IN THE ROYAL COURT OF THE ISLAND OF JERSEY

Before: Bailiff

Jurat P. G. Blampied

Jurat G. H.Hamon

41.

BETWEEN	RUBY PATRICIA SKINNER (NEE BALL)	PLAINTIFF
AND	JOHN GRAEME BOULTON MYLES	FIRST DEFENDANT
AND	THE PUBLIC HEALTH COMMITTEE OF THE STATES OF JERSEY	SECOND DEFENDANT

Original Judgment, distributed on the 30th March, 1990, included a typographical error. The attached judgment has been amended on the Bailiff's instructions.

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Advocate J. G. White for Plaintiff

Advocate G. R. Boxall for First Defendant

Advocate S. Nicolle for Second Defendant

The plaintiff in this action was admitted to the General Hospital on two occasions in 1973. The first occasion was on or about the 2nd May when she was a private patient of the first defendant who is a consultant surgeon. She remained in hospital until the 5th July. On the 12th July she was re-admitted, this time as an ordinary patient, and, therefore, fully in the care of the second defendant which is the Committee of the States responsible for running the General Hospital. On or about the 1st August she was transferred to Southampton General Hospital for further treatment. During her first admission, following manipulation and traction, the first defendant performed a laminectomy on her. During her second admission she was placed in the Psychiatric Ward before being sent to the Southampton General Hospital. At this hospital she was diagnosed and treated for a number of complaints for which she holds the first defendant responsible, in the main, with the second defendant vicariously responsible, or directly responsible, as the case may be ~~be~~, depending on the facts of admission, for the condition in which she was found and diagnosed at Southampton. It is not necessary to set these down in detail as this is not a trial of the action.

She consulted Advocate Falle in April 1977. On the 8th November, 1978 he wrote the usual letter of intention to start an action to Mr. Peter Milner of Galsworthy and Stones, English Solicitors, acting for the Medical Defence Union, on behalf of the first defendant. The original order of justice was signed on the 6th November, 1981. Because she had alleged that a contract existed between her and the two defendants her action was grounded in contract and therefore the limitation period (or prescriptive period in our jurisdiction) was ten years, as opposed to three years in the English jurisdiction for similar actions. Accordingly she was some nineteen months within the prescriptive period when the order of justice was signed.

Throughout all the proceedings that followed, as well indeed from the inception of her instructions to Advocate Falle, she relied completely on him and, therefore, it may be said that she has not taken any action directly for the conduct of her case. It follows that any fault in conducting the case, whether of inaction, or otherwise, on the part of her Counsel, should not be laid at her door, although in law, as the Plaintiff, she has to accept responsibility. In due course we shall have to refer to the progess, if such it may be called, of the action, but it will be convenient here to say that in May 1989 the plaintiff became dissatisfied with Advocate Falle's conduct of her case and instructed Advocate White, who notified the Judicial Greffier on the 17th May, 1989. Some three months later, on the 25th August, the first defendant took out a summons to strike out the plaintiff's claim for want of prosecution on the ground that "such want of prosecution may prejudice or embarrass the fair trial of the action and/or is an abuse of the process of the Court". During the present hearing the second defendant associated itself with that summons and supported it. Notwithstanding the issue of the summons, on the 11th October, 1989 the plaintiff was given leave by the Judicial Greffier to amend the order of justice, which accordingly was done, but without prejudice to the summons itself. The amendments, inter alia, alleged negligence against the nursing staff during the second admission of the plaintiff to the General Hospital. There matters have rested until today's hearing.

The power of the Royal Court to strike out an action is contained in Rule 6/13 of the Royal Court Rules, 1982, which is as follows:-

> "The Court may at any stage of the proceedings order to be struck out or amend any claim or pleading, or anything in any claim or pleading, on the ground that -
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
> (b) it is scandalous, frivolous or vexatious: or
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
> (d) it is otherwise an abuse of the process of the Court
>
> and may make such consequential order as the justice of the case may require."

It is under heads (c) and (d) that the First Defendant F. proceeded.

In Lablanc Limited v. Nahda Investments Limited 1985-1986 JLR the Court, on the 6th May, 1986, considered an application to strike out an action under heads (b) and (d). In its judgment the Court applied some dicta of Diplock L. J. in Allen v. Sir Alfred McAlpine & Sons Limited 1968 1 AER 543. Because that latter case is one of the leading cases on the principles to be applied when hearing an application to strike out an action, and was approved in the later cases of Birkett v. James 1977 2 AER 801 and Department of Transport v. Chris Smaller (Transport) Limited 1989 1 AER 897, it may be said to be an authority which this Court is entitled to follow having done so already in Lablanc Limited. In so doing the Court has to be satisfied that the Rules of the Supreme Court are sufficiently similar to enable this Court to have regard to the English authorities on the law to be applied in considering an application to strike out an action. We are satisifed that, in fact, Rule 6/13 is very similar to those in the "White Book", and that it would be proper therefore, to have regard to the English cases.

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 inexcuseable 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 so that it would not be possible to have a fair trial.

Mr. White very fairly, at the beginning of the application, admitted that there had in fact been inordinate and inexcuseable delay on the part of the plaintiff's previous lawyer, Advocate Falle. He later submitted that, nevertheless, accepting the law as we have stated it to be, two further requirements would have to be satisfied by the first defendant, and to a lesser extent by the second defendant, before the Court should strike out the action.

They were, first, that the defendants themselves should not have contributed to the delay and, second, that they should not have waived or acquiesed in it, for example, by taking positive steps themselves after the delay had become clearly apparent. He cited Simpson v. Smith and another reported in the Times of the 19th January, 1989. But there the defendants' solicitors took a step showing that they were willing for the action to continue, by applying to the clerk of the list for a fixed date for trial some four months before they issued their summons to strike out.

There are two preliminary matters we should mention here.

First, the difference between the limitation period of three years in England and our own of ten years prescription means that the duty of a plaintiff to act with diligence and expedition when he brings an action near the end of the prescriptive period is that much more necessary in Jersey. It follows that the prejudice to a defendant and the consequent risk of not obtaining a fair trial is increased in Jersey when, as in the instant case, the order of justice is served near the end of the prescriptive period and thereafter the plaintiff has been guilty of inordinate and inexcuseable delay.

Secondly, because we do not have the legal equivalent of the Evidence Act 1938 under which statements of witnesses may be given in evidence, although the Royal Court has tended not to impose too rigid a rule in this respect, we think that in cases of the present sort where expert evidence is to be given, oral evidence should be the normal rule and the witnesses be subjected to cross-examination.

Some additional principles of law as applied in England on the question we have to decide may now be stated.

(1) The length of the delay may itself suffice to satisfy one of the conditions that a fair trial would no longer be possible if the relevant issues would depend on the recollection of witnesses of events which happened long ago. (See the observations of Diplock L. J. in Allen v. Sir Alfred McAlpine and Sons Limited 1968 1 AER 556 at letter C).

(2) The fact that the plaintiff may have an effective remedy against his solicitors for professional negligence is not a relevant consideration in deciding whether to dismiss the action for want of prosecution. (Birkett v. James 1977 2 AER 801).

(3) Where a long delay before the issue of the writ would cause prejudice to the defendant he only has to show something more than a minimal additional prejudice as a result of post writ delay to justify the action being struck out (Department of Transport v. Smaller (Transport) Limited 1989 1 AER 897).

We think the Royal Court may properly accept these additional principles in the instant case. We have examined the affidavits of the plaintiff, Advocate Falle, Mr. Milner, Mr. Myles and Miss Nicolle, and the relevant correspondence, and we have reached the conclusion that if the trial proceeded we could not be satisfied that the issues would be fairly tried for the following reasons:

(1) The recollection of the events by the first defendant, although he made a statement some five years after the event complained of, would not be in sufficient detail to permit a proper and fair cross-examination. Two of the senior medical staff, Dr. R. E. Gruchy and Dr. A. McInnes, who saw the plaintiff in July 1983, have both retired. Dr. Gruchy retired on the 31st Agust, 1982 and Dr. McInnes on the 31st August, 1984. According to the affidavit of Miss Nicolle no statements or proofs of evidence were taken from either of these doctors at the time. Moreover each of them are unable to recollect the case at all.

(2) The allegations against some of the hospital staff in respect of the second admission, and set out in the amended order of justice of the 11th October, 1989, were made some sixteen years after the event and it would clearly be impossible for the second defendant to trace all the nursing staff, some of whom have retired and left the Island, and difficult, if not indeed impossible, to obtain statements from them as to the events after such a long time.

(3) The principal witness for the first defendant, Mr. V. Loge, a consultant neurologist, prepared a report on the plaintiff on the 3rd March, 1979. He has now retired and would not be well enough to come to Jersey for the trial.

(Seventeen years is such a long time after the event that it would be almost impossible for such witnesses who could be available, even with the help of case notes, of which there is not a great number, and such as exist are incomplete, to recollect in effective detail and with sufficient accuracy to enable the Court to come to a reasoned decision.

(5) Oral examination of the medical witnesses would be impossible, but whose evidence would be essential, to determine the cause of the plaintiff's condition on admission to the Southampton Hospital. (Paxton v. Allsopp 1971 3 AER 370)

The actions of the defendants fall into two parts; (1) what they did when Advocate Falle was acting for the plaintiff and (2) what they did after Advocate White took over. Advocate White argued, also, that the correspondence showed that the defendants had accepted liability and that the only matter preventing a settlement was the apportionment of damages between the two defendants. That suggestion was answered fully by Miss Nicolle in a letter to Advocate White of the 13th February, 1990, which is as follows:-

" 13th February, 1990

Dear Advocate White,

I write with reference to your letter of the 9th February, 1990, in the penultimate paragraph of which you say -

> "In your Affidavit you refer to an exchange of correspondence which occurred between you and Advocate Boxall in September 1986 when Advocate Boxall suggested that you should meet to discuss the apportionment of liability. Although your Affidavit is qualified by the words "if any" I consider that the suggestion of such a meeting is clearly indicative of the Defendants having reached conclusions as to the liability and that the only matter preventing a settlement was the manner in which this would be apportioned between Defendants."

I am happy to assure you that this was not so. Certainly no lawyer acting for the Committee had ever at any stage reached any conclusion other than that if there was any liability it was vicarious. In December, 1981, the then Solicitor General wrote to Advocate Boxall, saying -

> "... it does appear to me that, if there was negligence and/or a breach of contractual duties it was committed by Mr. Myles and not by the Public Health Committee."
> (emphasis added.)

He went on to ask for an indemnity in respect of any dam. _es which "might" be awarded.

There is clearly here no concluded view as to whether there was any liability or not.

Advocate Boxall's reply was equally far from accepting that liability attached to either defendants; he wrote back saying that further consideration was needed before he could reply constructively.

A reminder letter from the Solicitor General in January, 1983, was answered by Advocate Boxall on the 7th February, 1983. He explained that he had made an application to Advocate Falle for further and better particulars in February, 1982, but had received no response, and added -

> "Since that time the matter has, so far as Court proceedings are concerned, temporarily gone to sleep."

On the indemnity point, he said that he could not give the assurance, because the claim related to the period May - mid August, 1973, and his client left the Island around the 20th July, 1973.

Again, it is impossible to read into either letter an acceptance by either party that liability existed.

On the 19th March, 1986, the former Solicitor General, now Attorney General, wrote to Advocate Boxall asking him to look again at the letter of the 16th December, 1981, asking for an indemnity against such vicarious liability "as may be found" to attach to the Committee.

Advocate Boxall's reply of the 7th May, 1986, said -

> "As appears from the pleadings my client denies the plaintff's(sic) allegations."

He concluded by referring to a new medical report which was being obtained, and added -

> "When it arrives it may be advantageous to have a meeting to discuss and try to agree an apportionment of responsibility (if any) on the assumption that the case is suitable for settlement."

The use of the words "if any", and "on the assumption that" make it clear any discussion was on the apportionment of liability if liability existed, a point upon which neither party had expressed a view (beyond occasional disclaimers on one side or the other).

My letter to Advocate Boxall of the 21st May, 1986 (the letter referred to in paragraph 15 of my affidavit) referred to his letter of the 7th May, 1986, and continued -

> "The file has now been passed to me, and I would be grateful if, when the report is received, you could contact me to arrange a mutually convenient date for the meeting."

My s purpose in writing this letter was to let Advocate Boxall know that the file had changed hands and that further correspondence should be addressed to me. I did not intend to express, nor did I express, a view as to whether liability existed, for the simple reason that I had not formed one.

What happened when the report did arrive is set out in paragraph 17 of my affidavit.

On the 11th January, 1988, Advocate Boxall wrote me a letter which included the phrase "in the event of liability being proved", and in a letter of the 26th May, 1988, he referred to "any liability found or agreed to be due to the Plaintiff Mrs. Skinner." These phrases did not suggest to me that Advocate Boxall had concluded that liability existed, nor do I believe that he had formed such a conclusion.

A letter of mine of the 10th June, 1988, to Advocate Boxall records that I had had a meeting with the hospital authorities, but on examining the case notes their view was that the treatment of Mrs. Skinner on the second admission, which I thought was the only one in respect of which the Committee could properly be a defendant, was reasonable, and that the notes did not show an inappropriate timescale.

I referred to the confusion which appeared to me to arise out of the Order of Justice as it stood, and concluded by saying that I thought that amended pleadings were probably an essential before we could go further with the question of contributions, and that I had written again to Advocate Falle asking him for amended pleadings.

This (the letter to Advocate Falle) was one of the letters which remained unanswered.

Again, I do not think that my letter to Advocate Boxall indicates that I, or any lawyer who had previously acted for the Committee, had reached the conclusion that any liability existed. The discussions were solely on the proportions in which the two defendants should contribute if liability existed. In fact, we were never able to proceed to the stage of a discussion, because Advocate Falle never amended his pleadings.

Yours sincerely,

S. C. Nicolle,
Crown Advocate

The conduct of the case for the second defendant was shared between a number of counsel in the Law Officers department. From 1981 to 1985 Advocate Whelan acted. Whilst doing so he wrote his last letter to Advocate Falle on the 23rd October, 1984 asking for further and better particulars. That letter was never answered.

After Mr. Whelan the matter was in the hands of Mr. R. A. L. Coward, a legal adviser in the Law Officers' department. In March 1986 he enquired from Advocate Falle if the plaintiff had lost interest and was told that she had not. Mr. Coward left the department in June 1986.

Miss Nicolle took over from him in May 1986 and between then and September 1987 exchanged letters with Advocate Boxall about possible apportionment of the damages as related in her letter to Advocate White of the 13th February, 1990.

On the 12th October, 1987 Advocate Falle filed the further and better particulars for which he had been asked by Mr. Whelan three years previously. Mr. Falle also took steps to set the case down for hearing and he obtained a date in April 1988 for the trial of the action.

Miss Nicolle then examined the pleadings and decided that amendments to the second defendant's answer might be needed and wrote accordingly to Advocate Falle about these matters on the 18th March, 1988 and, with the agreement of Advocate Boxall for the first defendant, asked for an adjournment of the date in April. (This may be compared with the actions of the solicitors in Simpson v. Smith). No answer to that letter, however, was received except a copy of a letter to the Bailiff's Secretary from Advocate Falle vacating the date was sent to Miss Nicolle. Miss Nicolle wrote subsequently to Advocate Falle on the 10th June, 1988 and received no reply nor indeed any further communication from him.

It seems to the Court, as regards the first part of the actions of the defendants which were said to have meant that they acquiesed in, or contributed to, the delay, that over some four years from 1984 the defendants could be said, at the most, to be doing no more than attempting to nudge Advocate Falle into some action. Nothing further appeared to have been done by Advocate Falle after March 1988 and the summons to strike out was then issued some sixteen months later. We cannot say that, looking at the facts in the light of the first part of the defendants' actions, it would be right to attribute to them either acquiesence in, or contribution to, the admitted and inexcuseable delay.

When Mr. White arrived on the scene did the defendants' action change in such a way so as to encourage the plaintiff to believe that they, the defendants, were ready and willing to proceed with the action? There was some correspondence between Advocate Boxall and Advocate White about the summons to amend the order of justice. Advocate Boxall complained that Advocate White would not allow the defendants an adjournment of the summons. Eventually the defendants agreed to the amendments without prejudice to the summons to strike out. Advocate Boxall wrote to Advocate White on the 23rd October 1989 asking for "properly formulated details of the client's claim". It should be noted that the particulars of the plaintiff's loss recited in the amended order of justice repeated the claims in the original order of justice and each head of claim is qualified with the identical words "to be finally ascertained". Even, therefore, in October 1989 the defendants were not in a position to know with precision what damages the plaintiff was claiming under particular heads. On the 24th October, 1989, Advocate White wrote to Miss Nicolle asking if he could inspect the originals of the Public Health Committee's documents and his personal assistant, Mr. Pearce, followed that up with a letter of the 30th October asking for discovery. On the 30th October Miss Nicolle replied to the letter of the 24th October as follows:-

"

30th October, 1989

Dear Advocate White,

Skinner v. Myles and Public Health Committee

I write with reference to your letter of the 24th October, 1989. I am perfectly happy that you should inspect the originals of such documents as I hold, and take further copies.

However, as I think you are aware, I am the fourth lawyer in these Chambers to have handled this action. Discovery took place some time before the file was passed to me, and I am quite frankly unable to say whether I have at the instant moment the originals of all the documents of which discovery was made.

This would cause no problem if the matter were not one of urgency, but in your letter you say that you wish to inspect the originals as a matter of urgency. Unfortunately, other commitments will make it impossible for me to check the documents which I have against the discovery which was made to you. The best suggestion which I can make is that you inspect such documents as I have forthwith: if, as is not impossible, any original notes have gone back to the hospital I will endeavour to retrieve them as soon as is conveniently possible.

In closing, could I ask whether you would mind putting my reference on correspondence relating to this matter? It makes it considerably easier for me to trace the file, and is especially useful when, as here, you do not cite the case by the full title.

Yours sincerely,

S. C. Nicolle,
Crown Advocate"

On the 31st October she replied to the letter of the 30th October as follows:-

" 31st October, 1989

Dear Mr. Pearce.

Skinner v. Myles and Public Health Committee

I write with reference to your letter of the 30th October, 1989.

So far as the first paragraph is concerned, this has been answered by my letter of the same date to Advocate White, with which I think your letter must have crossed.

So far as the second paragraph is concerned, I cannot agree that an order for discovery within twenty-eight days is appropriate. At the hearing on the 11th October, 1989, of the plaintiff's summons for leave to amend the Order of Justice, it was argued by both defendants that the time for filing an amended answer should not begin to run until final determination of the application to have the action struck out.

Our grounds for so arguing were that it was unreasonable that the defendants should be required to expend time and effort on this action, when it may well be struck out.

This argument was accepted by the Judicial Greffier, and the fact that the plaintiff did not appeal against that part of his order which directed that the time for filing the amended answers should run from final to termination of the application to strike out is, I think, a tacit acceptance of the correctness of his decision.

The arguments which applied to the filing of an amended answer apply with cogency to the making of discovery. Furthermore, as the time for filing the amended answers will not begin to run until final determination of the application to strike out, the action is, to all intents and purposes, stayed.

So far as your final paragraph is concerned, it is not my intention to file a separate summons, but I shall be arguing in support of Advocate Boxall's application, which asks that the claims against the defendants, and not merely the claim against the first defendant, should be struck out.

I thought that the position had been made clear at the hearing on the 11th October, 1989, but as it apparently was not I would be grateful if you would accept this as formal notification to that effect.

Finally, perhaps I could repeat the request made in my letter to Advocate White, namely that you would put my reference on correspondence, particularly if you do not intend to refer to the case by full title.

Yours sincerely,

S. C. Nicolle
Crown Advocate"

The remainder of the correspondence between Advocate White and the defendants' legal advisers related in the main to the hearing of the summons and cannot be construed on the part of the defendants as in any way acquiesing in, or contributing to, the delay which had already occurred.

Under all the circumstances, therefore, and looking at the way in which the defendants have conducted the case, and having regard to our findings, and indeed the admission of the plaintiff that there has been inordinate and inexcuseable delay, the summons to strike out succeeds.

Authorities referred to:

Lablanc Limited -v- Nahda Investments Limited 1985-86 JLR N3.

Allen -v- Sir Alfred McAlpine & Son Limited (1968) 1 AER 543 in general and at p.556 (letter C).

Simpson -v- Smith and another: Times Law Reports, 19th January, 1989.

Birkett -v- James (1977) 2 AER 801.

Department of Transport -v- Chris Smaller (Transport) Limited (1989) 1 AER 897.

Paxton -v- Allsopp (1971) 3 AER 370.

Jersey Demolition Contractors Limited -v- Resources Recovery Board(1985-86) JLR 77.

Jackson & Powell on Professional Negligence, Chapter 6.

Bolam -v- Friern Hospital Committee (1957) 2 AER.118.

RSC 1988 0 25/1/4-9.

RSC 1988 0 28/19.

Martin -v- Turner (1970) 1 AER.256. C.A.

Austin Securities Ltd -v- Northgate and English Stores Ltd (1969) 2 AER.753.

United Bank Ltd -v- Maniar and others (1988) 1 AER.229.

Hayes -v- Bowman (1989) 2 AER.293.C.A.

Simaan General Contracting Co -v- Pilkington Glass Ltd (1987) 1 AER.345.

William C. Parker -v- F.J. Ham & Son, Ltd. (1972) 3All E.R. 1053.

Biss -v- Lambeth, Southwark, and Lewisham Health Authority (1978) 2 AllE.R. 126.