## ROYAL COURT (Samedi Division)

9th December 1997.

Before: B. I. Le Marquand, Esq., Greffier Substitute

Between And Emile Marcel Hyacinthe Le Gall Richard John Coutanche Plaintiff Defendant

Application by the Defendant for the action to be struck out by reason of in ordinate and inexcusable delay upon the part of the Plaintiff in the prosecution of the action.

Mr. P.W. Syvret for the Defendant Advocate J.D. Melia for the Plaintiff

## JUDGMENT

**GREFFIER SUBSTITUTE:** On 14<sup>th</sup> November, 1997, I heard the defendant's summons seeking the striking out of the Order of Justice in this action in accordance with the terms of Rule 6/13 (1) (c) and/or Rule 6/13 (1) (d) of the <u>Royal Court Rules, 1992</u> as amended, and/or alternatively under the inherent jurisdiction of the Court. It soon became clear that the application was really seeking dismissal of the action for want of prosecution by reason of inordinate and inexcusable delay.

The action relates to a building contract which was entered into in December 1984 with the works being completed in early 1985. It would appear from correspondence between the parties' lawyers that the plaintiff soon became aware of certain defects. However, Advocate Fiott was only instructed by the plaintiff in late 1991 and proceedings were not served until 29<sup>th</sup> January, 1992. The action has proceeded slowly and the summons seeking striking out was first issued on 29th August, 1997. Leave was given for the filing of an amended Order of Justice on 19<sup>th</sup> April, 1993, and a joint letter was agreed between the parties in December, 1994 under the terms of which leave was to be granted for a re-amended Order of Justice. However, this letter was never sent to the Judicial Greffier and remained on the file of the defendant's solicitor. From December 1994 until the issuing of the summons to strike out the only activity was the request of the plaintiff on the 29<sup>th</sup> March, 1996, to the defendant for consent to the filing of a re-amended Order of Justice. Thus the action was not commenced until about 7 years after the completion of the work and upon the date

upon which the summons to strike out was first issued the action had been proceeding for more than five and half years without having been set down on the hearing list.

The defendant included a counterclaim in his answer in a sum of just over £1,000 relating to the same building works.

The plaintiff employed Messrs Bailhache & Breton in 1994 and R.J. Le Sueur Limited some time after that in order to attempt to remedy the alleged defects and Advocate Melia indicated that as those works were performed so further problems had been located. She also pointed out that the defendant had also been slow in prosecuting his counterclaim.

The plaintiff applied to the Judicial Greffier by letter dated 5<sup>th</sup> July 1994 for the action to be set done on the hearing list but the Judicial Greffier raised in his letter dated 8<sup>th</sup> July, 1994, the need for the plaintiff's claim for special damages to be quantified by an amendment to the amended order of justice and it was that amendment which was meant to be dealt with by consent in December 1994.

In the case of <u>Skinner v Myles</u> [1990] JLR 89 the principles are set out clearly in the following section on page 93 of the Judgement:-

"These cases show that there are two distinct, although related, circumstances in which an action may be dismissed for want of They are: (a) where a party has been guilty of prosecution. intentional and contumelious default (this head is not relied upon by the first defendant); and (b) where there has been inordinate and inexcusable delay in the prosecution of the action. It is under this head that the first defendant, supported by the second defendant, has asked this court to strike out the To the requirement that there has been plaintiff's claim. inordinate and inexcusable delay on the part of the plaintiff there must be added one of two additional grounds for striking out. These are: (a) that such delay will give risk to a substantial risk so that it is not possible to have a fair trial of the issues in the action; or (b) 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. Whilst Mr. White for the plaintiff drew our attention to the second head we have just mentioned, he based his main submissions on the first requirement (as claimed by the defendant), namely, that the delay in this case has given rise to a substantial risk that it would not be possible to have a fair trial."

The following section from page 555 of the case of <u>Allen v. Sir Alfred McAlpine & Sons</u> [1968] 1 All ER 543 is helpful:-

"It is thus inherent in an adversary system which relies exclusively on the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the court to dismiss the plaintiff's action for want of prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible."

In the case of Shtun v Zalejska [1996] 3 All ER 411 on page 428 starting in section c there is the following helpful paragraph:-

"When a case, such as the present case, depends upon conflicting oral testimony to be given about what was said or understood some 15 years earlier, the quality of the recollection of a witness is bound to be central to the trial and, in respect of the evidence of the party on whom the evidential burden lies, critical to the establishment of their case. The cross-examination of such a witness is bound to be directed primarily to attacking the reliability of the witness's recollection and testing it by reference to other evidence that may be adduced at the trial. It is unreal to expect a defendant to do more at the stage of his application for dismissal in demonstrating the existence of the substantial risk."

The R.S.C. (1997 Ed'n) at section 25/1/6 on page 462 of the first volume contains the following helpful sections:-

(1) "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 <u>Birkett -v-James</u> [1978] A.C. 297 at 318; [1977] 3 W.L.R. 38; [1977] 2 All E.R. 801, H.L. But what is "serious prejudice" depends on the facts; if the plaintiff has already added to the defendant's difficulties by taking full advantage of the delay permitted by the Limitation Acts any further prejudice beyond the minimal may be "serious"."

(2) "Inordinate delay" - Time which has elapsed before the issue of the writ within the limitation period cannot of itself come within these words. Only delay after the issue of the writ is relevant. But the later the plaintiff starts his action the higher his duty to prosecute it with diligence (Birkett -v- James [1978] A.C. 297; [1977] 2 All E.R. 801, H.L.: Tabata -v- Hetherington, The Times, December 15, 1983). Thus although time elapsed before the issue

of the writ within the limitation period cannot of itself constitute inordinate delay such as to justify dismissal of the action, once a writ has been issued the plaintiff is bound to observe the R.S.C. and to proceed with reasonable diligence; accordingly inordinate delay by a plaintiff within the limitation period can be relied upon to support a defendant's application to strike out after the expiry of the limitation period (Ruth -v- C.S. Lawrence & Partners [1991] 1 W.L.R. 399, C.A.; [1911] 3 All E.R. 679). But delay (in the particular case of some 28 years) in commencing an action for personal injury on the part of a plaintiff under a disability was irrelevant when the action was begun within the limitation period and called for no explanation no matter what prejudice may have been caused to the defendant, Headford -v- Bristol and District Health Authority; The Times November 30, 1994, C.A. further "Subsidiary points - Limitations Act", para 25/1/7 below.

Where a long delay before the issue of the writ causes the defendant prejudice, he has to show only something more than minimal additional prejudice as the result of any post-writ delay to justify the action being struck out (<u>Department of Transport -v-Chris Smaller (Transport) Ltd</u> [1989] I All E.R. 897, H.L.).

"Inordinate" means "materially longer than the time usually regarded by the profession and Courts as an acceptable period" (Birkett v- James, above). It is easier to recognise than to define."

(3) "Inexcusable delay" - This ought to be looked at primarily from the defendant's point of view or, at least, objectively; some reasonable allowance, for illness and accidents, may be made. But the best excuse is usually the agreement of the defendant or difficulties created by him.

The absence of legal aid in libel proceedings should be treated sympathetically where it is asserted by the plaintiff that the delay was caused by lack of finance, <u>Gilberthorpe -v- Hawkins</u>, The Times, April 3, 1995.

The fact that an action has been stayed by order of the Court pending the giving by the plaintiff of security for the defentant's costs does not excuse delay if the plaintiff could, at any time during the relevant period, have caused the stay to be lifted by giving the security or by making an appropriate application to the Court (Thomas Storey Engineers Ltd v-- Wailes Dove Bitumastic Ltd, the Times, January 21, 1988, C.A.)."

(4) "Prejudice to the defendant - This is a matter of fact and degree and has been discussed in <u>Allen -v- McAlpine</u> [1968] 2 Q.B. 229; [1968] 1 All E.R.543, C.A. and in a large number of reported cases. The effect of the lapse of time on the memory of witnesses or, in the course of such time of their death or disappearance are

Their importance depends upon the the most usual factors. circumstances, the issues and the other evidence that can be Thus the lapse of time may be very prejudicial if the circumstances of an accident or oral contracts or representations are in issue, but is of much less importance in a heavy, welldocumented commercial action (National Insurance Guarantee Corp. Ltd -v- Robert Bradford & Co. Ltd (1970) 114 S.J. 436, In a case of prolonged culpable delay following long C.A.). delays in serving of proceedings, the court may readily infer that memories and reliability of witnesses has further deteriorated in Benoit v Hackney Council, the period of culpable delay; February 11, 1991, C.A. Transcript No. 91/0116 unrep. assertion of prejudice or of a substantial risk that a fair trial was not possible are insufficient. There has to be some indication of prejudice, e.g. that no witness statement was taken at the time so that a particular witness who would have been called on a particular issue had no means of refreshing his memory or that a particular witness was of advanced age and no longer wished to give evidence or had become infirm or unavailable in the period of inordinate and inexcusable delay; Hornagold -v- Fairclough Building Ltd [1993] P.I.Q.R. 400; The Times, June 3, 1993, C.A. See further Rowe -v- Glenister, The Times, August 7, 1995 and Slade v. Adco, the Times, December 7, 1995 (both C.A.) reiterating the requirement of some evidence to support the inference of prejudice in the form of lost or less cogent recollection.

The prejudice to the defendant must be caused by delay since the issue of the writ; the defendant cannot rely upon prejudice relating wholly from earlier delay. Evaluation of the degree of prejudice caused by delay since issue of the writ, however, is likely to require consideration of the context of such delay and, therefore, of the effect of the total lapse of time since the events giving rise to the dispute (James Investments (I.O.M.) Ltd -v-Phillips Cutler Phillips Troy, The Times, September 16, 1987, C.A.). See also Donovan -v-Gwentoys Ltd [1990] 1 All E.R. 1018; H.L., where the House of Lords, in exercising a different jurisdiction (namely under s.33 of the Limitation Act 1980) took a similar view of how prejudice should be evaluated."

In relation to this application it appears to me that the defendant must firstly satisfy me that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and must secondly satisfy me 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.

The section from the White Book in relation to inordinate delay is very significant. In particular, the statement that the later the plaintiff starts his action the higher his duty to prosecute it with diligence and the statement that inordinate delay by a plaintiff within the limitation period can be relied upon to support a defendant's

application to strike out after the expiry of the limitation period. The prescription period in contract in Jersey of ten years is lengthy and is four years longer than the similar period in the United Kingdom. If, as here, a party commences an action seven years after the contract then there must be a higher duty to prosecute the same than if the action had been commenced at an earlier date. In my view, the plaintiff has been guilty of inordinate delay both in commencing the action (although this was within the prescription period) and in allowing more than five and a half years to elapse without the pleadings having been finalised.

Within the chronology there are the following obvious lengthy gaps :-

- (1) eight months from March to November 1992 in relation to filing particulars;
- almost 1 year from late June 1993 to early June 1994 before the filing of a reply; and
- (3) most seriously, 15 months from agreement on the re-amended order of justice to the request to file a re-re-amended order of justice and 17 months from the request to file the re-re-amended order of justice to the issuing of the summons to strike out.

I am, therefore, satisfied that the plaintiff has been guilty of inordinate delay in the sense defined in the White Book of "materially longer than the time usually regarded by the profession and courts as an acceptable period".

Advocate Fiott, in his affidavit, has alleged that there were two examples of time being wasted by the defendant's lawyers. Unfortunately, there was no merit in the first of these allegations relating to a letter written by Advocate Fiott on 31<sup>st</sup> December, 1992, as that letter appeared to be saying that Advocate Fiott would be writing further to the defendant on the matter. In relation to the second allegation there is no doubt that there was some delay in responding to a request for consent to an amendment but it was always open to the plaintiff to issue an appropriate summons in relation thereto.

It is certainly true that the defendant has been guilty of inexcusable delay in prosecuting his counterclaim but, because the plaintiff's claim is so much greater than the defendant's counterclaim, this is the kind of action in which the counterclaim really operates mainly as a set off and it is clear to me that it was always the responsibility of the plaintiff to prosecute the action.

Accordingly, I am also satisfied that the delay was inexcusable within the meaning normally applied in relation to such an application. There is no reasonable excuse for the delay.

I now move on to the question as to whether the inordinate and inexcusable delay has given rise to a substantial risk that it is not possible to have a fair trial of the issues in the action.

In his affidavit in support of the application, the defendant states that he believes that the principal issues in this case will turn upon the evidence given by the witnesses and he sets out various examples of this as follows:-

- (1) His first example is the surveyor Mr John Lyon who produced a report for the defendant in November 1991. The defendant submits that the memory of Mr Lyon will have greatly dimmed since the preparation of that report some 6 years ago.
- (2) The defendant alleges that as Mr Lyon's report was not prepared until more than six years after the work was completed it would be difficult for the Court to properly assess what was the condition of the work when it was completed.
- (3) The defendant alleges that as substantial additional works have now been done to the area in question it will be even more difficult to establish what was the original condition of the work.
- (4) Because of the above matters, the defendant alleges that the Court will have to rely heavily upon the evidence of the original workmen and other people involved and that after the elapse of almost 13 years evidence is bound to be unreliable.

In relation to documentary evidence, the defendant alleges that after the elapse of a period of almost 13 years relevant documents such as plans, invoices, notes or instructions and the like may well have been lost or may be incomplete. The defendant also alleges that he has now lost drawings which he may originally have had.

In relation to the matter of prejudice to the defendant, the defendant alleges that as the ten year prescription period in contract has now elapsed, he would not be able to bring any third party proceedings and, in particular, that if any further amendment to the Order of Justice gives rise to any further claims then he will be deprived of any third party claims which he might have due to prescription.

In his affidavit in support of the plaintiff, Advocate Fiott makes various Firstly, Advocate Fiott states that in responses to the defendant's allegations. addition to the report of Mr Lyon there are two other reports on behalf of the defendant together with a statement of Mr Le Sueur the beneficial owner of the last building company to do work on the relevant area of the property. He also alleges that the defendant sought the advice of a surveyor named Mr Colley at about the time Mr Lyon's report was produced and will therefore have the benefit of his evidence. Advocate Fiott submits that the defendant has not identified any particular problem with any particular witness and that his statements in relation to loss of memory by witnesses are mainly general statements. In relation to documents, Advocate Fiott responds that if the defendant has lost important documents then that is entirely his fault and alleges that the plaintiff will be able to produce the relevant documentation In relation to third party proceedings, Advocate Fiott submits that the defendant had plenty of time from the commencement of the action in which to join appropriate third parties whilst still within the 10 years prescription period in contract.

In my estimation, even if the action were now to be diligently prosecuted, it is unlikely that the trial will commence earlier than November 1998 by which time thirteen and three-quarter years will have elapsed since the work was completed.

There are a number of helpful sections in the extracts from the White Book relating to prejudice to the defendant. I find the following sections particularly helpful:-

" "Where a long delay before the issue of the writ causes the defendant prejudice, he has to show only something more than minimal additional prejudice as the result of any post-writ delay to justify the action being struck out.".

"Thus the lapse of time may be very prejudicial if the circumstances of an accident or contracts or representations are an issue, but is much less of importance in a heavy well-documented commercial action.".

"In the case of prolonged culpable delay following long delays in serving proceedings, the Court may readily infer that memories and reliability of witnesses has further deteriorated in the period of culpable delay.".

"Bald assertion of prejudice or of a substantial risk that a fair trial was not possible are insufficient. There has to be some indication of prejudice, e.g. that no witness statement was taken at the time so that a particular witness who would have been called on a particular issue had no means of refreshing his memory or that a particular witness was of advanced age and no longer wished to give evidence or had become infirm or unavailable in the period of inordinate and inexcusable delay.".

"The prejudice to the defendant must be caused by delay since the issue of the writ; the defendant cannot rely upon prejudice relating wholly from earlier delay. Evaluation of the degree of prejudice caused by delay since issue of the writ, however, is likely to require consideration of the context of such delay and, therefore, of the effect of the total lapse of time since the events giving rise to the dispute."

It appeared to me to be important that I accurately analyse how much of the evidence at the trial would rely upon the memories of witnesses who had been involved with the original work. That fact is particularly important in this case because no witness statements have been taken on behalf of the defendant.

The defendant alleges that the present case involves disputes as to who was responsible to do what, whether there were defects in the design of the structures and whether the problems have arisen by virtue of defective work performed by other people or performed subsequently. The defendant also alleges that there were a

number of changes of instructions to the defendant and, in the view of the defendant, his evidence, that of the plaintiff and that of other people involved when the work was taking place will be of great importance. The view of the plaintiff is different. The plaintiff's case is that the action will be decided upon the basis of the condition of the property both now and at the various stages at which expert reports were taken. In the plaintiff's view, the condition at various stages has been well documented and evidence as to what actually happened in 1984/85 will not be of great importance.

In my view, if issues relating to precisely what was agreed and who did what in 1984 and 1985 will be of importance in relation to this action then there is a substantial risk that it is not possible to have a fair trial of the issues in the action. Although expert evidence based on the various reports will be of great importance, in a case like this, where the work to be done was not clearly defined in a written building contract, it is likely that there will be disputes of the nature alleged by the defendant. In my view, the memories and reliability of witnesses are bound to have declined further during the period of, in my view, at least 4 years of culpable delay. On the other hand, there is no doubt that a considerable amount of evidence will arise from the condition of the building at the time when various reports were made and that the plaintiff still has relevant documents.

However, the more than four years of culpable delay are also bound to have had an effect upon the memories of Messrs Lyon and Colley who inspected the property in late 1991.

On balance, I am satisfied that the inordinate and inexcusable delay in this case of more than four years will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action. If, as I strongly suspect, the case will not, in any event, come to trial for at least another year, then fourteen years will have elapsed between the completion of the building works and the date of the trial and seven years will have elapsed since the commencement of the action. In those circumstances, if the original memories are of importance, then the delay of fourteen years will render a fair trial of the issues in the action impossible. Furthermore the memories of the first surveyors will by then be seven years old and, although they will presumably have made notes, their evidence will be seriously impaired. In my view, although a fair trial would have been difficult even if the action had been diligently prosecuted from the time of its commencement, the additional prejudice caused by the culpable delay since the commencement of the action is sufficient in these circumstances to warrant the striking out of the action.

Accordingly, I have struck out the action and will need to be addressed by both parties in relation to the costs both of and incidental to the summons and of and incidental to the remainder of the action.

## <u>Authorities</u>

Skinner -v- Myles (1990) JLR89

Allen -v- Sir Alfred McAlpine & Sons [1968] 1All ER 543

Shtun -v- Zalejska [1996] 3 All ER 411

R.S.C. (1997 Ed'n): Vol 1: p.462: 25/1/6

Beasant -v- Pavan, Public Health Committee (22nd October 1997) Jersey Unreported