6 page:

ROYAL COURT
(Samedi Division) 91

6th May, 1994

Before: F.C.Hamon, Esq., Commissioner and Jurats M.J. Le Ruez and M.A.Rumfitt

---

BETWEEN	**VICTORIA WENDY FORT wife of David Croxford**	**PLAINTIFF**
AND	**KENNETH ANDREW LE CLAIRE**	**DEFENDANT**

Advocate T.J. Le Cocq for the Plaintiff
Advocate C.J.Dorey for the Defendant

THE COMMISSIONER: The action arises out of a road accident which occurred on the 13th March, 1985, which was notified to Eagle Star Insurance Company Limited by its insured, the defendant, on the 29th March, 1985. The course of negotiations has not been smooth but an Order of Justice (which interrupted prescription) was eventually served on the 11th March, 1988 and returned before Court on the 18th March, 1988. The action was adjourned "*sine die*". As far as this Court is concerned, the matter has remained dormant with the exception of two similar matters.

In March, 1992, the defendant's legal advisers filed with the Court a summons to strike out the plaintiff's claim by reason of the plaintiff's delay in prosecuting the claim. That summons was filed and a date was fixed for the hearing. The summons was withdrawn on the 7th April, 1992.

In October, 1992, a further summons to strike out for want of prosecution was served and a date was fixed for hearing on the 19th November, 1992. That summons was adjourned "*sine die*" by letter to the Judicial Greffier.

More than five years have now elapsed since the Order of Justice was taken out. The defendant now brings this present action to ask the Court to order that the action has been withdrawn by operation of Rule 6/20(2) of the Royal Court Rules 1992.

That Rule reads:

> ***"Where an action has been adjourned "sine die", if at the expiration of five years from the date on which it was so adjourned no further steps have***

been taken, the action shall be deem to have been withdrawn".

Counsel have agreed that the narrow point that we have to decide as a preliminary before we move on to discuss the wider implications of Rule 6/20(2) is whether the two abortive applications to strike out can amount to "further steps".

There is no equivalent Rule in the Rules of the Supreme Court. Indeed the concept that a case could be adjourned "*sine die*" is, as Advocate Le Cocq put it to us, "unique to Jersey". The Rule was described to us by Mr. Le Cocq as a "housekeeping Rule" to enable the Judicial Greffier to tidy up his list and it is designed to deal only with cases adjourned "*sine die*", sandwiched as it is between a provision for the Court (which includes the Greffier) on its own motion, to order that an action be dismissed after giving the parties not less than 28 days' notice at the expiration of five years from the date on which the action was placed on the pending list, or ten years respectively.

So that under Rules 6/20(1) and (3) the parties must be made aware of the Court's intention. Under Rule 6/20(2) no notification needs to be given.

Advocate Dorey drew some analogy from Order 2 Rule 2 of the Rules of the Supreme Court which reads:-

> ***"An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity".***

It is clear from the commentary to that rule that a "fresh step" must be a positive action which is sufficient to constitute a waiver of the irregularity. So that "***steps reasonably taken to assert an objection cannot amount to a waiver of it***" (Rein v. Stein [1892] 66 LT 469)".

Another analogy was taken from Order 3 Rule 6 which states that "***where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed***". The Rule does not (according to the commentary in 3/6) "***apply to a summons to dismiss for want of prosecution, for such a summons is the proper method of terminating such delays***" (Lumley v. Hempson [1838] 6 Dowl. 558)"

We must remind ourselves that Rule 6/20(2) talks of a "step" and Chambers 20th Century Dictionary defines a "step" as a "move towards an end or in a course of proceeding".

Both Counsel referred to the Arbitration Act 1950 s.4 and to a case decided under it: "Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd. [1978] Ll.L.R. 357 C.A. The section reads as follows:-

> ***"Staying court proceedings where there is an arbitration agreement***
>
> ***4 - (1) If any party to an arbitration agreement or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings***".

Advocate Le Cocq criticised Advocate Dorey's reliance on a Statute which has no part in our jurisdiction. Because arbitration is a contractual matter and the courts in England, in following the Statute, are considering what constitutes a waiver of an express right to arbitrate, he felt that the courts would apply a much more stringent test in those circumstances than we need to apply here. The case of Eagle Star v. Yuval was therefore of little forensic value.

We cannot agree with that contention. We can agree that the test under the Arbitration Act is there for a different purpose but the finding of what constitutes a "step in the proceedings" is, in our view, useful to our purposes and very much in point.

In Eagle Star v. Yuval, Lord Denning M.R. said, at page 361:-

> " ***On those authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a "step in the proceedings" must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the courts of law instead of arbitration.***
>
> ***Applying this principle, the defendants here were presented with a writ indorsed with a statement of claim which was very defective. They applied, quite properly, to strike it out. That was***

> ***not an affirmation of the correctness of the proceedings. Quite the contrary. It was a disaffirmation of them. It was not a "step in the proceedings" such as to debar the defendants from applying for a stay."***

There is, however, something to note in the judgments of both Goff L.J. and Shaw L.J. in their judgments supporting that of Lord Denning M.R. At page 363, Lord Goff said:

> ***"Therefore without committing myself to the proposition that a summons to strike out for want of particulars can never be a step in the action, I am satisfied on the facts that it ought not to be so regarded in this case, and the appellants have not precluded themselves by asking for a stay"***

and Shaw L.J. said at page 364:-

> ***"I agree with both judgments. I would emphasise that I am by no means of the view that a summons to strike out a claim is not generally to be regarded as a step in the action to which it relates. A step may be in the direction of promoting the progress of the action or of impeding the action or of extinguishing it. But the circumstances of this case are peculiar...".***

We must remind ourselves that both the summonses were withdrawn before they came to Court. The first summons had been set down for hearing but was withdrawn by letter dated the 7th April, 1992. The second summons was adjourned "*sine die*" by letter to the Judicial Greffier.

We must also remind ourselves that the "steps" under the Arbitration Act 1950 constitute a waiver of an agreed right to arbitrate. A "step" under our Rules is in our view an indication that the party taking the "step" wishes to progress the matter.

If the action is deemed to have been withdrawn it would have been withdrawn on 17th March, 1993. The Judicial Greffier has already returned a cheque for payment under those circumstances on or about the 30th December, 1993. It was somewhat surprising that the parties appeared before us at all but that came about because, in returning the cheque for payment in, the Judicial Greffier invited the parties to test his contention and the matter has been referred to us for a declaration.

In the circumstances of the preliminary point, we are unable to take the view that either of the two summonses, neither of which came to be adjudicated, constitute a "step" which would have effectively stymied the effects of Rule 6/20(2). The defendant was not taking a "step" when he brought the summonses. He was attempting to have the action dismissed for want of prosecution.

What the effects of Rule 6/20(2) are, we must now go on to determine.

Authorities

Royal Court Rules 1992: Rule 6/20(2).

R.S.C. (1993 Ed'n): O.2: r.6; O.3: r.6; O.6: r.8.

Draper -v- Ferrymasters Limited (1993) Personal Injury & Quantum Law Reports 356 C.A.

Eagle Star Co. Limited -v- Yuval Insurance Co. Limited [1978] Lloyds Law Reports 357 C.A.

Jackson -v- Jackson (1966) JJ 579 C.A.

Finance and Economics Committee -v- Bastion Offshore Trust Co. Limited (9th October, 1991) Jersey Unreported; (1991) J.L.R. N.1.

Strata Surveys Limited -v- Flaherty and Co. Limited (15th February, 1994) Jersey Unreported.

Rein -v- Stein [1892] 66 LT 469.

Lumley -v- Hempson [1838] 6 Dowl 558.

Arbitration Act 1950: s.4.