

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 inordinate 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 14th 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 Royal Court Rules, 1992 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 29th 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 19th 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 29th 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 5th July 1994 for the action to be set down on the hearing list but the Judicial Greffier raised in his letter dated 8th 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 Skinner v Myles [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 prosecution. They are: (a) where a party has been guilty of 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 plaintiff's claim. To the requirement that there has been 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 rise 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 Allen v. Sir Alfred McAlpine & Sons [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

the most usual factors. Their importance depends upon the circumstances, the issues and the other evidence that can be given. 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, well-documented commercial action (National Insurance Guarantee Corp. Ltd -v- Robert Bradford & Co. Ltd (1970) 114 S.J. 436, C.A.). In a case of prolonged culpable delay following long delays in serving of proceedings, the court may readily infer that memories and reliability of witnesses has further deteriorated in the period of culpable delay; Benoit v Hackney Council, February 11, 1991, C.A. Transcript No. 91/0116 unrep. 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; 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- Gwentoy's 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;
- (2) 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 31st 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 responses to the defendant's allegations. Firstly, Advocate Fiott states that in 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 at trial. 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.

