

JERSEY / JUDGMENT

McGorrin v Pascoe [2002]

JCA 113 (07 June 2002)

[2002] JCA 113

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COURT OF APPEAL 7th June, 2002 Before: P. D. Smith, Esq., Q. C., President; Sir de Vic Carey, Bailiff of Guernsey; and K. S. Rokison, Esq., Q. C. Between Robert McGorrin Plaintiff/RESPONDENT And Michael Barron Pascoe Defendant/ APPELLANT Appeal by the Defendant/ APPELLANT from the Judgment of the Royal Court of 1st October, 2001, whereby the Royal Court dismissed the Defendant/APPELLANT's appeal against the Order of the Master of 10th July, 2001, refusing to strike out actions PL.88/18 and PL.88/109. Advocate A. D. Hoy for the Defendant/APPELLANT; Advocate R. J. Michel for the Plaintiff/RESPONDENT.

judgment

ROKISON JA: 1. The two actions with which the Court is concerned were started in January and March 1988 respectively - over fourteen years ago. The Plaintiff, Mr McGorrin, sought an account, damages and other remedies from the Defendant, Mr Pascoe, who was alleged to have received a total of £800,000.00 between the years of 1978 to 1984 to be held as nominee for the Plaintiff and applied for his benefit. The money was alleged to have been paid through an English solicitor, Mr Peter Rigby, and an English accountant, Mr Nagley. The actions also sought interim injunctions restraining the Defendant from certain dealings with shares and assets in a number of companies which were said to have received the benefit of the monies. 2. Mr Pascoe, in his Answer to the First Order of Justice, admitted receipt of sums of money totalling £423,674.00 from Mr Rigby to be held as nominee for Mr Rigby personally under and/or for unnamed persons described as clients of him or his firm, and further admitted receiving three sums from Mr Nagley totalling £189,000.00 paid into a bank account belonging to Pelican Homes Limited to be held as nominee for Mr Nagley. 3. Mr Pascoe denied that any of the sums so received were used for his own purposes. He raised a number of explanations in his Answer as to what happened to the money, and claims credit not only for the £100,000.00 which was admittedly repaid in 1987 but for fees totalling £100,000.00 said to have been agreed orally with Mr Rigby in respect of guarantees given by Mr Pascoe and his wife at Mr Rigby's request, and directors' fees of £10,000.00 a year. 4. In his amended Reply of August 1989 Mr McGorrin, as well as taking issue with the bulk of the Answer, asserts that further sums were paid to Mr Pascoe, as a result of which the total said to have been paid over was increased to £1,251,000.00. 5. It is not necessary to recite or summarise at this stage the further issues which arise from the pleadings. 6. Various

steps were taken in the actions between 1988 and 1990, but even during that period their progress can at best be described as sporadic. No further procedural steps were taken for the next ten years. 7. Rule 6/20(1) of the Royal Court Rules 1992 provided as follows: "Where at the expiration of 5 years from the date on which an action was placed on the pending list the action has not been set down on the hearing list, the Court may of its motion, after giving not less than 28 days' notice in writing to all the parties to the action, order that the action and any related counterclaim and/or third party claim be dismissed." Rule 6/20(3) provided: "Where at the expiration of 10 years from the date on which any action was placed on the pending list the trial of the action before the Royal Court had 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 the action and any related counterclaim and/or third party claim be dismissed." The sub-paragraphs within this Rule have recently been re-arranged but there is no material change in the substance of the Rule as it applies to these cases. 8. On 10 June 1994, 18 February 1997, 24 November 1998, 30 April 1999 and 30 May 2000, the actions were listed in a Schedule to a Circular Notice from the Deputy Judicial Greffier stating that pursuant to Rule 6/20(1) and/or Rule 6/20(3) of the Royal Court Rules, 1992, unless objections were received from any of the parties concerned within a specified period in each case exceeding 28 days, an order would be made that the actions should be dismissed. 9. In the judgment of the Court of Appeal in *In re Esteem Settlement* (27 July 2000) Jersey Unreported; [2000/150], Southwell J. A., under the heading "Management of Royal Court Proceedings Generally" made observations to the effect that it was essential that there was now a change to new ways of practice consistent with the objective to progress proceedings to trial in accordance with an agreed or ordered timetable at a reasonable level of costs and within a reasonably short time. The observations were made in the context of lawyers playing what were described as "interlocutory games" but one consequence was that on 9 February 2001, a new form of Circular was issued by Master Wheeler which read as follows: "The Bailiff has emphasised, particularly following the judgment of the Court of Appeal delivered on 27 July 2000, in the case of *In re Esteem Settlement*, that it is imperative that reforms be introduced to ensure that civil litigation is concluded within a reasonable period. He has accordingly directed and authorised the Master to take the necessary steps to achieve that end. Notice is hereby given pursuant to Rule 6/20(1) and Rule 6/20(3) of the Royal Court Rules, 1992, that the Court intends to consider dismissing the actions listed in Schedules A and B hereto pursuant to the powers conferred upon it by Rule 6/20(1) and Rule 6/20(3) respectively. Any party objecting to an action being dismissed must do so by issuing a summons to show cause why the action should not be struck out. Any such summons must be issued before the expiry of 28 days of this notice with a view to the summons being heard before the Master of the Royal Court at the earliest opportunity. It is not sufficient to write to the Judicial Greffier requesting that the action be allowed to continue. A summons must be issued within the specified time otherwise the action will be dismissed. Even if parties to an action all agree that it will continue, a summons must still be issued to show cause why that is appropriate. It should not be assumed that the Master will readily agree to an action being allowed to continue. He will require the applicant to convince him that this is appropriate. If the Master does agree, then the summons hearing will be used as an opportunity to give directions for orderly and expeditious conduct of the action to trial as soon as possible. Parties

issuing such a summons should, therefore, put forward proposals to be considered in any directions hearing." The two actions with which the Court is concerned were listed in Schedule A to that Circular. The Court was at one time concerned that there may have been no jurisdiction in the Master to effect a change in the Rules by Circular in this way, but we are satisfied that the new procedure set out fell within the ambit of Rule 6/20, being a statement as to the manner in which that Rule would be implemented for the future. Despite the Circular, no summons was issued on behalf of the Plaintiff within the 28 days specified. 10. On 7 June 2001, a summons was issued on behalf of the Plaintiff in both actions for the Defendant to appear to show cause why the actions should be dismissed. The summons did not therefore by its terms comply with the Circular which had placed the burden on the party seeking to avoid the action being dismissed but no point has been taken on that. The summons was heard by Master Wheeler on 10 July 2001. Despite the terms of the Circular, Master Wheeler did not dismiss the actions, but ordered that: (i) unless within 3 months from 10 July 2001 a Scott Schedule were filed by the First Defendant (Mr Rigby) in an action pending in the English High Court, Chancery Division, Liverpool District Registry and we refer to that as the English proceedings, (which had been brought by the Plaintiff against Mr Rigby and in which the Defendant had intervened), and forthwith filed by the parties to the present actions, the actions would be struck without further order; and (ii) unless within 14 days from the filing of the Scott Schedule the parties caused to be issued a Summons for Directions generally in relation to the actions, they should be struck out without further order. 11. In his judgment, Master Wheeler referred to the terms of Rule 6/20(3) and to his Circular of 9 February 2001. He recorded that he was contacted by Advocate Michel, who represented the Plaintiff by letter dated 12 March (outside the 28 day prescribed period) who asked the learned Master to confirm whether he should issue a summons as required under the terms of the notice. On 14 March Master Wheeler confirmed that Mr Michel should proceed in this way, and indicated that, if he had not done so by the end of March, the Master would consider whether to exercise his powers under Rule 6/20. Despite these communications, even a draft summons was not served until 4 May. 12. At the hearing of the summons, Advocate Begg who was then representing the Defendant, had submitted, as a preliminary point, that, since no summons had been issued on behalf of the Plaintiff within the 28 day period specified in the February Circular, the actions should be regarded as already struck out. The Master rejected that argument, concluding that to strike out or dismiss an action requires a judicial act. But the Master scarcely did justice to the terms of his Circular by stating that it was merely indicative of what he might do. The sentence: "A summons must be served within the specified time otherwise the action will be dismissed" could hardly be in clearer terms. Nevertheless Master Wheeler granted an application by Mr Michel to extend time under Rule 1/5 of the Royal Court Rules "sur le champ". 13. With regard to the merits, Master Wheeler appears to have given considerable weight to the progress, or rather the lack of it, in the English proceedings. From the affidavit evidence served, the Master concluded that "a fundamental reason" for the failure of the action in Jersey to proceed was the behaviour of Mr Rigby and in particular his failure to comply with orders of the English Court to produce detailed statements of account. Master Wheeler formed the view that "progress was being made and it was hoped that Mr Rigby would comply with the necessary orders in not too distant future". He further relied on the acknowledgment on the part of the Defendant that the

person or persons found to be the beneficial owners of the sums of money paid to the Defendant would be entitled to an account of the same and the assets representing the same. Despite describing the actions both in Jersey and in England as reflecting "a lamentable state of affairs", and being indicative of a "torpor" which would not be tolerated in Jersey or the United Kingdom, he concluded "with considerable hesitation" that, having regard to the particular and special facts of the case, which he regarded as constituting "exceptional circumstances" justice demanded that the actions be allowed to continue. In the course of his reasons, he observed that there had been fault on both parties and that no useful purpose would be served by apportioning blame. 14. Following the Order of 10 July 2001, on 18 July Mr Begg for the Defendant lodged Notice of Appeal. On 27 July 2001, Mr Michel wrote to Mr Begg in the following terms: "I received by mail on Thursday 26 July on my return to the office following our date fixing exercise with the Bailiff's Secretary, a Scott Schedule, which Mr Rigby at long last, has filed with the Court in Liverpool and has served upon your instructing solicitor, Mr A C R Langford. I have today filed a copy of the Scott Schedule with the Jersey Court and I enclose herewith by way of formal service a copy of that Scott Schedule. It appears to me that our instructing solicitors are in a far better position to advise than am I, or, I respectfully suggest are you, that the proper procedure now takes place in the Liverpool District Registry; namely what challenges, if any, can be made against Mr Rigby's response to the Scott Schedule. It is interesting that in his covering letter, Mr Rigby apologises for the fact that he should have lodged the Scott Schedule with the Liverpool County Court, (that of course should be High Court) some two years ago, as the document has not changed at all since then, notwithstanding my instructing solicitors efforts, and those of my client's personal assistant, to have Mr Rigby complete the document in proper form." 15. Despite the terms of this letter and the filing of the Scott Schedule, no Summons for Directions was issued within 14 days thereafter as had been required by the Master's order. Accordingly, on 21 August 2001 Mr Begg wrote to the learned Master inviting him to confirm that the actions had been struck out. The Plaintiff responded by issuing a summons seeking an extension of time, and on 20 September 2001 Mr Begg served a summons asking the Plaintiff to show cause why the Court should not declare that the actions had been struck out. 16. The two actions came before the Royal Court on 25 September 2001, which considered: (i) The Plaintiff's application for an extension of time within which to file the Summons for Directions; (ii) The Defendant's application that the actions be struck out pursuant to the Master's order of 10 July 2001; and (iii) The Defendant's appeal against the Master's judgment and order. 17. Meanwhile, there had been two significant developments. One was that by letter dated 10 September 2001, Mr Michel informed the Court and Mr Begg that, contrary to what he had stated in his letter of 30 July 2001, the Scott Schedule had in fact been served by Mr Rigby in the Liverpool proceedings in August 1996, but that, for reasons yet to be explained, it had been filed by the Plaintiff's Liverpool solicitors without their having taken any action on it. The other was that the Defendant, Mr Pascoe, had died. Mr Michel in a letter dated 17 September 2001 and before the Royal Court on 25 September 2001 took the point that, since the Defendant's summons had been taken out after Mr Pascoe's death, unless and until his personal representatives were substituted in the actions, the Defendant's summons could not be heard. 18. The Royal Court by a judgment given on 1 October 2001, dismissed the Defendant's appeal against the Master's orders and judgment. It declined to hear the Defendant's

application that the actions be struck out pursuant to that order, and recorded that the Plaintiff's application for an extension of time was in these circumstances not pursued. 19. In its judgment, the Royal Court regarded the appeal as a re-hearing, in which it was free to substitute its own discretion, but acknowledged an obligation to consider the Master's reasoning. 20. The Royal Court first of all dealt with Mr Begg's "threshold" submission that, following the Circular of 9 February 2001, the actions should have been regarded as already dismissed by reason of the Plaintiff's failure to issue the required summons within 28 days. We respectfully agree with the Royal Court's confirmation of the Master's decision that the Circular could not of itself have dismissed or struck out an action, and could only be regarded as a statement of intent, although as we have already indicated we do not agree with the Master's interpretation of the terms of his Circular. 21. Mr Begg's second ground of appeal was that the Plaintiff had failed to comply with the Master's "unless" order, and that no extension of time should have been granted. As we have already stated, we read the Circular as giving clear information that, unless a summons is issued within 28 days, the proceedings will be dismissed. It is only if the required summons is served that the Master will exercise his discretion. Furthermore, in the Master Wheeler's exposition of his exchanges with Mr Michel, no explanation appears to have been given as to why no enquiry was made of him until over 28 days after the Circular had been published, or as to why an enquiry (rather than compliance with a Circular which was clear in its terms) was thought necessary, or as to why it took until 4 May to produce even a draft summons. In our view, there is much to be said for the view that the actions should have been dismissed in accordance with the terms of the Circular. 22. Although the Court declined to hear the Defendant's separate summons seeking an order that the actions should be dismissed in accordance with the terms of the Order of 10 July 2001 on the ground that no Summons for Directions had been served within 14 days from the filing of the Scott Schedule, the Court quite properly appears to have taken some account of developments since the Master's decision and order in exercising its discretion. The Court referred to Mr Michel's letter to Mr Begg of 30 July 2001, which it regarded as "pellucid" in its terms, and to his subsequent letter of 10 September 2001 to which we have referred above. From the last mentioned letter, it was apparent that, far from a copy of the Scott Schedule to be served by Mr Rigby in the Liverpool proceedings being filed in the proceedings in Jersey "forthwith", at the time when the matter had been before Master Wheeler, the Scott Schedule had already been served five years earlier. Not only should this have immediately "triggered" the Master's "unless" order of 10 July 2001, which could clearly not be complied with, but it seriously undermined the foundation for much of the submission on behalf of the Plaintiff before the Master to the effect that the delay in the proceedings in this court was the result of Mr Rigby's failure to comply with orders of the English High Court in Liverpool. The Royal Court seems to have overlooked the significance of this revelation. 23. Finally, the Royal Court considered the general discretion to strike out an action for failure on the part of the Plaintiff to pursue it with sufficient expedition. It concluded that Mr Michel was "tied by insouciance of those conducting the English action" and agreed with the observation made by Mr Begg that "this man Rigby is dancing rings round people." The judgment continued as follows, at paragraph 42: "As the Master rightly says, it would be totally wrong for him to endeavour to make any orders in proceedings in the High Court. Particularly serious now is that after thirteen years of professional torpor, the

Defendant has died and Rigby continues to prevaricate unscathed. We must recall, however, that the remedy sought is essentially for an account. A very substantial sum of money belonging to the Plaintiff has disappeared and there is an admission that part of that sum is acknowledged by the Defendant to be due. These are exceptional circumstances. We are not minded to interfere with the Master's discretion, but we would urge upon him to take the most stringent steps to bring this matter to trial in the near future. It may well be that once the Executor Trustee Company has taken out probate, Advocate Begg, who has argued so well before us today, may receive more constructive instructions." 24. We for our part accept that the decision whether or not to dismiss or strike out an action pursuant to Rule 6/20 is essentially a matter of discretion, and we should not intervene and substitute our own discretion for that of the Royal Court unless we were of the view: (i) that the Royal Court's decision was fundamentally wrong in principle; or (ii) that the Royal Court had failed to take into account matters which it ought to have taken into account; or (iii) that the Royal Court had taken into account matters which it ought not to have taken into account. It would not be sufficient for us to conclude merely that, if hearing the matter de novo, we should have exercised our discretion in a different way. 25. The first and main point submitted to us by Advocate Hoy, who was now representing the Defendant, was that the Master and the Royal Court should have applied the well-recognised principles relevant in applications to strike actions out for want of prosecution, expounded in such cases as *Birkett v James*

[1978] A. C. 297 at 318; [1977] 3 W. L. R. 38; [1977] 2 All E. R. 801, House of Lords. 26. He referred us to the case of *Kinsella v Lido Bay Hotel (Jersey) Ltd* reported in 2001 JLR 247

- a decision of Master Wheeler made on 24 April 2001 (only 3 months or so before his decision in these cases), on an application by summons on the part of a Plaintiff seeking to avoid dismissal of proceedings under Rule 6/20(1), in which he said this: "In the absence of any authority directly in point on how rule 6/20(1) should be applied, I think that the proper approach for me is to follow the principles which the Royal Court has adopted in considering whether to strike out an action for want of prosecution. This requires consideration of English cases such as *Birkett v James*
- (3) and subsequent decisions of relevance. For examples of their application in Jersey, see the decisions in *Beasant v Pavan*
- (1) and *Skinner née Ball v Myles* (6). The English approach is considered in detail in *The Supreme Court Practice* 1999, paragraphs 25/L/1-25/L/22, at 500-505. Where a party has not been guilty of contumelious and intentional default, the requirements are as stated therein and are in the following terms: "Inordinate and inexcusable delay - The requirements are: (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. The foregoing statement of the law was approved in *Birkett v James*, [1978] A. C. 297 at 318; [1977] 3 W. L. R. 38; [1977] 2 All E. R. 801, House of Lords." 27. In *Kinsella*, Master Wheeler dismissed the action, holding that two

periods of delay in the prosecution of the case, which totalled together five years, was inordinate. 28. The Master's reasoning in *Kinsella* was considered, approved and applied by the Royal Court in *Eves v The Tourism Committee of the States of Jersey* (24th April 2002) Jersey Unreported [2002/84. 29. In its judgment, the Royal Court said, at paragraph 5: "The Master applied the test which he had set out in *Kinsella v Lido Bay Hotel (Jersey) Ltd*

(2001) JLR 247 . Thus he asked himself three questions (1) had there been an inordinate delay; (2) was the delay inexcusable; (3) if so, would such delay give rise to a substantial risk that it was not possible to have a fair trial of the issues in the action, or was it such as was likely to cause, or to have caused, serious prejudice to the defendant. The Master answered all these questions in the affirmative. We agree that *Kinsella v Lido Bay Hotel (Jersey) Ltd* sets out the correct approach and accordingly we will consider the same three questions." 30. Mr Hoy submitted that neither Master Wheeler nor, in particular, the Royal Court considered the application of these 3 principles in these actions, but simply concluded that there were what were described as "exceptional circumstances" which justified permitting the cases to proceed to trial. 31. Mr Michel for the Plaintiff fairly conceded that if this Court were to conclude that the *Kinsella* principles as approved in *Eves* should be applied, we were entitled to exercise our discretion de novo by reference to those principles. 32. But, following Supplementary Contentions, filed on 18 April of this year, he suggested as an alternative that the Court should consider adopting as the criteria for the operation of Rule 6/20 those criteria recently referred to by the Court of Appeal in England in *Woodhouse v Consignia plc* in an unreported judgment dated 7 March 2002, for the lifting of an automatic stay imposed pursuant to paragraph 19 of Part 51 of the Civil Procedure Rules. The question originally referred to the Court was whether on an application to lift the stay, the criteria were the same as for an application to strike out for want of prosecution. A footnote in *Jordan's Supreme Court Practice* of March 2000 had stated: "It is unlikely that the Courts will decline to lift a stay introduced by CPD 51 paragraph 19 unless the delay involved in the individual case brings it within the criteria which would otherwise justify an order striking out the case for want of prosecution". However, in *Audergon v La Baguette Ltd*

[2000] EWCA civ 10, the Court of Appeal had held that such a stay fell to be treated as a sanction imposed for failure to comply with any rule, practice direction or court order under CPR 3.9, and that accordingly the criteria laid down in that rule should be applied. These were set out in paragraph 31 of the judgment in *Woodhouse* as follows: "On an application for relief from any sanction imposed for a failure to comply with rule, practice direction or court order the court will consider all the circumstances including - the interests of the administration of justice; whether the application for relief has been made promptly; whether the failure to comply was intentional; whether there is a good explanation for the failure; the extent to which the party in default has complied with other rules, practice directions and court orders and any relevant pre-action protocol; whether the failure to comply was caused by the party or his legal representative; whether the trial date or the likely date can still be met if relief is granted; the effect which the failure to comply had on

each party; and the effect which the granting of relief would have on each party." 33. The Court of Appeal in Woodhouse endorsed the aversion which had been expressed in Audergon to a "judicially created check list", but held that in future judges should not simply latch onto one or two considerations (such as the length of delay) to the exclusion of others, but must carry out the "balancing exercise" laid down in the rule methodically - something which the Court in Woodhouse therefore went on to do. 34. We for our part are happy to resist the temptation to lay down any check list of this kind which should be applied in this jurisdiction in relation to applications under Rule 6/20. CPR 3.9 is of wide application, applying, as it does, to any application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order. By contrast, Rule 6/20(3), which has now been re-numbered as Rule 6/20(2) is concerned solely with the power of the Court to dismiss an action, in effect, for want of prosecution. 35. We conclude that the Royal Court in Eves was right to follow Kinsella and to apply the criteria which have been developed in "strike out" cases, and which have been consistently applied not only in England but in Jersey also. 36. The difference between an application under Rule 6/20 and a "simple" application for dismissal for want of prosecution is that the former gives the initiative to the Court, and under the terms of the Circular requires the Plaintiff to file the necessary summons within the period specified to bring the parties to the Court, and to show cause why the action should not be dismissed. In so doing, it further suggests that where the "thresholds" laid down in Rule 6/20 have been crossed, there is at least a presumption that the delay has been inordinate. 37. We turn to apply the Kinsella criteria to the facts of these actions. 38. First, it is clear there has been inordinate delay on the part of the Plaintiff or his lawyers. Mr Michel could not realistically submit otherwise. The chronology produced on behalf of the Defendant which purports to be a comprehensive list of all steps taken in relation to the actions shows a "yawning gap" between December 1990 and January 2001 - a period of over 10 years. 39. Was this delay inexcusable? It is in this context perhaps that reliance may be placed on what were described in the Court below as "exceptional circumstances". 40. However in our view, although no doubt the progress of these actions in Jersey has been delayed to some extent by the slow progress of the proceedings against Mr Rigby and the Defendant in Liverpool, it was for the Plaintiff and his lawyers in those proceedings also to put the necessary pressure on Mr Rigby to ensure that delays on his part were avoided or visited with the necessary court sanctions. If, as the Royal Court concluded, Mr Michel was "tied by the insouciance of those conducting the English action", that is not something that can be prayed in aid on behalf of the Plaintiff, who must be held responsible for delays on the part of his lawyers (whether in Jersey or any other jurisdiction), against whom he may have other remedies. It is for the Plaintiff to ensure that proceedings are expedited, and the Defendant does not bear an equal burden. It is not so much a question of apportioning blame, as responsibility. Furthermore, as was pointed out in the course of argument, in an application to the Court in 1988 to vary interim injunctions granted by way of security to the Plaintiff's claim, the Plaintiff by his advocate undertook to pursue the English High Court action in Liverpool with due diligence. We conclude that the delay was inexcusable.

41. So far as prejudice is concerned, the sort of delay which has occurred in the prosecution of these actions is bound to cause prejudice, especially where reliance is placed (as it was placed in the pleadings from the outset) on alleged oral agreements which are disputed. As we have observed, the actions were commenced over 14 years ago. They concern events going back as far as 1978 - 24 years ago. Although it may be that much will be revealed by the documents, Mr Hoy took us through the pleadings and demonstrated to our satisfaction that a number of the issues raised are likely to depend, at least in part, on oral evidence. Recollections of witnesses in relation to events occurring decades ago must be unreliable. Further, there is an inherent risk of potential witnesses no longer being available by reason of illness or death. This has been exemplified in this case by the death of the Defendant, Mr Pascoe. This factor which we consider to be of overriding importance only merited a brief mention in the judgment of the Royal Court in one sentence - "Particularly serious now is that after 13 years of professional torpor the Defendant has died...". But the Royal Court did not appear to go on to consider the consequences. 42. We conclude that, applying the test adopted in *Kinsella*, the delay has given rise to a substantial risk that it is not possible to have a fair trial of the issues in the action and is such as would be likely to cause and indeed to have caused, serious prejudice to the Defendant. As we understood it, Mr Michel suggested that the Court could in some way ameliorate that prejudice by requiring any evidence given by or on behalf of the Plaintiff which the Defendant was unable to counter because of Mr Pascoe's death, should be rejected unless corroborated. But if the matter were to proceed to trial, the Plaintiff would only have to satisfy the civil burden of proof on the evidence presented to the Court, and we do not see how the Court could impose some special rules of evidence. 43. Quite apart from the kind of prejudice outlined above, the Defendant suffered the further prejudice of having these actions hanging over him for the last 14 years of his life, and his personal representatives - and his heirs at law - now face the prospect of having the proceedings hanging over them in the future. It is important for them at this time to be able to achieve a degree of finality concerning Mr Pascoe's affairs

- his assets and liabilities. 44. The Court was informed that that the proceedings which are pending in Liverpool have now been stayed by consent. This is apparently because the Plaintiff considers that it is in his best interests rather to pursue the actions in Jersey, since the principal asset from which any judgment might be satisfied is the substantial Pascoe family home - which has been subject to a caveat which has been regularly renewed. Although Mr Pascoe's estate generally has passed to trustees, the house is vested in his heirs at law. If they wish to dispose of the house, they will have to apply for the caveat to be lifted and will presumably be required to put up equivalent security. This would be further severe prejudice. 45. The Royal Court endorsed the Master's conclusion that there were "exceptional circumstances" in this case, one of which was that the Defendant had admitted that he had received considerable sums of money from Mr Rigby and the account produced by his accountants Touche Ross in 1989 effectively admitted an outstanding balance of about £189,000.00. But that admission, as we understand it, should be regarded as being subject to

Mr Pascoe's set offs. Even if we were to have been persuaded to carry out the sort of balancing exercise set out in CPR 3.9, we do not regard those circumstances which count in the Plaintiff's favour as being sufficient to justify the indulgence granted by the learned Master and the Royal Court. 46. Finally, Mr Michel relied on the contention that this was a breach of trust case, for which there was no relevant limitation period, and that if the actions were dismissed, new actions could be started. We accept that in the majority of cases, if the limitation period has not yet expired, the courts will not strike out an action for want of prosecution. But we conclude that this is a clear case for the dismissal of the two actions. If there is any attempt to start a new action, then in accordance with the guidance given by the English Court of Appeal in *Arbuthnot Latham*

[1998] 1 WLR 1426 , whether or not a second action is allowed to proceed or should itself be struck out, will be a matter for the discretion of the Court which will proceed on the assumption that if the party has had one action struck out, some special reason has to be identified to justify a second action being allowed to proceed. 47. Accordingly, and for these reasons, the appeals in both actions are allowed, and the actions are dismissed. Authorities Royal Court Rules 1992: Rule 6/20. In re Esteem Settlement (27 July 2000) Jersey Unreported; [2000/150]. *Kinsella-v-Lido Bay Hotel*

(2001) JLR 247 . *Drake-v-Gouveia* (10 th August,

2000) Jersey Unreported; [2000/161]. *Arbuthnot Latham Bank Ltd & Ors-v-Trafalgar Holdings, Ltd & Ors*

(1998) 1 WLR 1426 . *Birkett v James*

[1978] A. C. 297 at 318; [1977] 3 W. L. R. 38; [1977] 2 All E. R. 801, House of Lords. *Eves v The Tourism Committee of the States of Jersey* (24th April 2002) Jersey Unreported [2002/84]. *Woodhouse v Consignia plc* (7 th March,

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