

JERSEY / JUDGMENT

Viera -v- Kordas [2014] JRC 042 (19 February 2014)

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judgment

the deputy bailiff: 1. This is an appeal by the plaintiff against a decision of the Master on 11 th December, 2013, to strike out the plaintiff's claim against the first defendant pursuant to Rule 6/13(1)(d) of the Royal Court Rules 2004 as amended. The grounds for the Master's decision were that there had been an inordinate delay in the progress of the claim such that it would be an abuse of the process of the Court if the plaintiff were to be permitted to continue. The test we apply on such an appeal is that we consider the matter afresh and reach our own conclusions whilst of course taking due note of the Master's decision and the reasons which he gave for it. 2. We gratefully adopt the summary of facts set out by the Master in his judgment, (

[2013] JRC 251) to which no objection is taken:- "2. The plaintiff's claim arises out of a road traffic accident between the plaintiff and the first defendant on 4 th October, 2007. The plaintiff alleges that the first defendant, while riding his motorbike, negligently collided with the plaintiff's van. The plaintiff claims damages for pain and suffering and loss of earnings. 3. The Motor Insurers Bureau was named as second defendant to the proceedings because the first defendant, on 8 th January, 2008, was convicted of driving without valid motor insurance. 4. The Order of Justice was served in September 2010 to avoid limitation issues arising. When the matter first came before the Royal Court on Friday, 1 st October, 2010, it was adjourned sine die with reciprocal undertakings to reappear upon 48 hours' notice. No further steps have occurred in the proceedings since that date and no pleadings have been filed. 5. In argument before me the first defendant's position is that liability is denied. As far as the second Defendant is concerned, in a letter dated 17 th February, 2010, the second defendant wrote to ForumLaw, a firm of English solicitors then representing the plaintiff, stating "we can advise that liability is not in dispute". It was not clear to me whether this was an admission of liability purportedly made on behalf of the first defendant or whether it was no more than the second defendant accepting that, if the first defendant was found liable but was unable to pay due to being uninsured, then the second defendant accepted that it was then liable to meet any all [sic] damages the first defendant was required to pay. Advocate Livingstone was unable to clarify the position, despite having sought instructions. 6. As to what has happened since the matter was adjourned

sine die, the following has occurred:- (i) In the autumn of 2010 there was correspondence between Le Gallais & Luce, acting for the plaintiff, and Viberts, acting for the first defendant, where the first defendant sought information to understand the basis of the claim. No substantive information was provided apart from contact details for the second defendant. After 2010 there was no further communication between the plaintiff and the first defendant's advisers until the first defendant issued the application now before me. (ii) In 2010 the plaintiff did obtain letters from various individuals confirming that they had employed the plaintiff in 2007 prior to accident. The letters obtained in 2010 were provided to the second defendant's advisers but not the first defendant's advisers. They were only provided to the first defendant as part of the documentation filed in relation to the present application. (iii) The plaintiff obtained a medical report from a Doctor Pring dated 3rd May, 2011, and an updated report dated 26th August, 2012. It was accepted that the medial [sic] report was provided to the second defendant but not the first defendant (I was told due to an oversight) in 2012 and the updated report was provided in August 2013. (iv) There was correspondence between Advocate Livingstone on behalf of the second defendant and Le Gallais & Luce in 2012. The board thrust of this correspondence is that Advocate Livingstone was chasing for an update. (v) In the papers filed by and on behalf of the plaintiff in this application a notice of assessment of the plaintiff's earnings for 2011 was attached. Neither defendants' legal advisers had seen this document previously although it is dated 10th October, 2012. (vi) Finally, I was provided with a schedule by the plaintiff showing the steps taken by the plaintiff's English solicitors from September 2012 until the date of this application. The schedule and summary shows communications between the plaintiff's English solicitors and the plaintiff chasing for information. There was no communication between the plaintiff's English solicitors and the advisers to the first or second defendant based on the chronology produced to me until the present application was issued. 7. One of the difficulties alluded to in relation to communications between the plaintiff's English solicitors and the plaintiff was that the plaintiff could not speak much English and therefore communications had to be through a translator. I was told that this had contributed to the delays. I deal with this later in this decision." 3. The application before the Master was based on Rule 6/13(1)(c) and (d). The Master found that Rule 6/13(1)(c) focused on the ground for striking out where the nature of the pleading was such that it might prejudice, embarrass or delay the fair trial of the action. That was not in point here because the complaint lies in the failure to take the action forward as a whole. We agree that Rule 6/13(1)(c) does not apply here. 4. The Master based his decision on the legal tests set out in *Kinsella v Lido Bay Hotel (Jersey) Limited*

[2001] JLR 247, a decision of Master Wheeler. On the *Kinsella* test, the Master had to consider three questions:- (i) Has there been an inordinate delay; (ii) Is that delay excusable; and (iii) Does such delay give rise to substantial risks such that it is not possible to have a fair trial of the issues and the action or is it such as is likely to cause or to have caused serious prejudice to the defendant? 5. The Master did not have cited to him some of the more recent authorities in this Court, in particular *Eckman v Sidem International Limited*

- [2009] JRC 233 and *Café de Lecq Limited v R A Rossborough (Insurance Brokers) Limited*
- [2011] JRC 011 . The skeleton argument of the respondent put before the Master did refer to the decision of this Court in *Garfield-Bennett v Philips*
- [2002] JLR N 42 although the authorities annexed to the Master's judgment do not suggest that the case itself was put before him. In that case there was a full summary by Birt DB of the principles to be applied, and those principles were applied by the Court in subsequent cases. 6. The Master does not appear to have cited to him, either, the case of *Irish Nationwide Building Society v Volaw Corporate Trustee Limited*
- [2012] JRC 035 (INBS). (He did have before him a subsequent decision in the same litigation, given also by Commissioner Clyde-Smith, for which the reference is
- [2013] JRC 099 , and he referred to that part of Commissioner Clyde-Smith's decision which dealt with the question whether the Master had any inherent jurisdiction. The Master concluded that, although the point did not arise for decision below, he would have approached the matter on the basis he did not possess an inherent jurisdiction.) This is perhaps important because the 2012 decision in INBS , not before him but cited to us, contains like the Eckman decision references to the Human Rights (Jersey) Law 2000 and the need to have regard to the Article 6 Convention rights of the parties. That, of course, means the Convention rights of both the plaintiff and the defendant. The Convention requires us to be satisfied that a decision to strike out is proportionate. Rules of procedure are not to be applied arbitrarily if the result would be disproportionate and caused injustice. In our judgment, while the approach of the Master did not in terms refer to the need for proportionality, that was in fact the approach which he took. We form that conclusion having regard to all his reasoning. 7. On this appeal, we apply the principles of the *Garfield-Bennett* decision with the additional assistance of *Eckman* and the 2012 decision of this Court in INBS insofar as human rights considerations are concerned. We were addressed by both counsel on the basis of the *Kinsella* test, and indeed we think that those three questions are convenient for the purposes of dealing with this appeal, albeit they are not framed so widely as the principles listed by Birt DB in *Garfield-Bennett* . 8. Before going on to the *Kinsella* questions, we record that we have also had before us an affidavit sworn by Miss Jessica Veasey on 28 th January, 2014, two days before the hearing of the appeal, and tendered on behalf of the appellant. This of course was not evidence which was before the Master. Annexed to the affidavit are a number of documents, including correspondence between ForumLaw and Messrs Le Gallais & Luce, an agreement variously dated 7 th September and 20 th September, 2000, between the Home Affairs Committee of the States of Jersey and the second defendant, some draft orders of justice and some correspondence between the plaintiff's solicitors and the second defendant. There is also attached a chronology of events prepared by the deponent dealing with the progress in the matter between 8 th October, 2010, when the proceedings were adjourned sine die and 13 th December, 2013, when the English solicitors sought an opinion from Messrs Voisin in relation to an appeal. We record that Advocate Preston did

not appear before the Master, and that it seems to us he said everything that could possibly be said on behalf of the appellant in relation to this appeal. 9. We turn next to the three Kinsella questions. 10. Inordinate delay? Advocate Preston submitted that the delay was not inordinate. Although the Master had not all the information before him, it was clear from the chronology of Miss Veasey that the plaintiff's legal advisers were taking steps behind the scenes regularly between October 2010 and December 2013. We have reviewed that chronology. It is true that it reflects an amount of work performed by the English solicitors. It is clear that much of the work involved difficulties with coordinating the work of translators and obtaining medical reports. Nonetheless, it is also true that there appears to be no communication at all during this period with the first or second defendant. We cannot help noticing that many of the difficulties encountered by the plaintiff's English solicitors would not have been so encountered if the plaintiff had instructed the firm of local advocates to deal with his claim before the Jersey courts. The plaintiff, according to the Order of Justice, was resident in Jersey. There are Jersey advocates who are able to speak both English and Portuguese. However understandable the delay as between the English solicitors and the plaintiff, the fact remains that this delay is not in any sense down to inaction on behalf of either defendant. 11. In this case, proceedings were issued a matter of weeks before the expiry of the limitation period. By agreement with the defendants, they were then adjourned indefinitely, with mutual undertakings to reappear in court at the request of any party. There followed a further delay in excess of 36 months. We do not have any hesitation in finding that this delay was inordinate. This was - or should have been - a relatively simple road traffic negligence claim. If such a claim cannot be brought before the court within six years of the accident occurring, there is something badly wrong. Quite complicated cases come to court much more quickly. The delay was inordinate and we agree entirely with the Master's conclusion in that respect. 12. Was the delay excusable? In essence there were two points put to us here by Advocate Preston. The first was that the value of the claim was probably in the order of £30,000

- £35,000. The plaintiff relied upon the admission of liability by the second defendant, and was concerned to avoid racking up costs unnecessarily. This indeed was stated in the affidavit which Miss Veasey put before us on the plaintiff's behalf. The acknowledgment of liability to which we have referred was a letter from the second defendant to ForumLaw sent on 17 th February, 2010, in which the writer says that "our investigations have now finished and we can advise that liability is not in dispute ". The writer then went on to ask for documentation in relation to quantum. 13. As Advocate Preston indicated, we do not know the basis upon which the second defendant made that admission that liability was not disputed. We do know that whatever the basis for that admission, the plaintiff ought not to have relied upon it. Paragraph 5 of the agreement between the Home Affairs Committee of the States of Jersey and the second defendant, to which we made reference earlier, provides:- "Subject to clauses 6

- 16, if a claimant has obtained against any person in a court in the Bailiwick of Jersey a judgment which is an unsatisfied judgment then [the Second Defendant] will pay the relevant sum to, or to the satisfaction of, the claimant or will cause the same to be so paid. 5.2 Paragraph (1) applies whether or not the person liable to satisfy the judgment is in fact covered by a contract of insurance and whatever may be the cause of his failure to satisfy the judgment." 14. There is nothing in clauses 6 - 16 which has an impact on Clause 5 of this agreement. That clause makes it plain that the obligation of the second defendant does not arise until a claimant has obtained against any person in a court in the Bailiwick of Jersey a judgment which is an unsatisfied judgment. In the present case, no such judgment has been obtained against the first defendant. Furthermore, it is clear from emails between Messrs Viberts, acting for the first defendant and Messrs Le Gallais & Luce, then acting for the plaintiff, sent in November 2010, that liability was not admitted. In the second of those emails, timed at 10:56 on 10 th November, 2010, Messrs Viberts said this:- "The pre-admission of "liability is not in dispute" by the [second defendant] is questionable and in my opinion cannot be relied on. My client neither admits nor denies liability at present. He is entitled to see the liability evidence against him and put your client to proof." 15. So it could not have been clearer that liability was not accepted. The plaintiff was not entitled to rely on the second defendant's submission not only because it was not the place of the second defendant to make any such admission until a judgment had been obtained in the Bailiwick against the first defendant, but also because the first defendant had not admitted liability or been subject to such a judgment himself. 16. The second reason given by Advocate Preston for saying that the delay was excusable was that there was a proper desire not to rack up costs. We are entirely sympathetic to the approach of any party that costs should not be incurred unnecessarily. It is common place in personal injury actions to distinguish work done on issues of liability from work done on issues of quantum. Sometimes liability is admitted and argument then takes place on quantum. Sometimes liability is parked whilst discussions on quantum take place. Sometimes liability is disputed and that issue is then taken forward. This case therefore falls into the second of those three categories. In our judgment, it might have been excusable to take no steps in relation to establishing liability if there had been active steps taken to negotiate issues of quantum with the defendants. However no steps were taken for such negotiations. The first without prejudice offer made in this respect was imminently before the hearing before the Master in December 2013 with liability not established and no significant discussions between the parties over quantum. Furthermore, no evidence whatever to establish loss and injury had been put before the first defendant for consideration. 17. When the Master made his decision, he had no affidavit in support of the application to continue the action explaining what steps had been taken. As we have indicated, that has in part been dealt with by the affidavit of Miss Veasey. However, there were no discussions at all between the plaintiff and the first defendant to try to resolve the claim. All communications seem to have ceased at the end of 2010. There was very limited discussion with the second defendant - this seems to have been restricted to giving some medical evidence. 18. It seems to us to be clear that the plaintiff relied upon the statement by the second defendant that liability was not in dispute when it should not have

done so. In those circumstances, the delay was not excusable. 19. 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. In our judgment this is the true position here. The accident is alleged to have taken place in October 2007 at approximately 7:15pm. It is not apparent that there were any witnesses - if there were any witnesses, they certainly have not yet been identified. This is one of those cases where what actually happened will be very much dependent upon the evidence given by the two drivers involved - the plaintiff and the first defendant. There is no police report, no examination of debris in the road to identify where the accident took place, no indication as to whether either the car or motorcycle was stationary at the time of the accident, no indication of skid marks, and indeed no external evidence whatsoever. All the court will then have are the recollections of the plaintiff and the first defendant. The plaintiff clearly will have some difficulties in his evidence in the sense that an email from ForumLaw to Messrs Le Gallais & Luce sent on 14 th September, 2010, has been disclosed with Miss Veasey's affidavit in which the litigation executive at ForumLaw says this:- "My client has advised that the accident happened in the evening, between 19.30 and 19.45 so the time needs to be altered at para 3. My client cannot remember which direction he was going but remembers he was travelling towards the city centre - is this sufficient information for the purposes of the order." 20. If the plaintiff could not remember the direction he was travelling in September 2010, one cannot think that his memory will be much improved by the time of trial at some date later in 2014. But suppose it is? It is quite unfair to the defendant to be expected to remember, seven years after the event, details which are essential for determining who, if either driver, was negligent at the time of the accident. There is real prejudice to the defendant here. 21. There is also real prejudice in connection with the injuries which are said to have resulted from the accident. In the Order of Justice, it is asserted that there was injury to various soft tissue, including whiplash injuries causing pain and stiffness and limitation in movement, injuries to the back and arm, severe headaches with shooting pains and associated dizziness and ongoing injuries to the plaintiff's mouth and maxilla. We are told that there are two medical reports. We are also told that there was a second accident involving the plaintiff some 12 months after the first. Identifying which injuries were sustained as a result of the first accident as opposed to the second accident will not be a matter which is easily determined. As of the autumn of 2013, the first defendant had not seen the medical reports at all, and had no basis for assessing whether the plaintiff was intending to take the matter forward, or had really abandoned it, and if he was to take it forward, what evidence there was of injuries sustained in order that these could be assessed by having a medical report prepared on behalf of the

first defendant. The delay would cause the first defendant real prejudice in assessing with any degree of accuracy the reliability of the plaintiff's medical evidence. On those two counts, we think the Master was absolutely justified in concluding that there was real prejudice to the first defendant. 22. We wish finally to deal with a point that was argued at some length before us by Advocate Preston. Essentially the contention was that a defendant is not permitted to sit on his hands and that the defendant was not entitled to abdicate responsibility for the proceedings. It was said that this was an approach which might have been justifiable years ago, but the combination of the Court of Appeal's decision in *Re Esteem Settlement*

[2000] JLR Note 41 and the practice direction RC 05/31 shows that the Royal Court considered there was an obligation on all parties to have actions disposed of if possible within 12 months. Advocate Preston relied upon dicta of the Royal Court in *Eckman* between paragraphs 60 and 63, and in particular the reference to the case of *Hately v Morris and Others*

[2004] 1 BCLC 582, where, on an application to strike out a petition on the grounds that it was an abuse of the process of court, Mann J made the comment that:- "I have in mind the passage from *Asiansky*, set out above, which points out that it is not always appropriate for defendants to let sleeping dogs lie. This was not a case where the next step in the action was something which it was within the sole province of the petitioner to carry out. Nor is it a case in which there has been some express order with which the petitioner has failed to comply. The next step required in this petition after 9 April 2002 was a further CNC. The respondents could themselves have applied to re-fix the date, even though it might be said that the responsibility lay more naturally with the petitioner because it was his petition. They did not do so, and did not indicate which counsel was to be instructed in place of counsel had been acting up to that time. The picture would have been very different if the registrar had been correct in his finding that the petitioner had expressly assumed responsibility for re-fixing, but there is no evidence to support it". 23. In the Court's judgment in *Eckman*, Clyde-Smith, Commissioner expressed the view that similar sentiments applied in this jurisdiction and that it was not always appropriate for defendants to let sleeping dogs lie. 24. Accordingly it was argued by Advocate Preston on behalf of the plaintiff that, the defendant being as much responsible for the delay as the plaintiff because the defendant could have given notice to bring the case back to court and placed on the pending list, the plaintiff's action should not be struck out. 25. It seems to us that this was a wholly unattractive submission, and one which wrongly construes the effect of the practice direction and where the obligations lie in relation to procedure before this Court. We note that in October and November 2010, questions were put by Messrs Viberts to Messrs Le Gallais & Luce in relation to issues of liability, with the first defendant's lawyers seeking information in order that the claim could be assessed. The response was that instructions were being sought. A reminder was sent on 15 th December, 2010. It does not appear there was any response. The affidavit sworn in support of the application to strike out the Order of Justice indicated that the first defendant's

lawyers took the view that it would be wrong to chase Messrs Le Gallais & Luce any further as it only served to increase costs and it was the plaintiff's responsibility to advance his case. 26. The unattractive nature of the plaintiff's submission in this respect is demonstrated by comparing the submission that the plaintiff's delay was excusable because his lawyers did not wish to rack up costs unnecessarily with the submission that the defendant's case was unacceptable because the defendant had in effect sat on his hands and not been prepared to rack up costs in order to have the issue of liability dealt with. 27. This approach seems to us to misunderstand the obligations of the parties to litigation. First of all it is right to start with the decision of the Court of Appeal in *Re Esteem*. The note in full provides this:- "The objective of all involved in civil proceedings is to progress to trial in accordance with an agreed or ordered timetable, at a reasonable level of cost, and within a reasonably short time. In the 21st century the conduct of advocates playing interlocutory games, passing between the Royal Court and the Court of Appeal several times before pleadings are closed, and perhaps additionally before trial is reached, is unacceptable, because only the lawyers benefit. The assumption that a trust fund will necessarily bear the lawyers' costs no longer applies. The correct function of pleadings is to set out the material facts the parties will later rely on to establish their causes of action or defences. Advocates should not try to persuade the Royal Court to strike out the whole or part of a pleading which contains plainly arguable causes of action, or to edit a pleading to make it more or less effective. If there is not a change to new ways of practice consistent with this objective, advocates may be ordered to pay the costs of the opposing party, or be denied the ability to charge their own client for unnecessary additional work." 28. It is to be remembered that that case involved complex trust litigation. It is to be noted that the real criticism by the Court of Appeal was of advocates playing interlocutory games. The facts of that case bear no resemblance to the facts we are dealing with here. The practice direction RC 05/31 is concerned with case management. It indicates that the Royal Court will adopt a more active approach to case management with a view to achieving a more efficient, timely and cost effective method of disposing of civil actions. It is true that the Royal Court's expressed wish was that parties should seek to have actions disposed of within 12 months of their commencement wherever that is possible. The thrust of the practice direction is that lawyers for plaintiffs and defendants have an obligation not to play procedural games of the kind mentioned in *Esteem* the results of which would be a delay in proceeding to trial. Once again, that is some distance away from what has taken place in this case. No procedural games have been played here by the first defendant. The first defendant asked for information which could then be considered. There was no substantive reply. A reminder was sent. There was no reply. This was not a case brought by the first defendant. He was not entering any counter-claim. It would be wholly unreasonable to expect him to incur costs in order to take forward a claim which the plaintiff had brought. It was not the first defendant's case, and it was not his obligation to take any such steps. The defendant's obligation in these circumstances was not to take steps which would delay the trial of the action. He did not take any such steps, and he was not and is not responsible for the delay in getting this

action to trial. 29. It may be that *Hately v Morris* contains some dicta which go contrary to these views just expressed. That case was a very different type of case. Furthermore the case was undoubtedly much influenced by the civil procedure rules which do not apply in Jersey. As the Court of Appeal said in *Alhamrani v Alhamrani*

[2008] JCA 187A at paragraph 70:- "This jurisdiction has not adopted rules such as the Civil Procedure Rules of England and Wales and the applicant could go no further than to suggest that those rules offered valuable guidance to the principles which should be applied in this jurisdiction, particularly after the coming into force of the Human Rights (Jersey) Law 2000. 71. Once it is accepted, as it is by the applicant, that the practice in England shown by the CPR offers only valuable guidance, it cannot, upon the basis only of that comparison, be maintained, the court below has misdirected itself as regards the principles in accordance with which the discretion has to be exercised. 72. For my part therefore, I could not suggest that the test for the grant of leave to appeal was met upon the basis of this part of the applicant's argument". 30. So here we have a statement from the Court of Appeal that one must be cautious about taking the CPR as providing anything more than valuable guidance. To the extent that the CPR reverses the responsibility for taking forward a case to trial, we do not find that valuable. It is the plaintiff's case, 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 which do in fact bring the case forward to trial and, depending upon whether there is a counterclaim or perhaps upon the factual nature of the case, it may well be incumbent on a defendant to issue a summons for directions. This is particularly likely to be so 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 the timetables which are set down in the Royal Court Rules. A defendant is obliged not to waste the time of the parties and the court in procedural games. Other than these features, however, it is the plaintiff's case and it is not the responsibility of the defendant, particularly in the early stages, to take it forward to trial as quickly as possible perhaps exposing himself to irrecoverable costs as a result. 31. For all these reasons, the appeal is refused and the plaintiff ordered to pay the costs of the first defendant of and incidental to the appeal on the standard basis. Authorities Royal Court Rules 2004 *Viera-v-Kordas* and *The Motor Insurers' Bureau*

[2013] JRC 251 . *Kinsella v Lido Bay Hotel (Jersey) Limited*

[2001] JLR 247 *Eckman v Sidem International Limited*

[2009] JRC 233 . *Café de Lecq Limited v R A Rossborough (Insurance Brokers) Limited*

[2011] JRC 011 . *Garfield-Bennett v Philips*

[2002] JLR N 42. *Irish Nationwide Building Society v Volaw Corporate Trustee Limited*

[2012] JRC 035 . *Irish Nationwide Building Society v Volaw Corporate Trustee Limited*

[2013] JRC 099 . Human Rights (Jersey) Law 2000. Re Esteem Settlement [2000] JLR Note 41.
Hately v Morris and Others [2004] 1 BCLC 582. Alhamrani v Alhamrani

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