

JERSEY / JUDGMENT

Drake v Gouveia [2000]

JRC 161 (10 August 2000)

[2000] JRC 161

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JUDGMENT

THE MASTER: 1. On the morning of 18th March, 1994, Mr. Derek Cyril Drake (the original plaintiff in this action) was driving his Austin Allegro motor car along St Peter's Valley when it collided with a BMW car driven by Mr. Arlindo Gouveia ("the defendant") who was coming out of the car park at the Britannia Hotel public house. As a result of the accident Mr. Drake suffered a whiplash type injury to his neck and an injury to his right shoulder. On 31st October, 1994, an Order of Justice was issued at the instance of Mr. Drake which sought damages from the defendant on the basis that the collision was caused as a result of the negligence, imprudence, and lack of care of the defendant. The matter first came before the Royal Court on 11th November, 1994, and it was adjourned by agreement on two occasions until it was placed on the pending list on 25th November, 1994. The Court File shows that no further steps were taken procedurally in relation to the action until March this year. As will be seen, however, at least in the period from 1995 to 1997 various activities were taking place behind the scenes. In May 1999 Mr. Drake died suddenly. 2. In March, 2000, the Judicial Greffier gave notice pursuant to Rule 6/20 of the Royal Court Rules 1992 of his intention to dismiss the action on the motion of the Court itself. Advocate Landick, on behalf of the current plaintiff who is the sole executrix of the late Mr. Drake, requested that the action for dismissal be held in abeyance for the time being to enable his client to investigate her duties and liabilities in taking over the action as executrix. 3. Following discussions between Messrs. Crill Canavan representing the defendant and Advocate Landick it was agreed by consent that Mrs. Drake, in her capacity as executrix of her late husband's estate, be substituted as plaintiff and that the surname of the defendant be corrected so that it was properly spelt. A Consent Order to this effect was issued on 10th May, 2000. In agreeing this proposal Messrs. Crill Canavan reserved their rights to proceed with a summons to strike out the plaintiff's claim. This summons was formally issued on 12th May and came before me for hearing on 1st August. 4. Although no procedural steps were taken after the action was placed on the pending list in November 1994, there were various activities taking place in the

background.

The late Mr. Drake's then lawyers, Messrs.. Lemprière Whittaker Renouf were carrying out investigations into the whole matter. It transpired that a serious doubt had arisen as to whether the defendant was in fact insured at the time of the accident. His apparent insurers (who were separately legally represented) ultimately asserted that he was not insured with them as he was acting in the course of his employment and they did not, therefore, have any liability to Mr. Drake. The question then arose as to whether insurance cover had been provided by Mr. Gouveia's employers but this seems not to have been the case. On 24 th January 1995, Lemprière Whittaker Renouf wrote on behalf of Mr. Drake to the Motor Insurers' Bureau advising them of the uncertain position regarding the matter of insurance and asking them to waive any notice requirement and asking confirmation that they would meet any liability to Mr. Drake under the terms of the Memorandum of Agreement made in 1990 between the Bureau and the States of Jersey Defence Committee. Copies of the Order of Justice, various medical reports and details of loss were enclosed with that letter. On 2 nd February the Motor Insurers' Bureau acknowledged receipt to Lemprière Whittaker Renouf of their letter, noting that proceedings had been issued without the correct notice being given and that as a consequence the Bureau might have no liability under the Memorandum of Agreement and reserved its position. Advocate Whittaker replied on 17 th March 1995 stating that she felt confident that adequate notice under clause 5(1) (a)(ii) of the Memorandum of Agreement had been given. In fact, what seems to have happened was that Avon Insurance (the original insurers thought to have covered the defendant) had been given notice of the position by Lemprière Whittaker Renouf. 5. The Memorandum of Agreement with the States of Jersey provides, subject to its terms, for the Motor Insurers' Bureau to pay damages awarded by a court in respect of death or personal injury or damage to property where the driver of the motor vehicle who is found liable is uninsured. There are various conditions precedent to the Bureau's liability, one of which requires written notice of the proceedings to be given. The conditions precedent are set out in clause 5 of the Memorandum of Agreement and clause 5(1)(a) states as follows:- "CONDITIONS PRECEDENT TO M. I. B.'S LIABILITY 5. (1) M. I. B. shall not incur any liability under clause 2 of this Agreement unless - Written notice of proceedings (a) notice in writing of the bringing of the proceedings is given within seven days after the commencement of the proceedings - (i) to M. I. B. in the case of proceedings in respect of a relevant liability which is either not covered by a contract of insurance or covered by a contract of insurance with an insurer whose identity cannot be ascertained, or (ii) to the insurer in the case of proceedings in respect of a relevant liability which is covered by a contract of insurance with an insurer whose identity can be ascertained, such notice to be accompanied by a copy of the Order of Justice, Summons or other document initiating the proceedings." 6. Matters then seemed to have dragged on with various insurance companies having been instructed on behalf of the Motor Insurers Bureau, each of which had corresponded with Lemprière Whittaker Renouf. The first of these companies was Guardian Insurance which corresponded with Lemprière Whittaker Renouf in 1995. On 25 th May 1995 Guardian Insurance wrote to Lemprière Whittaker Renouf requesting various information. It also pointed out that it had been advised by the Motor Insurers Bureau that correct notice of proceedings in accordance with clause 5(1)(a) of

the Memorandum of Agreement had not been given. Guardian Insurance went on to state that in its belief the only way matters could be rectified would be to re-issue proceedings giving the required notice. Guardian suggested that it should first carry out enquiries into the insurance position before that was done but expressly stated that nothing in its letter should be construed as altering the plaintiff's legal rights or waiving any requirement of the Memorandum of Agreement. Correspondence between Guardian and Lemprière Whittaker Renouf continued on a fairly cursory basis during 1995 and in February 1996 Lemprière Whittaker Renouf wrote again. In that letter they referred to re-service of the Order of Justice and asked where within the jurisdiction of the Royal Court it should be served. This seems to have been based on a misunderstanding of the terms of clause 5 of the Memorandum of Agreement and what had previously been advised. It seems to me quite clear that the proper procedure was for the Order of Justice to be served again on the defendant and notice given to the Motor Insurers Bureau at that time. This was apparently understood by Lemprière Whittaker Renouf on 8 th March 1996 because on that date they wrote to Messrs.. Crill Canavan advising that firm that they were required to serve the Order of Justice upon the defendant in order "to bring the MIB into the frame" and they asked whether Crill Canavan had instructions to accept service of the proceedings. Crill Canavan replied on 16 th April, confirming that they were instructed to accept service. 7. There is one other matter to which I should also briefly refer. On 9 th December 1994 Messrs.. Crill Canavan wrote to Advocate Renouf and advised that they were minded to join the defendant's employers as a third party in the action on the basis that they owed a duty to insure him as he was acting as their agent at the time of the accident. They asked if Advocate Renouf would agree with this course of action so that an appropriate letter of consent could be prepared. On 24 th January, Advocate Renouf replied, raising the apparent uncertainty with regard to insurance cover and the potential involvement of the Motor Insurers' Bureau. He concluded by saying that until it was learnt whether it was appropriate to join the Bureau as a party to the proceedings he suggested that other matters be left in abeyance, specifically the request to join a third party. This position was re-stated by Lemprière Whittaker Renouf in the letter of 8 th March 1996 to Messrs. Crill Canavan to which I have just referred. The full terms of that letter are as follows:- "Dear Advocate Santos-Costa Mr. D. C. Drake - Mr.. A. Gouveia I refer to correspondence last year concerning the above case and write to advise that in the interim I have been in consultation with insurers advising the M. I. B. As a result of the discussions held and under the terms of the M. I. B. agreement I am required to serve the Order of Justice upon Mr.. Gouveia in order to bring the M. I. B. into the frame. I would be grateful if you could advise as to whether you are able to accept service in order to bring the matter back into Court as soon as possible. Thereafter we may deal with the Third Party application referred to in earlier correspondence and then progress this matter. I look forward to hearing from you by return. Yours sincerely" 8. Following Crill Canavan's confirmation that they would accept service nothing seems to have happened until August 1996 when Eagle Star notified Messrs.. Lemprière Whittaker Renouf that they were now acting in place of Guardian Insurance on behalf of the Motor Insurers' Bureau. By October 1996 Advocate Whittaker was writing to Eagle Star to express her concern at the lack of activity. Eagle Star responded on 31 st October confirming that they were now acting on behalf of the Motor Insurers Bureau. They suggested that as there were a number of insurers with

potential involvement these insurers should receive notice as well. They also sought copies of the proceedings and a schedule of damages in due course. 9. On 9 th December 1996, Advocate Whittaker wrote direct to the Motor Insurers' Bureau expressing her dissatisfaction with the manner in which the insurance companies acting on the its behalf had dealt with matters. In that letter she again asked whether papers should be re-served on the Bureau. The Bureau acknowledged receipt of the letter and advised that they had asked Eagle Star to deal with it on their behalf. On th March 1997 Eagle Star replied to Messrs.. Lemprière Whittaker Renouf stating that their own enquiries were now complete and they had received a signed consent and indemnity form from the defendant and were therefore now able to proceed with the plaintiff's claim. They did refer to the fact that the instigation of legal proceedings had been raised in the correspondence in the Autumn of 1996 but nothing seemed to have happened. On 9 th April 1997 Advocate Whittaker, in a without prejudice letter, sent details of her client's claim to Eagle Star. On 18 th July Eagle Star responded, apologising for the delay in replying, and asking confirmation whether proceedings had been served and if so, upon whom. From that date nothing whatsoever seems to have been done until March 2000. In the meantime, Mr. Drake died in May, 1999. 10. The striking out summons came before me for determination on 1 st August 2000. The summons sought the striking out of the plaintiff's claim on the grounds that it might prejudice, embarrass or delay the fair trial of the action or was otherwise an abuse of the process of the Court. In the alternative the striking out of the plaintiff's claim was sought under the inherent jurisdiction of the Court on the basis of inordinate and inexcusable delay by the plaintiff in pursuing the claim. At the hearing it became clear that the defendant sought only to rely on the latter ground and the hearing proceeded on that basis. 11. The principles applicable to striking out for want of prosecution are well known. In England they are stated in the case of *Birkett -v- James*

(1978) A. C. 297 and they are explained in the 1999 Edition of *The Supreme Court Practice* ("the White Book") in paragraphs 25/L/1 to 25/L/22 at pages 500 to 505. These principles have been cited with approval by the Royal Court on many occasions (see for example *Skinner née Ball-v- Myles* 1990 JLR 88 and *Beasant -v- Pavan* 1997 JLR 270). 12. The principles are set out in the speech of Lord Diplock in *Birkett -v- James* at page 318 in the following terms:- "The power [to strike out for want of prosecution] should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (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 ..." The present case is concerned only with the question of inordinate and inexcusable delay and the defendant does not rely upon any question of contumelious default. 13. In order to succeed in his application the defendant must show that there has been inordinate delay, that the delay is inexcusable and as a result there is a substantial risk that it is not possible to have a fair trial or that the delay is such as to be likely to cause or to have caused serious prejudice to the defendant. 14. "Inordinate" means "materially longer than the time usually regarded by

the Profession and Courts as an acceptable period". It is easier to recognise than to define (see the White Book paragraph 25/L/5 at page 501). In the present action, the Court File shows that from November 1994 until earlier this year there has been no procedural activity whatsoever although, as described, there was activity in the way of correspondence between the plaintiff's lawyers and various insurance companies and the Motor Insurers' Bureau. In my view, the fact that there has been no action taken in the conduct of the litigation itself since November 1994 does constitute inordinate delay and I so find. 15. I now turn to consider whether the delay can be regarded as inexcusable. Paragraph 25/L/6 of the White Book states that this question ought to be looked at primarily from the defendant's point of view or, at least, objectively. The history of the action shows that from the commencement of the proceedings in November 1994 there was (albeit at times in a somewhat cursory way) action by way of correspondence between the plaintiff's then lawyers and various insurance companies and the Motor Insurers' Bureau. It is quite clear, however, that at the very latest since July 1997 no action whatsoever was taken by or on behalf of the plaintiff. That remained the position until March this year. If looked at from the defendant's point of view, which must be the correct approach, there has been no activity since his lawyers were contacted by insurers representing the Motor Insurers' Bureau in May 1997. No real reason, let alone any cogent reason, has been put forward for the lack of activity since 1997. Whilst I am prepared to concede that there was an excuse for delay between 1995 and 1997 while correspondence was entered into between Mr. Drake's lawyers and the various insurers, I can see no reason for inactivity since May 1997 and I therefore find the delay since that date to be inexcusable. 16. As I have found the delay on the part of the plaintiff to be both inordinate and inexcusable, I now have to turn to consider whether as a result there is a substantial risk that it is not possible to have a fair trial of the issues in the action or the delay is such as is likely to cause or to have caused serious prejudice to the defendant. In so doing it is irrelevant for me to consider whether the plaintiff has any alternative remedy against her late husband's former legal advisers (see the White Book paragraph 25/L/16 at page 504). 17. In his affidavit in support of the striking out application the defendant puts forward the reasons which he says will result in his being severely prejudiced if the action is allowed to proceed. These are set out in full in paragraph 11 of the affidavit. He contends that because the Motor Insurers' Bureau has not been served and he was uninsured at the time of the accident, his position will be prejudiced as the Bureau will not conduct the proceedings and assist with any judgment if it is granted against him. He also points out that he is legally aided and, therefore, needs the assistance of the Bureau who would, in any event, have paid any fees incurred by him in defending the action. Miss Martin also urged on his behalf that if the Bureau had been involved and paid any sum adjudged to be due from the defendant then it would have regard to his overall financial position and would not have pursued him to recover any such sum even though they would be entitled so to do. No evidence, has, however, been produced to support this contention and I therefore disregard it. 18. The defendant also says that as the accident took place over six years ago he cannot recall clearly what happened. He made a witness statement in September 1994

but it did not contain very much detail. He does recall that there was a question of something being wrong with Mr. Drake's brakes because skid marks were left at the scene of the accident. He also points out that he would have argued contributory negligence on the part of Mr. Drake and a breach of duty on the part of the defendant's then employers. As Mr. Drake is now dead, the defendant will be severely prejudiced in raising any question of contributory negligence. Similarly, he claims he will be disadvantaged because of the fact that his employers no longer exist, and any potential third party claim against them would, in any event, be time-barred. Because the original plaintiff has died he also says that it would be possible to ascertain up-to-date medical reports and there are issues relating to a pre-existing medical condition and the Mr. Drake was wearing a neck brace at the time of the accident. Additionally, of course, Mr. Drake will not be available for cross-examination. The only other witness to the accident was a work mate of the defendant who also made a brief statement in 1994. 19. In her submissions, Advocate Martin contended that not only would the defendant be seriously prejudiced but, for many of the same reasons, a fair trial of the issues in the action would be impossible. Because of the death of the original plaintiff she argued that the Royal Court would not be able to assess properly the question of liability, let alone related questions such as contributory negligence. Furthermore, because it was not possible for any re-assessment of the original plaintiff's medical condition, the Court would find itself in an impossible possible in trying to assess correctly any damages. In her view it would not be possible to have a sensible trial either as to liability or quantum of damages. In addition, she pointed out that because of the delay, any award of special or general damages would carry interest, which was quite wrong when a substantial delay had resulted solely because the plaintiff's claim had not been pursued. Even at this time the action is procedurally "young" and will not come to trial for a considerable time. 20. Advocate Landick argued, in response, that any problems which arose would be to the detriment of the plaintiff rather than the defendant. He pointed out that in law there was no requirement for a plaintiff to give evidence on his own behalf and he urged that the death of Mr. Drake in 1999 was irrelevant. He also argued that the Motor Insurers' Bureau had properly received notice and could and should, therefore, be able to have conduct of the proceedings on behalf of the defendant. I cannot accept this submission as it flies in the face of the evidence which is before me. It seems quite clear to me that the plaintiff's then lawyers did accept, in the course of their involvement, that proceedings needed to be re-served and notice given to the Motor Insurers' Bureau but no action was taken in that regard. Mr. Landick also argued that the maxim "*res ipsa loquitur*" applied to the accident (as is pleaded in the Order of Justice) and the Court could and should take this into account in considering the question of liability. He also suggested that much of the delay was down to the Motor Insurers' Bureau and its agents and this was not something for which the plaintiff should be held responsible. 21. Mr. Landick also urged that the defendant himself was in breach of the Royal Court Rules because he had failed to file an Answer in the proceedings. He argued that the defendant could not, therefore, rely on the delay because of his own default. In the present case it is quite clear, however, that the question of filing an Answer and third party proceedings had been raised in

correspondence between the plaintiff's then lawyers and the defendant's lawyer. As a result of that correspondence the defendant was told by the then plaintiff's lawyers that the question of third party proceedings could be left over pending discussions between the Motor Insurers' Bureau's agents and the plaintiff's lawyers. In the event, however, matters did not progress any further forward. Although it may be arguable that in certain cases the default of the defendant in filing an answer might debar him from the remedy of dismissal of the action (see the case of *Allen -v- Sir Alfred MacAlpine & Sons*

(1968) 1 All ER 543 at page 558), I do not consider that it should do so in the particular circumstances of this case. Rather, I think that the position is that stated by Diplock L. J. at page 555 of the *MacAlpine* case in the following terms:- "It is thus inherent to an adversary system which relies exclusively on the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the court to dismiss the plaintiff's action for want of prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible." 22. My finding is that there has been inordinate delay on the part of the plaintiff and at least from July 1997 that delay was inexcusable. Furthermore, I consider that because of that delay there is a substantial risk that a fair trial of the issues in the action is not possible. I also consider that the delay is such as to have caused or to be likely to cause serious prejudice to the defendant. In the circumstances I consider that the defendant should succeed in his application and I therefore strike out the plaintiff's action for want of prosecution. 23. Having heard argument today by the parties on the question of costs, I order that the defendant's costs both of this application and the proceedings generally be paid by the plaintiff on the standard basis. Authorities *Skinner née Ball -v- Myles*

(1990) JLR 88 *Beasant -v- Pavan*

(1997) JLR 270 *Birkett -v- James* (1978) A. C. 297 *Allen -v- Sir Alfred MacAlpine & Sons* (1968) 1 All ER 543 The Supreme Court Practice 1999 Editions paragraphs 25/L/1 to 25/L/22 at pages 500 to Page Last Updated: 24 Apr 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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