defendants' conduct amounted to an attempt to pervert the course of justice; and (ii) if destruction occurred after the issue of proceedings, it would have to be satisfied that it was no longer possible to have a fair trial. Discussion 25. The evidence adduced from Mr Pinzari, which is unchallenged, is that the window was replaced on 29 October 2020, but it was not until June 2023 that he became aware that it had not been retained by the window company. There is no evidence, nor indeed, any suggestion from the Plaintiff to the Court, that the loss of the window was anything other than inadvertent. 26. In my judgment, the window is most likely to have been destroyed at or around the time of replacement, which occurred significantly before the commencement of proceedings. Accordingly, if the Court is to consider intervening by way of striking out the Answers of the First and/or Second Defendant, the Plaintiff would need to satisfy the Court that the conduct of one or other of the Defendants amounted to an attempt to pervert the course of justice. No such allegation was advanced by the Plaintiff, let alone established to a civil standard. 27. If, contrary to the above assumption, the window was destroyed after proceedings were commenced in July 2022, the Court would need to be satisfied that a fair trial was no longer possible before it could consider striking out one or both of the Answers. The Plaintiff alleges, without any supporting evidence, that he cannot have a fair trial on the basis that (as set out in his Skeleton Argument): "5.11. The prejudice which arises is in having the opportunity to challenge properly (or at all) the evidence of Mr Livesey. He of course has had the opportunity to perform a full inspection of the window in situ whereby contrast any expert the Plaintiff appoints / retains will not be able to provide an opinion in the same was as Mr Livesey. Any expert will inevitably have to qualify his opinion on the basis that he / she will not have actually inspected the window, unlike Mr Livesey. Moreover, the First Defendant will have a significant advantage at trial as any challenge to what Mr Livesey has said can be met by Mr Livesey pointing out, repeatedly, that it is he, and only he, who has physically seen and assessed the window in question." 28. I accept that any expert instructed by the Plaintiff will not be able to physically examine the window and that there may be some, perceived, disadvantage caused as a result, but in my judgment the trial process is more than capable of dealing with such a situation. That is particularly so in this case: (i) there are a number of detailed photographs of the window, in situ, at the time of the accident, and at the time of Mr Livesey's inspection in August 2020 which can all be examined by any expert and/or the Jurats; (ii) Mr Livesey's report is a report prepared for the benefit of the Court, by an expert who states that he is aware of his duties to the Court and the other parties; (iii) that report contains a detailed factual description of the glazing and the frame which could inform any further expert opinions; (iv) whilst the Plaintiff now submits that the window is a crucial piece of evidence that his expert needs to examine, this is undermined by the facts that: (a) the Plaintiff made no attempt, or request, to examine it before sending a letter of claim in September 2020, 11 months after the accident; (b) there was no request in that letter before action to retain the

window for inspection; (c) proceedings were issued in July 2022, 3 years after the accident, and the claim was pleaded against the Defendants without any expert having been instructed, let alone any report having been obtained, and it would appear that the Plaintiff intended to prosecute his claim on the basis of his evidence alone; and (d) it does not appear that any expert has yet been instructed to opine on the material currently available. (v) the Plaintiff can, and will, give evidence and has the ability to cross-examine Mr Livesey and any other witnesses adduced by the Defendants, and to make submissions. 29. In my judgment, the fact that an expert instructed by the Plaintiff may not be able to examine the window does not put the fairness of the trial at risk at all, let alone put it at risk to an unacceptable level or otherwise prevent a fair trial taking place. 30. Accordingly, irrespective of when the window was destroyed, I find that there is no basis for the Court to strike out the Defendants' Answers or either of them and I decline so to do. 31. Advocate Preston's final submission was that if the Court was not minded to strike out the Answers, it should order Mr Livesey's report to be edited or redacted and should give directions to manage his evidence at trial to ensure that he does not stray into redacted areas or alternatively, no party should be allowed to rely on it. That alternative submission is supported by the Second Defendant. This is not an application to exclude all or part of Mr Livesey's evidence on the basis that he has strayed beyond his expertise or opined on an ultimate issue but rather a generic plea to level the playing field in the Plaintiff's favour. In my judgment, having found that the destruction of the window does not put the fairness of the trial at risk, I have found that the playing field is level and there is no basis for the Court to intervene. Accordingly, I decline so to do. 32. Further, whilst pursuant to the Overriding Objective, procedural orders could in theory be used to redact or to exclude Mr Livesey's report, in whole or in part, to remedy procedural breaches, in my judgment, I would be extremely wary of so doing as Master. Firstly, I am not the trial court, and not only might such orders deprive the trial court of some of the best evidence available in relation to the issues in the case, but in trying to level the playing field, such orders could, inadvertently, lead to the trial court being misled. Secondly, such orders risk unjustifiably and/or disproportionately preferring one party at the expense of another. In my judgment, if a party fears that it may be at a disadvantage, albeit one that does not undermine the overall fairness of the trial, one remedy may be to place all of the facts relating to the perceived disadvantage before the trial court and for the Learned Jurats to reach such conclusions as they think fit on the basis of the evidence as a whole. 33. Accordingly, I dismiss the Plaintiff's application. Authorities Health and Safety at Work (Jersey) Law 1989. Practice Direction RC17/07 N. E. Masefield Limited v Gleeson

[2023] JRC 161 . Douglas v Hello

[2003] EWHC 55 . British American Tobacco Australia Services Ltd v Cowell and McCabe

[2002] V. S. C. A. 197. Logicrose Ltd v Southend United Football Club Lid (The Times, March 5, 1988) Arrow Nominees Inc v Blackledge

[2001] BCC 591 . Leeds United Football Club v Admatch

[2011] JRC 016A . Alhamrani v Alhamrani

[2009] JLR 301 . Consolidated Resources Armenia v Global Gold Consolidated Resources Limited & Ors

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Prepared on 23 October 2026 · Esheria