

JERSEY / JUDGMENT

Piazza -v- Larsen Ltd [2017]

JRC 153 (20 September 2017)

[2017] JRC 153

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judgment

the MASTER:

Introduction

1. This judgment represents my detailed written reasons for refusing to strike out the plaintiffs' claim for want of prosecution at the request of the first and second defendants.

Background

2. The background is taken from the pleadings filed by the parties. 3. In or around October, 2010, the plaintiffs retained the first defendant to carry out certain building works at the plaintiffs' property. The works were largely of a renovation and refurbishment nature and included the relocation of an oil-fired boiler. 4. The boiler was relocated to a small outbuilding and a length of pipe was installed to supply oil to the boiler from a storage tank. The tank was approximately 40 meters from the relocated boiler. The pipe was passed underground and through a protective conduit to connect the boiler to the storage tank. The first defendant dug the trench between the supply tank and the relocated boiler, and laid drainage piping in the trench. 5. One of the issues raised by the first defendant in its answer was whether the relocation of the boiler was part of the original works specification or whether it was a variation required by an architect employed by the plaintiffs. 6. The second defendant was retained by the first defendant as a sub-contractor to carry out plumbing and heating work for the boiler. The second defendant fitted an oil pipe inside the protective conduit to connect the boiler to the storage tank. Who was responsible for the design of this system is in issue. 7. On or around 1 st October, 2012, the plaintiffs noted a smell of oil at the property and samples were taken to ascertain whether oil was present in the drinking water at the property. 8. On 19 th October, 2012, the second defendant attended the property and carried out a visual inspection of the pipe and pressure testing. No leaks were identified but as a precautionary measure the oil pipe was replaced by the second defendant with the original pipe being removed. 9. The plaintiffs allege that the testing in October 2012 has revealed that there was an apparent defect in the oil pipe which had caused a leak. 10. This

led to further testing and the carrying out of remedial work on behalf of the plaintiffs. It is the cost of this work that the plaintiffs' insurers seek to recover from the first and second defendants in the sum of £80,806.41. 11. Proceedings were issued by the plaintiffs on 29 th September, 2015, i.e. just before the third anniversary of the plaintiffs noticing a smell of oil. Accordingly, as far as the second defendant is concerned, which entity had no contract with the plaintiffs, proceedings were issued just before expiry of the 3 year limitation period applicable to claims in negligence. The period of limitation as against the first defendant was agreed as being 10 years from the date of any breach of contract. 12. The second defendant served its answer on 5 th December, 2015, and the first defendant served its answer on 7 th December, 2015. 13. Following the filing of the first defendant's answer, the plaintiffs had until Monday, 28 th December, 2015, to file a reply, although no reply was in fact filed. 14. From 28 th December, 2015, the plaintiffs therefore had until Thursday, 28 th January, 2016, to issue a summons for directions under Rule 6/26(1) of the Royal Court Rules , as amended. No such summons for directions was issued during this period. 15. However, on 3 rd February, 2016, Advocate Heywood, on behalf of the plaintiffs, wrote to Miss Wise, an employee of Davies Ingram, acting for the second defendant. In summary, Advocate Heywood stated that it was necessary for each of the parties to be allowed an opportunity to inspect and carry out destructive testing on the oil pipe removed from the property by the second defendant in 2012. The plaintiffs therefore suggested that the matter be adjourned sine die in order to allow sufficient time for the necessary inspection and testing to be completed. 16. A similar email was sent to Carey Olsen, who act for the first defendant, on the same day. 17. This led to further correspondence between the advocates for all the parties about instructing experts and the location and storage of the oil pipe removed in 2012. This correspondence continued throughout March, April, May and June 2016. 18. On 13 th July, 2016, Mr Borg, a legal assistant at Benest Corbett Renouf, advocates for the plaintiffs, indicated that he was going to issue a summons for directions unless the first defendant indicated by return the identity of its expert and details of that expert's availability during the following two months. 19. In reply, Carey Olsen, for the first defendant, copied to the second defendant, asked for more time to respond. The plaintiffs ultimately agreed not to issue a summons for directions before 8 th August, 2016, to allow the first defendant time to take instructions on who would act as their expert. 20. On 3 rd August, 2016, Carey Olsen, on behalf of the first defendant, wrote to Advocate Heywood on a without prejudice save as to costs basis. I have only been provided with a redacted copy of this letter but it was accepted by all parties that this letter contained certain proposals in relation to the dispute. It was also agreed that this letter also contained proposals to resolve the matter on behalf of the second defendant. 21. Thereafter nothing happened until 6 th February, 2017, when Advocate Heywood on behalf of the plaintiffs wrote to Advocates Grace and Ingram on behalf of the defendants. 22. This reply led Carey Olsen, by an email dated 1 st March, 2017, to agree to attend a without prejudice meeting. 23. Ultimately this meeting took place on 16 th March, 2017. I was informed that meeting was attended by legal representatives for the plaintiffs and the first defendant, albeit (as with the letter of 3 rd August, 2016,) the discussions were intended to resolve the dispute between the plaintiffs

and both defendants. The second defendant did not therefore attend the meeting on the basis of proportionality. Again, I am not privy to what was discussed at the meeting. 24. The meeting led to further correspondence from Advocate Heywood on 23 rd May, 2017, again on a without prejudice save as to costs basis. A chasing email was sent by Mr Borg, on behalf of the plaintiffs on 13 th June, 2017. 25. In response, on 23 rd June, 2017, the first and second defendants issued their application to strike out the plaintiffs' claim for want of prosecution. The relevant legal principles 26. While I was referred to a number of different authorities, when an application is made for a failure to issue a summons for directions, I summarised the relevant legal principles at paragraphs 26 to 29 of Hong Kong Foods Ltd and Another-v-Robin Hood and Another

- [2014] JRC 187 : "Legal Principles 26. There is no real disagreement between the parties of the relevant legal principles on a strike out application for breach of the Rules which briefly are as follows:- (i) The power to strike out is contained in Rule 6/26(13) of the Rules which permits the court of its own motion to dismiss an action after giving 28 days' notice in writing to all the parties; (ii) On considering whether an action can be dismissed the court considers the following by reference to *Lescroel v Le Vesconte*
- [2007] JLR 273 :- (a) Apart from the failure to issue a summons for directions, has the plaintiff prosecuted its case with at least reasonable diligence; (b) Is the failure to apply to issue for a summons for directions within the time frame contemplated, excusable; (c) Has the plaintiff satisfied the Master/Court that the balance of justice indicates that the action should be allowed to continue? 27. Ultimately, the court in *Lescroel* also noted that the Master had a discretion. In *B v MR* [2007] JLR N 48, the Royal Court stated "the decision to dismiss an action without considering the merits should be taken on the basis of all the circumstances. The three questions should not therefore be considered sequentially with the court only considering the next question if the plaintiff succeeded on the previous one". 28. It is also clear that the remedy of dismissal must not be disproportionate to the breach involved (see *B v MR*
- [2007] JRC 139 at paragraph 26 and *Irish Nationwide v The Volaw Corporate Trustee Limited & Ors*
- [2012] JRC 035 at paragraph 27). 29. In *Vieira v Kordas*
- [2014] JRC 042 although considering a strike out under Rule 6/13 of the Rules, which is a slightly less stringent test, W. J. Bailhache, Deputy Bailiff at paragraph 19 stated as follows:- "We come now to the question as to what sanction should be applied in the light of the first two findings. Having regard to the Article 6 Convention rights of the parties, we note and accept the proposition that we should not apply the most severe sanction of striking out the plaintiff's claim if there are other sanctions which could be applied which would enable justice to be done between the parties. Illustrations of the type of sanctions - costs orders, orders that no interest be due on any sum awarded and so on - are canvassed in some of the other cases. On the other hand, if the court were to be of the view that it is

now no longer possible to have a fair trial of the action, then there would undoubtedly be prejudice to the defendant, and it would not be right to allow the action to proceed." I consider it is correct to take the same approach in exercising the discretion vested in me where a breach of Rule 6/26 has occurred." 27. In *Mayhew Ltd v Bois Bois*

[2016] (1) JLR 77 Sir Michael Birt agreed the summary set out in *Hong Kong Foods* was a correct statement of the applicable legal principles. I have therefore followed the approach in *Hong Kong Foods*. The parties' contentions 28. Advocate Boothman for the first defendant took the lead in relation to the defendants' application. 29. As far as the first defendant was concerned, Advocate Boothman accepted that he could only argue there had been delay from August 2016 onwards by virtue of the correspondence that had taken place between the parties between February and the beginning of August 2016, referred to in the above chronology. In my judgment he was correct to do so because it cannot be argued based on this correspondence that the plaintiffs in relation to the first defendant had not prosecuted their case with at least reasonable diligence. 30. However, from August 2016 onwards, nothing happened. What the plaintiffs should have done was therefore to have issued a summons for directions. The defendants were not required to issue such a summons following *Viera v Kordas*

[2014] (1) JLR Note 15, which states as follows:- "Civil Procedure-case management-defendant's obligations Jersey has not adopted the English Civil Procedure Rules and one must be cautious about taking those Rules as providing anything more than valuable guidance in Jersey (*Alhamrani v. Alhamrani*, [2008] JCA 187A, considered). To the extent that the Rules reverse the responsibility for taking forward a case to trial, they are not valuable. It is the plaintiff's case, not the defendant's, and the plaintiff is obliged to take the necessary steps to bring it forward. As part of case management, the court may well direct the parties to take steps that bring the case forward and, depending on the facts of the case, it may well be incumbent on the defendant to issue a summons for directions, particularly if, as a result of the defendant's interlocutory activity, both parties have invested heavily in the litigation process. Furthermore, it is the obligation of the defendant to comply with any such case management directions timeously and to comply with timetables set out by the Royal Court Rules 2004. A defendant is obliged not to waste the time of the parties and the court with procedural games. Other than that, however, it is not the responsibility of the defendant, particularly in the early stages, to take the plaintiff's case forward to trial as quickly as possible, perhaps exposing himself to irrecoverable costs as a result. " (emphasis added) 31. Alternatively, the plaintiffs should have asked for a stay while discussions were taking place. The fact that those discussions had taken place, however, did not absolve the plaintiffs from either issuing a summons for directions or ensuring that a stay had been agreed. 32. What had happened here were six months of no progress for a low value claim which therefore justified the case being struck out. 33. This delay was in respect of a leak that was first noticed in October, 2012, but was not notified to the first defendant until 2015. 34. While Advocate Boothman fairly accepted that his case would turn on expert evidence, insofar as other parties would call witnesses to give evidence of

fact, he contended that I was entitled to infer, in view of the period of time that had elapsed, that impairment of witness recollection could occur. It was not necessary for specific evidence of impairment to be placed before the court, see *Garfield-Bennett v Phillips*

[2002] JLR Note 42 at paragraph

- (c) and (g) as follows:- "(c) The prejudice may take a variety of forms, e.g. the impairment of the memory of witnesses, and the effect on the defendant of having a claim hanging indefinitely over him. The anxiety which inevitably accompanies litigation is insufficient by itself to justify dismissing an action except in exceptional circumstances (*Birkett v. James*, [1978] A. C. 297; *Shtun v. Zalejska*, [1996] 1 W. L. R. 1270, followed). (g) When the prejudice takes the form of the impairment of witnesses' recollections, it is not necessary for evidence of specific examples of impairment to be placed before the court. Moreover, when there are two or more periods of delay, the court may infer that any substantial delay at any period leads to a loss, or further loss, of recollection (*Roebuck v. Mungovin*, [1994] 2 A. C. 224, dicta of Lord Browne-Wilkinson, followed)." 35. Advocate Ingram, on behalf of the second defendant, supported Advocate Boothman's submissions. He also contended that the period of delay commenced at the end of June, 2016, when the first defendant was not responding, and therefore shortly after that date the plaintiffs should have issued a summons for directions. 36. As far as his client was concerned, the employees, by reference to the affidavit of Mr Gregg Robertson of the second defendant, sworn on 15 th August, 2017, who had installed the oil pipe in 2010 had left the second defendant in 2011, the second defendant having decided not to continue with the plumbing services of its business. These employees had however returned in 2012 to the plaintiffs' property at the request of the second defendant to test the oil pipe and had replaced it. Given the passage of time, the second defendant could therefore face real prejudice because of impairment of the recollection of its ex-employees by virtue of the delay that had occurred. 37. In addition, if the oil pipe was inherently defective, it was not clear why that was the fault of the second defendant and why the second defendant should be held liable. Instead the plaintiffs should have sued the manufacturer. 38. He further argued that the delay was a year because an application for directions was only issued by the plaintiffs in June, 2017. He also emphasised that the plaintiffs had not asked for a stay while negotiations were taking place. Yet cases before the Royal Court which were straightforward (and this was a straightforward case) should only take twelve months to resolve and complex cases should be concluded within twenty-four months (see *Ybanez v BBVA Privanza Bank (Jersey) Limited*

- [2007] JLR Note 45 . 39. Advocate Heywood, in response, questioned the motives of the defendants' application and suggested that the application was tactical. Ultimately this was a dispute between the insurers of each of the parties about where the loss suffered should fall. 40. It was for this reason that his clients had sought to be proportionate and had wanted to adjourn matters sine die while testing of the oil pipe was carried out. This testing was required because the second defendant's agent (appointed by a loss adjuster

for the second defendant) had held the oil pipe since it was removed in 2012 by the second defendant. 41. Furthermore, testing could only take place by agreement because, if the plaintiffs had tested the pipe, this would have led to the pipe being destroyed as part of the testing process. If the plaintiffs had carried out testing without involving the first defendant, the latter would have understandably protested. What the plaintiffs were therefore trying to arrange was testing involving all experts to be retained by each of the parties. 42. The delay up until August 2016 was therefore delay due to the first defendant not getting instructions and not finding an expert. Furthermore the defendants were working together and, while without prejudice discussions were with the first defendant, it was clear this was on behalf of both defendants. 43. Where Advocate Heywood accepted that there had been delay was from after August 2016 until his letter dated 3rd February, 2017, and that either a summons for directions should have been issued earlier or a stay applied for and agreed. In the case of the latter, he contended that the defendants would have agreed to a stay had one been asked for or, failing that, it would have been granted by the court. 44. Advocate Heywood also accepted that there was some delay following the without prejudice meeting, on 16th March, 2017, until he responded on 23rd May, 2017. He calculated this delay as around a period of one month. 45. Ultimately therefore the total period where there was delay was in the region of six months, but this was in the context of the plaintiffs having tried to engage with the defendants in a proportionate manner. 46. The defendants, having agreed to take part in without prejudice discussions after the main period of delay, and only then issuing its present application, were engaging in procedural games. 47. As far as prejudice is concerned, the key evidence was expert evidence and therefore he argued there was no real prejudice that the other parties would suffer by the delay. 48. As far as the second defendant is concerned, the difficulty the second defendant faced due to ceasing to carry out plumbing was not affected by the period of delay. Any difficulties that arose were because the second defendant had chosen to cease its plumbing operations in 2011 before the leak was identified and long before proceedings were issued. Any period of delay of six months did not alter the position. 49. He also argued that the answers to questions put by me to Advocate Ingram about what enquiries had been made to track down the relevant witnesses were not satisfactory and it appeared that very little had been done to ascertain whether in fact the relevant witnesses could be located and what they might remember. 50. It was not necessary for him to pursue the manufacturer which was a difficult claim in any event because the manufacturer might not owe a duty of care. It was for this reason that in England statutory changes had been made to make manufacturers liable for goods that turned out to be defective. Decision 51. I start by reference to the test in Hong Kong Foods set out above. 52. Firstly, until August 2016 by reference to the correspondence between the parties from February and early August 2016 I am satisfied that the plaintiffs prosecuted their case against both defendants with at least diligence. I also do not consider that a distinction can be drawn between the defendants as Advocate Ingram suggested. 53. However, the position changed after August 2016 because the plaintiffs, not having heard anything, at some point should have issued a summons for directions or sought to agree a stay. In my

judgment this should have happened by early September 2016. Instead nothing happened for a further five months. 54. I further consider that after the without prejudice meeting, on 16 th March, 2017, Advocate Heywood was right to concede that it took the plaintiffs too long to respond and therefore a further period of delay of one month had occurred where the plaintiffs had not prosecuted its case with at least reasonable diligence. 55. The second question arises as to whether this period of delay is excusable. Advocate Heywood did not seek to excuse the delay. Rather he simply explained why the delay had occurred for two reasons. Firstly, he was out of the office for periods of time due to personal circumstances and secondly, there was a change of personnel responsible at the insurers instructing him Advocate Heywood was correct not to advance these explanations as justification to excuse the period of delay. Where individuals are absent for entirely justifiable personal reasons, colleagues should step in to ensure that cases are progressed properly in order to discharge the responsibilities owed by a law firm to its client. 56. Similarly a change of personnel at insurers is not sufficient justification for a delay. Changes of personnel happen. An organisation the size of the plaintiffs' insurers (Aviva) should take steps to ensure that the matters for which they are responsible are handled in an appropriate time frame. While this may lead to a slight period of delay, a change of personnel does not justify a delay of six months. 57. In light of an inexcusable delay of six months, should this attract a sanction and, in particular, where does the balance of justice fall? In this regard, any remedy for an inexcusable delay must not be disproportionate to the breach and the most severe sanction of striking out the plaintiffs' claim should only take place where no other sanctions can be applied to enable justice to be done between the parties. 58. In this case I am satisfied that the balance of justice falls on the side of the plaintiffs. 59. Firstly, this is not a case where the plaintiffs have failed to act at all. The plaintiffs, prior to the period of delay, tried to take a proportionate approach to have the relevant piping tested by all parties by appropriate experts. The fact that did not happen cannot be laid at the door of the plaintiffs. 60. Secondly, the defendants, when re-engaging in negotiations in March 2017 did not raise any issue that there had been inexcusable delay. Rather they only chose to issue an application alleging delay once attempts at negotiation had failed. The approach therefore seems to be tactical in nature. Having decided to take part in negotiations on the merits, it does not seem fair to strike out a claim for want of prosecution where a defendant at least has not reserved its position prior to any such negotiations. 61. This is also a claim that ultimately will turn mainly on expert evidence. The key issue is whether the oil pipe was inherently defective and therefore was not fit for purpose. Such evidence can still be obtained to allow a trial to take place without any prejudice to any party. 62. As far as impairment of memory is concerned, in relation to the second defendant's witnesses, I do not regard this as a strong point, given that no attempt appears to have been made to contact those witnesses or to ascertain what their recollection might be, even though the second defendant has been on notice of the proceedings for at least 2 years. While I accept that I can draw inferences that memory may be impaired, that has to be balanced against what steps have been taken by the second defendant to find out whether the individuals concerned have any recollection.

Moreover, in this case their memory may well have been impaired at the time proceedings were commenced, given that they had left the second defendant's employment nearly 4 years before proceedings were served. I am therefore not satisfied that the additional delay of 6 months will significantly affect any recollection, given that the extent of any recollection has never been ascertained, and given the delay of 5 years since the works were carried out and proceedings being issued. Moreover, the second defendant was on notice of the leak in 2012 when its ex-employees returned to the site to test the pipe and also replaced it. The second defendant could therefore have asked its ex-employees at that stage to set out their recollection given a leak was possible due to the smell of oil. 63. I am therefore not satisfied that the period of delay of 6 months, in particular when after 5 months without prejudice discussions took place, justifies the ultimate sanction of a strike out in this case. 64. My decision not to strike out the claim does not mean however that the plaintiffs should get off scot-free. A period of inexcusable delay has occurred. This justifies some sanction. In my judgment however the appropriate sanction is that the plaintiffs should be deprived of interest for 6 months should the matter go to trial and should they be successful. Had the plaintiffs acted as I have indicated they should have acted in August 2016, either a summons for directions or (more likely) a stay would have been agreed and the matter would have progressed. Depriving the plaintiffs of interest for the inexcusable period of delay in my judgment restores the parties, as far as possible, to the position they should have been in had they acted in a manner expected by the Court. 65. I should make it clear that in reaching my view, while I am of course bound by the decision in Ybanez that straightforward cases should be concluded within 12 months, at present, while the time taken for matters to conclude has reduced, for a number of reasons which it is not necessary to set out in this judgment, the statements in Ybanez, in part, remain an aspiration. I am of the view, therefore, that care needs to be taken in deciding whether or not to exercise the power to dismiss a claim for want of prosecution where it has not been concluded within the time limits set out in Ybanez . Instead, my focus has been on what the plaintiffs did or failed to do, the reasons why, what prejudice might flow from any period of delay, and what is the just sanction for any unacceptable delay. 66. Finally, as far as costs are concerned, I wish to be addressed on what costs orders I should make, applying Mayhew, when this judgment is handed down. Authorities Royal Court Rules 2004. Hong Kong Foods Ltd and Another-v-Robin Hood and Another

[2014] JRC 187 . Mayhew Ltd v Bois Bois

[2016] (1) JLR 77. Viera v Kordas

[2014] (1) JLR Note 15. Garfield-Bennett v Phillips

[2002] JLR Note 42 . Ybanez v BBVA Privanza Bank (Jersey) Limited

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