ROYAL COURT
(Samedi Division) 196.

22nd October, 1997.

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

BETWEEN:	Paul Anthony Beasant	Plaintiff
AND	Sithiravelu Saravana Pavan	First Defendant
AND	The States of JerseyPublic Health Committee	Second Defendant

Application by the Second Defendant for the action to be struck out as against Second Defendant only by reason of inordinate and inexcusable delay upon the part of the |Plaintiff in the prosecution of the action

Advocate M. St. J. O'Connell for the Second Defendant.
Advocate P.S. Landick for the Plaintiff

JUDGMENT

GREFFIER SUBSTITUTE: On 25th September, 1997, I heard the Second Defendant's Summons dated 1st July, 1997 and 22nd August, 1997, seeking *inter alia* an order that the action as against the Second Defendant only be dismissed for want of prosecution by reason of inordinate and inexcusable delay. I then made an Order striking out the action as against the Second Defendant only and the Plaintiff has subsequently lodged an appeal against that Order.

The action relates to the admission to the General Hospital of the Plaintiff in late December, 1984, by reason of fractures to the bones of his right leg. The Plaintiff alleges that he suffered from chronic cellulitis and that both he and his wife told members of the Second Defendant's staff in the Accident and Emergency Department and/or elsewhere that this was so. Furthermore, the Plaintiff alleges that this condition ought to have been apparent to members of the Second Defendant's staff. An operation occurred by virtue of which a metal plate was inserted in the leg and the Plaintiff alleges that this was the wrong treatment for someone suffering from chronic cellulitis and that as a result of this he has suffered a serious exacerbation of his existing condition and the Plaintiff claims both special and general damages.

Both parties produced a chronology in relation to the action. From this it is apparent that the Plaintiff was admitted to the hospital on 20th December, 1984, and the operation occurred on 21st December, 1984. The Order of Justice was served on 18th December, 1987, and the action was placed on the pending list as against the Second Defendant on 22nd January, 1988. According to the Second Defendant, the only activity between 29th January, 1988, upon which date the Second Defendant filed an Answer, and late June, 1995, upon which date the Plaintiff began to actively prosecute the case, were the Plaintiff sending a copy of a medical report to

the Second Defendant on 21st September, 1990, and the Plaintiff writing to the Second Defendant quantifying the Plaintiff's claim on 12th November, 1993. Advocate C.R. de J. Renouf's Affidavit dated 24th September, 1997, in support of the Plaintiff, set out in great detail the various steps which he and other lawyers had taken on behalf of the Plaintiff during the relevant period. There had been a great deal of correspondence with the First Defendant's lawyers and with medical experts over the period of years. However, the Second Defendant's chronology was accurate in relation to correspondence between the Plaintiff and the Second Defendant. Advocate Landick submitted that the relationship between the two Defendants was so close that I should treat correspondence with the First Defendant as if it were correspondence with the Second Defendant. I took the view that this was not so. Although at one stage, the Law Officers' Department considered asking the lawyer who was acting for the Frist Defendant to also act for the Second Defendant, that actually never occurred, presumably due to a possible conflict of interests between the two Defendants.

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 Judgment:-

> ***"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 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 be not possible."***

In the headnote to the Roebuck v. Mungovin action [1994} 1 All ER 568 an additional principle is introduced as follows:

"Held - Where a plaintiff was guilty of inordinate and inexcusable delay which prejudiced the defendant, subsequent conduct by the defendant which induced the plaintiff to incur further expense in pursuing the action did not constitute an absolute bar preventing the defendant from obtaining an order striking out the claim. Such conduct on the part of the defendant was a relevant factor to be taken in to account by the judge in exercising his discretion whether to strike out the claim but the weight to be attached to it depended on all the circumstances of the particular case. Applying that principle, the plaintiff's inordinate and inexcusable delay coupled with the prejudice caused to the defendant had been such that the plaintiff's action should be struck out notwithstanding the correspondence between the parties after the delay had occurred."

In the case of Shutun 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 1997 White book at section 25/1/6 on page 462 of the first volume thereof 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 forgoing statement of the law was approved in Birkett v. James [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.; [1991] 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. See further "Subsidiary points - Limitation 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 (Department of Transport v. Chris Smaller (Transport) Ltd [1989] 1 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, Gilberthorpe v. Hawkins, 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 defendant'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 Allen v. McAlpine [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 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 it 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. 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 Second 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.

Upon the most basic analysis of the action it took twelve and a half years from the date of the operation to the date upon which the action was set down on the hearing list and the latter date was nine and a half years after the end of the three year prescription period in tort. Very little happened in the action in relation to the Second Defendant until June, 1995, and even the quantification of the claim on 12th November, 1993, was not speedily followed up. Most of the activity on the part of the Plaintiff was in relation to the issue of the quantum of damages and there was very little activity directed to the issue of liability. Applying the test of "inordinate" as meaning "materially longer than the time usually regarded by the profession and Court as an acceptable period" this is a very clear case of inordinate delay. It is also clear to me that that delay is inexcusable within the meaning normally applied in relation to such application. There is no reasonable excuse for the delay.

I then move on to the question as to whether the inordinate and excusable delay has given rise to a substantial risk that it is not possible to have a fair trial of the issues in the action. It was common ground between the parties that although the main medical notes in relation to the Plaintiff had been preserved, the notes of the Accident and Emergency Department had been routinely destroyed in 1992. The Second Defendant alleged that this was significant because the Plaintiff and his wife were alleging that they had told staff from the Accident and

Emergency Department who had seen them about the chronic cellulitis. The Second Defendant also confirmed that no witness statements had been taken from any of the medical staff involved and that this was probably because there had been so little activity on the part of the Plaintiff from January, 1988, to November, 1993, and because thereafter there had been a further quiet period until July 1995. In fact, it was clear from the documents before me that the Accident and Emergency notes had not been sought until 1995. As at the date of the hearing before me twelve and three-quarter years had elapsed since the operation in December 1984 and the Second Defendant submitted that the memories of the doctors and other medical staff must have dimmed. Furthermore, due to the loss of Accident and Emergency records, the Second Defendant submitted that it was not now possible to ascertain who were the staff in the Accident and Emergency Department on the relevant date. Thus, the Second Defendant submitted that there was a very substantial risk that it would not be possible to have a fair trial of the issues in the action because of the general loss of memory upon the part of their witnesses, because of the impossibility of discovering who were the staff in the Accident and Emergency Department, because of the loss of the Accident and Emergency Department's records and because of the fact that no witness statements had been taken.

In response to this, Advocate Landick came up with two most ingenious arguments. The first argument was that it was the fault of the Second Defendant that the Accident and Emergency notes had been routinely destroyed and that no witness statements had been taken. I did not find any merit in this argument for the simple reason that it is not unreasonable for a Defendant who is faced with almost total inactivity on the part of the Plaintiff to take a decision that they want to keep their costs to the minimum and to, therefore, not take an active role. The above quotation from page 555 of the Allen v. Sir Alfred McAlpine & Sons case supports this kind of approach.

The second argument was that, in any event, the trial could not have commenced until late 1988 at the very earliest and that by then four years would, in any event, have elapsed from the original incidents and that the difference in the memories of the parties between twelve and three-quarter years and four years from the original incidents would make no practical difference. That argument does not deal with the loss of the accident and Emergency notes and the impossibility of determining who was on duty in that Department at the relevant time. It also seeks to impose a different test to that which I have set out above. Advocate Landick was effectively asking me to find that I could only take into account any difference in the recollection as between the four years and the twelve and three-quarter years. Although it is clear from the section from the White Book on "Prejudice to the Defendant" that there must be prejudice after the commencement of the action which leads to the substantial risk that it is not possible to have a fair trial of the issues in the action such prejudice exists in this case. Furthermore where an action is commenced just before the end of the prescription period, as is the case here, there is a higher duty to prosecute the action and the effect of the total lapse of time is relevant. This is an action in which the recollection of what was said by the Plaintiff and his wife is very important and the culpable delay has led to great prejudice to the Second Defendant.

In this case, I had no doubt that the inordinate and inexcusable delay had given rise to a substantial risk that it is not possible to have a fair trial of the issues in the action.

There remained, however, the further factor which is referred to in the above quotation from Roebuck v. Mongovin. The question arose as to whether there had been subsequent conduct by the Second Defendant which had induced the Plaintiff to incur further expense in

pursuing the action and, if so, whether this factor was sufficient to lead me, in exercising my discretion as to whether or not to strike out the action as against the Second Defendant, to decline so to do.

Since June 1995, the Plaintiff has been relatively active in relation to this action. I say relatively because two years from there to setting down, in the context of the previous delay, is slow. The Second Defendant went along with this activity as far as the action being set down on the hearing list in June 1997, but soon after that issued the present Summons. In my view an application to strike out upon these grounds could have been made in the Summer of 1995 and the Second Defendant either did not consider this possibility or was perhaps overly cautious and could have been more aggressive. Nevertheless, in a case such as this in which the inordinate and inexcusable delay and the risk that it is not possible to have a fair trial of the issues in the action are both very substantial, it does not seem to me that this factor is sufficient to outweigh the very substantial risk of prejudice to the Second Defendant.

Accordingly, I proceeded to strike out the action as against the Second Defendant and, after hearing the parties in relation to the issue of costs proceeded to make an Order for taxed costs in favour of the Plaintiff both in relation to the successful application to strike out and in relation to the action as against the Second Defendant only.

Authorities

Skinner -v- Myles [1990] JLR 89.

Allen -v- McAlpine [1968] 1 All ER 543.

Birkett -v- James [1977] 2 All ER 801.

Shutun -v- Zalejska [1996] 3 All ER 411.

Roebuck -v- Mungovin [1994] 1 All ER 568.

Fort -v- Le Claire (6th May, 1994) Jersey Unreported.

Fort -v- Le Claire (22nd September, 1994) Jersey Unreported.