

JERSEY / JUDGMENT

De Mouilpied v Sturdy

[2003] JRC 079 (14 May 2003)

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judgment

the bailiff: 1. This is an appeal from a decision of the Master of the Royal Court of the 4th February, 2003. The facts are relatively straightforward. In March, 1994, the plaintiff was visiting her daughter who lived in a flat at 3, St Marks Road, St Helier. As the plaintiff was leaving the premises by means of an outside staircase, one of the steps of the staircase apparently collapsed and the plaintiff suffered leg injuries. 2. The plaintiff claims that this incident resulted from the negligence of the defendant and the breach of a duty owed to a person visiting the premises. The plaintiff accordingly claims both special and general damages. The defendant denies liability and specifically denies the alleged negligence and breach of duty of care. 3. A letter before action was sent by the plaintiff's legal advisers on the 15th March, 1994, and a further letter sent in June of that year. A reply from the defendant's loss adjusters came in June 1994, but there was then no further activity until the beginning of 1997, when the plaintiff's legal advisers sought an extension of the prescription period. By agreement the prescription period was extended initially for 6 months and subsequently for a further 1 month. 4. The Order of Justice was issued on the 14th September, 1997. An Answer was eventually filed on the 18th December, 1997. There was then no further substantial procedural activity until July, 1999, when the plaintiff was granted leave by consent to amend her Order of Justice and an amended Answer was filed on the 27th July, 1999. 5. There were apparently some negotiations and correspondence between the parties, between February 1998 and March 1999, but these came to nothing. On the 9th August, 1999, the plaintiff applied to the Judicial Greffier to set the action down for hearing. On 11th August, 1999, the Judicial Greffier wrote to the plaintiff's lawyers pointing out that certain procedural requirements had not been complied with. There was no response to that letter until the 27th July, 2000, when the plaintiff's legal advisers informed the Greffier that the information requested would be supplied, and the action requested to be taken, would be carried out very shortly. 6. On the 11th August, 2000, the Greffier wrote to the plaintiff's legal advisers, again requesting that the information be provided as soon as possible, so that the action could be set down. No reply was received from the plaintiff's legal advisers until 26th September, 2002, following which a summons for directions was issued. Before that summons could be heard, however, an application had been made by the defendant, by summons, to strike out the Order of Justice. 7. The matter was heard before the Master and in his judgment he concluded as follows: - "On

balance I have come to the conclusion that the delays are such as are likely to cause, or to have caused, serious prejudice to the defendant because she has not been able through her insurers to pursue the case in a manner in which she would have done according to Mr. Jeanne's affidavit. For the same reasons I consider that there is a substantial risk that a fair trial of the issues of the action may be prevented". Against that decision the plaintiff appeals. 8. It is accepted on all sides that this Court must exercise its own discretion while, of course, having due regard to the decision of the learned Master. Miss Dorey who presented her case on behalf of the appellant with commendable brevity and clarity conceded that the delays involved had been both inordinate and inexcusable. This realistic and very proper concession enables the Court to concentrate upon the crucial issue, which is whether there has been serious prejudice to the defendant, or whether there is a substantial risk that it is not possible to have a fair trial of the issues. 9. There are disputed factual issues in this claim and in particular a dispute as to whether the defendant knew that the Portland stone step was defective and had been warned before the accident that it was defective. The relevant law applicable to applications to strike out an Order of Justice was helpfully summarised by the Deputy Bailiff when giving a judgment of this Court in *Garfield-Bennett -v- Phillips* (6 th November, 2002) Jersey Unreported; [2002/214]. The Court there stated: "It is well established at the level of the Royal Court that the principles to be applied on an application to dismiss for want of prosecution are those laid down in the leading English case of *Birkett -v- James*

(1978) AC 297 as subsequently elaborated by decisions of the English courts. A convenient summary of the principles as they have developed is to be found in *Shtun -v- Zalejski*

(1996) 3 All ER 411. With minor alterations, we would adopt those principles as reflecting the law of Jersey and would set them out as follows:-

- (i) In a case where there has been no contumelious conduct by the plaintiff, the Court, if it is to strike out an action for want of prosecution, must be satisfied (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants, either as between themselves and the plaintiff, or between each other, or between them and a third party. (ii) The delay which must be shown to have caused such risk or such likelihood of prejudice is the delay after the issue of proceedings. (iii) But where the plaintiff delays in issuing proceedings and by such delay causes prejudice, the additional prejudice which must be shown to justify dismissal of the action need not be great, provided that it is more than minimal. (iv) Further, once the plaintiff is guilty of further delay causing more than minimal additional prejudice, the prejudice caused by the totality of the period of his delay can be looked at.
- (v) The prejudice may take a variety of forms, but one recognised form is the impairment of the memory of witnesses. Another form consists of the prejudice to the defendant through having a serious claim hanging indefinitely over him. But the Court should only in exceptional cases treat the anxiety which accompanies all litigation as alone being sufficient

to justify dismissing an action. (vi) Save in exceptional cases, an action will not be struck out for want of prosecution before the expiry of the relevant limitation period. We would add two further points:-

- (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. (See *Skinner -v- Myles*

(1990) JLR 88 at 94). (ii) Where the prejudice relied upon takes the form of impairment of witnesses' recollections, it is not necessary that there should be evidence of particular respects in which potential witnesses' memories have failed; the Court is entitled to draw appropriate inferences from delay (see *Shtun -v- Zalejski* (supra)). Furthermore the Court can infer that any substantial delay at whatever period leads to a further loss of recollection (see Lord Browne-Wilkinson in *Roebuck -v- Mungovin*

(1994) 1 All ER 568 at 574). 10. Applying those principles to this case it is said that there are three elements of prejudice to the defendant. (i) The defendant has had this action hanging over her since March 1994. Counsel for the plaintiff correctly pointed out, however, that there was no evidence from the defendant as to the effect of the long drawn out action upon her. Furthermore, even if an inference could be drawn that this had been a stressful period for her, this was not sufficient by itself to found prejudice. (ii) It is said that the defendant and her advisers, given the dilatory approach of the plaintiff's legal advisers, and the consequential uncertainty as to whether the claim would be pursued, did not take steps that might otherwise have been taken to seek out relevant witnesses. The action was not begun until September 1997, some 3½ years after the incident. The defendant's advisers did at that time take two statements, one from the defendant and one from the builder who had repaired the stone step. Mr Michel for the defendant submitted, however, that if the action had been pursued more vigorously at that stage the defendant's advisers might well have sought to widen the net. (iii) Counsel submitted that the delay must have impaired the recollections of the witnesses, not only for the defendant but also for the plaintiff. Counsel submitted that prejudice had, undoubtedly, occurred in this respect even in 1997, when statements were recorded after the institution of proceedings some 3½ years after the incident. Memories must have been impaired at that stage and the fault for that prejudice lay with the plaintiff. Counsel for the plaintiff drew attention to correspondence between the legal advisers of the parties in October, 2002, and submitted that the defendant's conduct had induced a belief in the plaintiff that the action would be proceeding. We do not think that anything turns upon that flutter of activity. 11. We are bound to say that we have some sympathy for the plaintiff, although we do not know, of course, whether the inordinate and inexcusable delay affecting this action was her fault,

or the fault of her legal advisers. 12. On balance, however, we have concluded that the delay is such as to give rise to a substantial risk that it is not possible to have a fair trial of the issues. We accept the submission that some prejudice had been caused to the defendant by the failure to bring proceedings until September, 1997. Given that initial delay it was incumbent upon the plaintiff to move the action forward with all due expedition. She did not do so, and in our judgment the defendant has suffered more than minimal additional prejudice as a result of the 5½ years further delay which has followed. 13. There will have been in our judgment undoubtedly a further impairment of the memories of witnesses. We are satisfied that the defendant has established that all the elements required to dismiss an action for want of prosecution are present in this case. The appeal is therefore dismissed, and I order that the plaintiff pay the costs of the appeal on the standard basis. Authorities Supreme Court Practice: 1999: Litigation Topics: paras 25/L/1 to 25/L/22. Garfield-Bennett -v- Phillips (6 th November, 2002) Jersey Unreported; [2002/214]. McGorin -v- Pascoe (7 th June, 2002) Jersey Unreported; [2002/113]. Woodhouse -v- Consignia plc

[2002] 1 All ER 737. Royal Court Rules 1992; Rules 6/7, 6/20, 6/21. Page Last Updated: 23 Jun 2016
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