

JERSEY / JUDGMENT

Fry v Rowlandson [2018]

JRC 234 (19 December 2018)

[2018] JRC 234

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judgment

the master:

Introduction

1. This judgment represents my decision in respect of an application by the plaintiff to permit the present proceedings to continue notwithstanding that 3 years have elapsed since the proceedings were adjourned sine die on 7 th August, 2015, pursuant to Rule 6/25(1) of the Royal Court Rules 2004 (as amended) ("the Rules"). 2. Rule 6/25(1) provides as follows. "6/25 Deemed withdrawal; dismissal (1) When proceedings have been adjourned sine die, if at the expiration of 3 years from the date on which it was first so adjourned no further steps have been taken, the proceedings shall be deemed to have been withdrawn." 3. This judgment addresses two issues:- (i) Whether the Master of the Royal Court possesses an inherent jurisdiction to reinstate an action deemed to have been dismissed under Rule 6/25(1) of the Rules; and (ii) If the Master does possess such jurisdiction how should it be exercised?

Background

4. The order of justice relates to a road accident that took place in November 2011 when the plaintiff was a passenger in a vehicle where the defendant lost control with the result that the vehicle flipped over and fell approximately 40 feet down a cliff face. Liability for the accident was admitted on 11 th May, 2012, by the defendant's insurer. 5. As a result of the accident, the plaintiff claims to have suffered the following injuries:- (i) Significant surgery on his abdomen. (ii) Installation and subsequent removal of a colostomy bag. (iii) Scar revision surgery. (iv) Psychological symptoms as a consequence of the incident and in connection with the scarring. 6. In 2012, the defendant's insurer funded various psychological assessment reports, a physiotherapy assessment, gym membership and private surgery for revision of the abdominal scar. 7. Expert reports from Mr David Johnson, an orthopaedic consultant surgeon and Mr Hugh Henderson a consultant plastic surgeon were obtained and funded by the defendant's insurers and disclosed. 8. There is a further report from a consultant plastic surgeon obtained on 14 th September, 2018, which has not

yet been disclosed. 9. Three reports were obtained from a neuro psychologist, Professor Rodger Wood, dated 2 nd July, 2014, 9 th December, 2015, and 16 th February, 2017. These were produced for the first time at the hearing of the plaintiff's application on 26 th November, 2018. 10. I refer to these reports in more detail later in this judgment. However it is because of these reports that the matter has not progressed. 11. It is accepted for the purposes of the plaintiff's application that there has been no communication between the plaintiff and the defendant's insurers or advocates since the proceedings were adjourned sine die on 7 th August, 2015. As a result of the proceedings having been adjourned sine die on 7 th August, 2015, on 9 th October, 2018, I issued an Act of Court recording that the proceedings were deemed to have been withdrawn pursuant to Rule 6/25(1) of the Royal Court Rules 2004 . The jurisdiction question 12. The first issue raised concerns whether I possess jurisdiction to reinstate an action deemed to have been withdrawn under Rule 6/25(1). This issue arises because it is clear that the Royal Court possesses such a jurisdiction (see *Croxford v Le Claire*

[1994] JLR 304). However, in *Croxford v Le Claire* the Royal Court ruled that in relation to the then equivalent to Rule 6/25(1) (which was found in Rule 6/20(2) of the rules of court then in force) there was no power in the Royal Court Rules to reinstate an action that had been deemed to have been withdrawn. However, the Royal Court ruled that it possessed an inherent jurisdiction to do so. 13. Paragraph (2) of the headnote of the judgment states as follows:- "(2) The court nevertheless retained the discretion to restore an action that had been automatically struck out by r.6/20(2) under its inherent jurisdiction and in exercising that discretion, the court had to balance the interest of the plaintiff in pursuing her action, to which effect should be given notwithstanding the precise wording of the rules if to do so would have no detrimental effect on the parties, against the interest of the defendant, who would under normal circumstances be able to plead that an action effectively initiated so long after the cause of action had arisen was time-barred. The court would exercise its discretion to restore the action only if the plaintiff satisfied the burden of showing that there was an exceptional reason why it should do so. In the present case, no such reason had been shown; in particular, the fact that negotiations had been in progress was not a satisfactory explanation of the delay. Since the plaintiff had been guilty of inordinate delay and since the defendant would be prejudiced by the continuance of the proceedings, her application would be dismissed (page 308, line 38 - page 309, line 5; page 310, lines 36-41; page 313, line 13 - page 314, line 13)." 14. Advocate Hoy for the plaintiff argued that I possessed an inherent jurisdiction to do so by analogy with a recent decision in *Bertrand des Pallieres v RBC Trustees (CI) Limited*

[2018] JRC 172 . In the *des Pallieres* decision, the case had been deemed to have been withdrawn pursuant to Rule 6/25(2) not Rule 6/25(1). Rule 6/25(2) of the rules provides as follows:- "(2) If at the expiration of 2 years from the date on which an action was set down on the hearing list, the trial of the action before the Royal Court has not been completed, the Court may, of its own motion, after giving not less than 28 days' notice in writing to all the parties to the action, order that it be dismissed" 15. I therefore gave notice to the parties as

required by Rule 6/25(2) and then having heard nothing from the parties, I dismissed the action. The defendant then applied for its costs. The plaintiff argued that I possessed no jurisdiction to make a costs order, I ruled that I did possess such a jurisdiction. I did so first by reference to the recent decision of the Court of Appeal in Halabi v Wilson and HMRC

[2018] JCA 114 which led me at paragraph 23 of the des Pallieres decision to state as follows:- "In relation to the question of the courts' inherent jurisdiction, Advocate Woolrich referred me to the decision of Mayo Associates v Cantrade

[1998] JLR 173 and the recent decision of the Court of Appeal in Halabi v Wilson and HMRC

[2018] JCA 114 applying Mayo where the court described the inherent jurisdiction at paragraph 37 as follows:- "The inherent jurisdiction is, put shortly, an authority in a court to do everything to uphold, protect and fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner, which must include all procedural power necessary to act as a court in a meaningful sense.'" 16. My reasons for ruling that I did possess power to make a costs order consequent upon a decision by me to dismiss a case under Rule 6/25(2) was set out in paragraphs 25 to 30 of the judgment as follows:- "25. The conclusion I reached was that I possess the power to make a costs order where I dismiss a case for want of prosecution under Rule 6/25(2) having given the requisite 28 day notice for the following

reasons.

26. Firstly, I do not regard this case as identical to Ebor. Ebor was a case about whether the Master could set aside an order previously made under then the equivalent of Rule 6/25(2). I agree with Master Wheeler that the Master of the Royal Court does not possess jurisdiction to set aside an order dismissing proceedings. If any party wishes to challenge such an order the correct procedural route is by way of appeal to the Royal Court. 27. Secondly, I do not agree that the fact that I cannot set aside an order dismissing proceedings does not mean I do not possess jurisdiction to make costs orders consequential upon such a dismissal. I consider that I do possess such a jurisdiction. The cost jurisdiction vested in me arises from Article 2 of the Civil Proceedings (Jersey) Law 1956 which provides that in all proceedings costs are in the discretion of the Royal Court and the Court has "full power to determine by whom and to what extent the costs are to be paid". The breadth of this discretion in my judgment means that I can make a cost order consequential upon dismissal of proceedings under Rule 6/25(2). 28. Thirdly, while I do not have a general inherent jurisdiction as noted by Commission Clyde-Smith in the Irish Nationwide case, the observations of the Court of Appeal Halabi, in my view apply to the exercise of the judicial functions delegated to the Master of the Royal Court under the Royal Court Rules. I would not be a court in a meaningful sense if I could not make a costs order consequential upon dismissing proceedings for want of prosecution. 29. Where I have ruled that proceedings should be dismissed in other circumstances, such as under the court's strike out or summary judgment

powers or for failure to comply with specific court orders, clearly I possess the power to make costs orders as a consequence of that decision. I am not persuaded that the position should be different where I exercise the specific power under Rule 6/25(2). To have a different approach creates an anomaly which I do not consider can be justified. 30. Finally, I construe Rule 6/26(13) to mean that a costs order can be sought after dismissal of proceedings under that Rule as well as at the same time as dismissing proceedings. To construe Rule 6/26(13) to mean that a costs order had to be sought within the 28 day period in my judgment is too narrow an interpretation. It also unfairly deprives a party of their opportunity to ask for costs. Having reached that conclusion it would produce an absurd result if a party could seek costs following a dismissal of a case under Rule 6/26(13) but could not seek costs following a dismissal under Rule 6/25(2) notwithstanding that generally for the latter type of dismissal a want of prosecution has occurred." 17. Advocate Hoy argued that if I could make a costs order consequent on the decision to dismiss proceedings, I also possessed power to reinstate proceedings which had been deemed to have been withdrawn. 18. Given I was the civil procedure Judge, the procedural power necessary to be a procedural court in a meaningful sense extended to having the power to reinstate proceedings that had been deemed to have been dismissed. 19. He also argued that, if I could give relief from sanction where an unless order had been breached, I could also give relief from sanction where the rules meant that proceedings had been deemed to have been dismissed. 20. Advocate Corbel contended that generally the Master of the Royal Court did not possess an inherent jurisdiction as I had ruled in *Vieira v Kordas & Anor*

[2013] JRC 251 at paragraph 17 and had applied in *In the matter of A (Settlement)*

[2014] JRC 101A at paragraph 10, *Home Farm Developments Limited and Others v Le Sueur*

[2014] JRC 131 at paragraph 13 and *De la Haye v Corbel*

[2004] JRC 140B at paragraph 5. 21. The *des Pallieres* decision was a modification to the general principle that the Master did not possess an inherent jurisdiction because it allowed the Master to make consequential orders in respect of decisions made under the Rules. Any relief from sanction from an unless order was such a decision because the general case management powers vested in the Master under the Rules allowed for unless orders in the first place. The Master could not however, use this limited inherent jurisdiction in order to plug any gap in the Rules. Generally the Master did not possess an inherent jurisdiction. 22. As there was no power under the Rules vested in the Master to reinstate an action deemed to have been withdrawn, only the Royal Court could reinstate an action under its inherent jurisdiction. The withdrawal of the present proceedings were automatic and did not arise as a result of any decision making power. The fact that an application had to be made to the Royal Court did not give rise to a situation that was perverse. 23. Advocate Corbel fairly accepted that allowing the Master the power to reinstate actions that been deemed to have been withdrawn would be a useful amendment to the Rules, however, the fact that an amendment was useful or desirable did not meet the threshold to allow the Master to exercise an inherent jurisdiction. 24. The view I have reached is that I do not

possess jurisdiction to reinstate an action that has been deemed to have been withdrawn under Rule 6/25(1). 25. I have reached this view firstly because of the decision in *Croxford v Le Claire*. At page 308 line 28 to line 37 the Royal Court stated as follows:- "In our view, however, r.6/20(2) is not a rule that requires some action to be taken by either party. It is the second method by which an action is dismissed under this rule. It applies specifically to actions adjourned sine die, as contrasted with the first method, where the court of its own motion can, after giving 28 days' notice in writing to all the parties, order that the action be dismissed. During that 28 days, it is open to the parties to take some action. Not so, in our view, under r.6/20(2), where no party is "required" or "authorized" to do any act in any proceeding whatsoever. The action is "deemed to have been withdrawn" and no rule of court, in our view, can be used to reinstate it." (Emphasis added) 26. As the Royal Court has ruled that no rule of court can be used to reinstate an action dismissed under Rule 6/25(1), the limited jurisdiction which I possess under the *des Pallieres* case to make consequential orders does not apply. The deemed dismissal of the proceedings does not arise as a result of the exercise of any power under the Rules by me. The Act of Court issued on 9th October, 2018, simply confirmed what had already happened namely that the proceedings had been deemed to have been dismissed because 3 years had passed. 27. Secondly, my decision means that whether an action is dismissed under 6/25(1) or 6/25(2), the action can only be reinstated by the Royal Court. The ability of the Master to reinstate an action dismissed under Rule 6/25(2) was addressed in *Ebor SA v Incat Constr. (Holdings) Ltd*

[2001] JLR 280 where Master Wheeler ruled that he did not have jurisdiction to extend time to allow an action to be reinstated. My decision means therefore that whether an action is dismissed under Rule 6/25(1) automatically because 3 years has passed or whether an action is dismissed because a notice is issued and then the Master makes a decision to dismiss proceedings under Rule 6/25(2) only the Royal Court can reinstate an action. The same approach therefore applies to both parts of Rule 6/25. 28. Thirdly, the fact that the Superior Number might consider it desirable for the Master to have power to reinstate an action deemed to have been dismissed (which is a matter for the Superior Number) does not provide a jurisdiction for the Master to exercise an inherent jurisdiction to plug any perceived gap. 29. Fourthly, the ability of the Master to give relief from sanction where a party has failed to comply with orders made by the Master is different from the automatic operation of a rule. While the closeness of the ability to give relief from sanction for breach of an order rather than a rule may lead to consideration of whether Rule 6/25(1) should be reformed, it is still a step too far to extend the limited inherent jurisdiction of the Master to give relief from sanction from the effect of a rule automatically where not provided for in the Rules themselves. 30. Therefore I have no jurisdiction to hear the plaintiff's application which must be determined by the Royal Court. The merits of the plaintiff's application. 31. Notwithstanding that I do not possess jurisdiction to hear the plaintiff's application, as both parties had prepared submissions on the merits of the plaintiff's application, this judgment also contains my views on whether or not the

plaintiff's action should be reinstated if I am wrong on the conclusion I have reached on the jurisdiction question. I took this approach to assist the parties and the Royal Court should any application be made by the plaintiff to reinstate the action before the Royal Court. 32. In respect of the applicable test to be applied, there was no dispute between the parties on the applicable test which was considered in *B v M-R*

[2007] JRC 139 , where the Royal Court applied the test summarised in *Kinsella v Lido Bay Hotel (Jersey) Ltd*

[2001] JLR 247 :- (i) Has there been inordinate delay? (ii) Is that delay inexcusable; and (iii) If so, does such delay give rise to a substantial risk that it is not possible to have a fair trial of the issues of the action or is such as is likely to cause or is likely to have caused serious prejudice to the defendant. 33. The above questions are subject to the warning at paragraph 26 of *B v M-R* where the Royal Court counselled:- "A decision as to whether to dismiss an action without considering the merits is clearly an important discretionary decision which should be taken on the basis of all the circumstances of the particular case. It would be inconsistent with the existence of such a discretion for the Court to be bound rigidly by a series of sequential hurdles which the plaintiff has to surmount if he is to succeed. In our judgment the three questions are simply an attempt to provide some guidance as to the matters which should be considered on such an application. For example, if the plaintiff is only in default by one month when the matter comes before the Court, we think it highly unlikely that the Court would dismiss the action even if satisfied that there was no excuse for the failure to issue a summons. The remedy of dismissal would simply be disproportionate for the breach involved. An award of costs against the plaintiff (or his advocates) coupled with the giving of directions to progress the matter would in many cases be a much fairer outcome." 34. The above test is also subject to qualification that the remedy of dismissal must not be disproportionate to the breach involved. In deciding what sanction to be imposed, a court should therefore also have regard to the rights of parties under Article 6 of the European Convention on Human Rights as noted at paragraph 19 of *Vieira v Kordas*

[2014] JRC 042 at paragraph 19. In particular, the Royal Court in *Vieira* accepted the proposition that it 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." 35. These are the principles I have applied. 36. I now turn to consider the psychiatric evidence obtained by the plaintiff in more detail because, as noted above, this is the evidence that is relevant to why there has been no communication between the plaintiff and the defendant's advocate since proceedings were commenced and then adjourned. 37. In Professor Wood's first report, he noted that the plaintiff was experiencing anxiety symptoms and concluded (at paragraph 9.3) that these could be reasonably attributed to the accident. Professor Wood therefore recommended a course of psychological therapy. While the plaintiff was ambivalent about such therapy, Professor Wood recommended that provision for ten sessions of cognitive behaviour therapy be set

aside over the next five years. 38. The second report dated 9th December, 2015, (i.e. after proceedings had started) noted that the plaintiff appeared to exhibit characteristics of a chronic adjustment disorder with a low mood and anxiety. This led Professor Wood to repeat his recommendation of cognitive behaviour therapy sessions plus a short course of anti-depressants for six months. 39. In his third report, dated 16th February, 2017, Professor Wood noted that the plaintiff had benefitted from anti-depressant medication. While Professor Wood felt there was no need for immediate therapy he was still of the view that the plaintiff would probably need some form of psychological support in the future because any future serious adverse life event could precipitate a psychological reaction that would trigger a resurgence of the thoughts and feelings wrapped up with the experience the plaintiff had suffered as a result of the accident. 40. While I have referred to these reports in more detail, they were only provided to me during the course of the hearing. The defendant had not seen them and was not in a position to respond to the reports. I asked to see the reports to understand the nature of the evidence obtained, whether Professor Wood was providing treatment to the plaintiff and therefore whether the reports were disclosable because he had given factual evidence, and to try to evaluate how far the defendant could respond to these reports to allow a fair trial to occur. 41. In that regard I briefly adjourned the hearing to allow Advocate Corbel time to consider whether she wished to adjourn the hearing in order to adduce evidence from an expert psychiatrist as to how far the defendant could review Professor Wood's evidence. Advocate Corbel indicated that she did not wish to add to cost by delaying matters further for a claim that was said to be worth in the region of £50,000. 42. In relation to these reports, the first report was in my view expert evidence because it opined on the anxiety the plaintiff was suffering and whether it was as a result of the accident or not. The second report by contrast was an assessment of low mood and anxiety and led to a recommendation of ten to fifteen sessions of cognitive behaviour therapy plus anti-depressant medication. The third report reviewed the effect of the anti-depressant medication and stated that some form of therapy would be beneficial in the future to address significant events. 43. In relation to the second and third reports, these related to ongoing assessment of the anxiety the plaintiff claims to have suffered as a result of the accident and subsequent treatment. In my view the defendant should have been made aware of the need for ongoing treatment and should have been given an opportunity to either carry out their own assessment or to obtain their own psychiatric opinion. This should have occurred when the second and third reports were being completed. 44. At the very least the plaintiff's advocate should have contacted the defendant shortly after receipt of the third report in February 2017 to provide copies of those reports and to agree a timeframe for expert evidence in response if that was required by the defendant. 45. The delay since February 2017 is therefore inordinate and inexcusable. 46. The plaintiff's advocates have further still not provided medical records of the plaintiff to the defendant despite indicating they would do so even before proceedings were commenced. 47. The plaintiff's advocates did retain counsel in June and July of this year to quantify the plaintiff's claim and have obtained updated costings for further scar revision surgery said to be necessary

but no quantification of the claim has still been provided to the defendants including the costs of any surgery. Nor has the defendant been provided with any updated report explaining further why scar surgery is required. 48. Although Advocate Hoy stressed the importance of not incurring costs unnecessarily (which I agree with), keeping the other party ensured of steps being taken to progress a case is not an unnecessary cost. Such communications allow the defendant the opportunity to take decisions as to whether they wish to incur the cost of obtaining their own evidence or enter into their own negotiations or a combination of the two. The defendant was not afforded that opportunity. 49. In relation to the steps taken since June of this year in my view, these could have been taken from April 2017, (allowing time for the plaintiff to confirm that no more antidepressants were required) and so a delay of some fourteen months has occurred which is not excusable. Advocate Hoy suggested that the plaintiff found it difficult dealing with the accident and the claim but in my view that is not an excuse for the delay. The defendant's advocate should have been given opportunity to take part in any psychological assessment and should have been provided with reports and, medical records and a quantification of loss much earlier. While I understand why the plaintiff finds dealing with a claim difficult because the accident is said to have caused him anxiety, and therefore any involvement of the defendant in any examination of the plaintiff would have to be handled sensitively, any anxiety does not justify the plaintiff's advocates not keeping the defendant's advocates informed or providing evidence or explaining why there was a delay. 50. The difficult question that arises is where the balance of justice lies. Advocate Hoy explained that no significant claims for special damage is advanced. Therefore the plaintiff's claim is for general damages only in respect of the injuries suffered to his abdomen, the use of a colostomy bag and its later removal and in respect of scarring as well as for psychological effects of the accident and the subsequent injuries. 51. Apart from the psychological impact, the other aspects the plaintiff's claim are matters of expert evidence and where the evidence has been produced. Only one updated report in respect of the current need for further scar revision surgery is required; the other expert reports were provided before proceedings started. The medical records can now be provided and can still be assessed. Ultimately the question for the court is to decide on a figure for general damages to compensate for the injuries suffered by the plaintiff, liability not being in issue. I do not therefore consider that it would be a just result to prevent the plaintiff from continuing his claims in respect of the abdominal injuries he has suffered, the treatment he had to undergo and the scarring he has suffered. If I had jurisdiction to hear the application I would therefore allow these parts of the plaintiff's claim to continue because I would not be satisfied that the most serious sanction of maintaining a strike out of the entirety of the plaintiff's claim should be applied. A fair trial to assess these parts of the claims could still occur. 52. In respect of the claim for psychological injury, in *Croxford v Le Claire* the court noted that an action could only be restored if the court was satisfied there was an exceptional reason why it should do so. The plaintiff did not produce reports from Mr Wood until the hearing when at the very latest they should have been produced shortly after February 2017. In my view the defendant's insurers should also have been involved

with at least the production of the second and third reports from Professor Wood because those reports primarily went to ongoing treatment of the psychological injury the plaintiff claimed to have suffered. The fact that the defendant was on notice that such a claim was a possibility in my judgment does not excuse the plaintiff's failure to involve the defendant where there were issues of ongoing treatment. The plaintiff did not even produce the reports until the hearing itself so the defendant had no opportunity to consider them and to consider whether or not the conclusions could be analysed effectively at this stage. I would therefore conclude that the plaintiff has failed to persuade me that he should be permitted to pursue that part of this claim relating to the psychological effect of the injuries he suffered. I would therefore maintain this part of the strike out of the plaintiff's claim thus limiting it to a claim for general (and any limited special damages) for the abdominal injuries, the consequential treatment and any current or future scar revision surgery. Authorities Royal Court Rules 2004 (as amended). Croxford v Le Claire

[1994] JLR 304 . Bertrand des Pallieres v RBC Trustees (CI) Limited

[2018] JRC 172 . Halabi v Wilson and HMRC

[2018] JCA 114 . Vieira v Kordas and Anor

[2013] JRC 251 . In the matter of A (Settlement)

[2014] JRC 101A . Home Farm Developments Limited and Others v Le Sueur

[2014] JRC 131 . De la Haye v Corbel

[2004] JRC 140B. Ebor SA v Incat Constr. (Holdings) Ltd

[2001] JLR 280 . B v M-R

[2007] JRC 139 . Kinsella v Lido Bay Hotel (Jersey) Ltd

[2001] JLR 247 . Vieira v Kordas

[2014] JRC 042 . Page Last Updated: 07 Jan 2019 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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