11 pages.

ROYAL COURT
(Samedi Division)

189.

22nd September, 1994

Before: F.C. Hamon, Esq., Commissioner, and
Jurats Le Ruez and 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

JUDGMENT

THE COMMISSIONER: This action arises from a road accident that occurred on the 13th March, 1985. The defendant notified his insurers, Eagle Star Insurance Company Limited ("Eagle") of the accident on the 29th March, 1985. Eagle was made aware of a potential claim by the plaintiff by a letter from Messrs. Le Gallais & Luce on the 5th August, 1985. Correspondence ensued. The early correspondence from Le Gallais & Luce placed liability for the accident on the defendant. The reply from Eagle on the 17th December, 1985 was in the time-honoured form:

> *"We would advise you that it is not the policy of this company to admit liability. Having said this, however, we would advise that if you forward full details of your client's claim, we will be prepared to give the matter our full consideration".*

Later, on the 14th August, 1987, the Claims Superintendent of Eagle was able to write on the company's behalf that *"We have formed the view from our enquiries that your client is partially responsible for the accident and we will, of course, wish to discuss that aspect with you, in due course".* An interim payment of £1,000 was tendered to be set off against special damages. Negotiations proceeded at a leisurely pace. Between the letter from Eagle of the 17th December, 1985 and the details of special damages being supplied by Le Gallais & Luce, some eighteen months elapsed. A request from Eagle to Le Gallais & Luce seeking information on why the plaintiff retired early took three months to obtain a reply. By the 20th January, 1988, Eagle was referring

in correspondence to *"a fairly substantial degree of contributory negligence"*. In that letter the cheque for £1,000 was enclosed.

In order to interrupt the three year prescription period, an Order of Justice was served on Olsen, Backhurst & Dorey and this came before Court on 18th March, 1988. It was served on the 11th March, 1988 (the accident had occurred on the 13th March, 1985). The action, when called, was adjourned *sine die* on written undertakings to appear on forty-eight hours' notice.

On the 20th July, 1988 there was a meeting between a claims officer from Eagle and Le Gallais & Luce. Following that meeting, on the 22nd July, 1988, Eagle requested further specific information. Eight months later, on the 13th March, 1989, the information was supplied On the 21st March, 1989, Eagle requested documentary evidence to substantiate the plaintiff's salary for the years 1986, 1987 and 1988. Three months later, on the 14th June, 1989, the information was supplied. There was some progress in the following months, but on the 24th January, 1991, Eagle's lawyers wrote to request on progress. They wrote again in February, in March and in May and finally wrote enclosing a summons to strike out (over one year from their original letter) on the 10th February, 1992. The letter from Le Gallais & Luce on the 9th March, 1992, explained that the delay was due to pressure of work on the Harley Street consultant surgeon who had examined the plaintiff on the 25th March, 1991, but whose report had only recently become available. The plaintiff's lawyers undertook that if negotiations were not successful, then the case would be set down for hearing. The summons was withdrawn. "Without prejudice" negotiations began. There was apparently no further progress for another six months. A further summons to strike out was due to be heard on the 19th November, 1992. It was adjourned *sine die* against an undertaking that Le Gallais & Luce would supply *"a full and detailed qualification of the plaintiff's claim on or before 10th December, 1992"*. The claim laid before Eagle on the 3rd December, 1992, amounted to almost £197,000 in special damages and £15,000 in general damages, together with interest and costs. There were further negotiations and enquiries of a general nature and on the 16th November, 1993, a detailed reply came from Eagle's lawyers assessing a figure for the claim of £37,500. With the deduction of the £1,000 already paid and with such an enormous gulf between the parties, Eagle arranged to pay £36,500 into Court.

The Greffier's reply to the attempt to pay into Court raised a point of law which we dealt with in our judgment of the 6th May, 1994. By Rule 6/20(2) of the Royal Court Rules 1992:

> ***"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 deemed to have been withdrawn".

So that, unbeknown to either party, on the 17th March, 1993, no steps having been taken, the action was "deemed to have been withdrawn".

The application today is to reinstate it.

The plaintiff's first attempt to reinstate comes within Rule 1/5. This states:

"1/5 (1) The Court or the Viscount may, on such terms as it or he thinks just, by order extend or abridge the period within which a person is required or authorized by rules of court, or by any judgment, order or direction, to do any act in any proceedings.

(2) The Court or the Viscount may extend any such period as is referred to in paragraph (1) of this Rule although the application for extension is not made until after the expiration of that period.

(3) The period within which a person is required by rules of court, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order being made for that purpose."

This rule is written in very similar terms to Order 3 Rule 5 of the Rules of the Supreme Court and we have the benefit of reading the scope of the rule in the commentary contained within the White Book. That commentary states ***"the object of the rule is to give the Court a discretion to <u>extend time</u> with a view to the avoidance of injustice to the parties".***

In our view, however, 6/20(2) is not a rule that requires some action to be taken by either party. It is the second method by which an action is dismissed under this rule. It applies specifically to actions adjourned *sine die*, as contrasted with the first method, where the Court, of its own motion, can, after giving twenty-eight days' notice in writing to all the parties, order that the action be dismissed. During that twenty-eight days, it is open to the parties to take some action. Not so, in our view, under 6/20(2), where no party is "required" or "authorised" to do any act in any proceeding whatsoever. The action is "deemed to be withdrawn" and no rule of court, in our view, can be used to reinstate it.

Once the action has been automatically struck out under Rule 6/20(2), then the only way that it can be restored is if we are

able to exercise our inherent jurisdiction. In considering whether we should do so, we have to balance an argument which has two persuasive factors, both expressed in Jackson v. Jackson (1966) JJ 579 where the Court of Appeal said at 584:

> *"In the reasons for the judgment now appealed from, the opinion is expressed that a Court is bound to enforce the substance of its rules but not the letter if the failure to do so could have no real effect on the parties concerned".*

and again at 585 the counter argument:

> *"To allow the variation which the appellant seeks would deprive the respondent of the right to plead that the action is time barred".*

The inherent jurisdiction of the Court and the way that it can be used (and both counsel in this case accept that the Court has an inherent jurisdiction) is shown by the judgment of the Court of Appeal in Bastion Offshore Trust Company Ltd. v. The Finance and Economics Committee of the States of Jersey (9th October, 1991) Jersey Unreported; (1991) JLR N.1, where at page 15 of the unreported Judgment the Court of Appeal says:

> *"Practitioners in these Courts and in the Courts of Guernsey are familiar with the maxims 'La Cour est toute puissante' and 'The Court is master of its own procedure'. The better known a proposition is the harder it is to find authority for it and so it turns out if one seeks judicial statements of the two maxims (though in Guernsey the Court of Appeal relied on the second maxim in Cherub Investments Ltd. v. The Channel Islands Aero Club (Guernsey) Ltd. decided on 13th January 1982 at p.6 of the report.)*
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> *Both maxims are expressions of the inherent jurisdiction of the court. So far as English law is concerned the inherent jurisdiction of the court has been said to be a virile and viable doctrine, and has been defined as being 'the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them'. (Halsbury's Laws Vol. 37 4th Ed. title Practice and Procedure paragraph 14).*
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> *Reference is there made to a lecture on the topic given by Sir Jack (then Mr. I.H.) Jacob in 1970 and published in 23 Current Legal Problems pp 23-52. The definition quoted above first appeared in that erudite and authoritative*

lecture and it has been approved judicially in Canada and New Zealand.

One feature of the inherent jurisdiction is that it can exist alongside an identical or similar rule of court. The court does not lose its power because a rule is made (although there may be many cases where the Court will have no need to look outside the text of the rule)".

The defendant stresses the dilatory behaviour of the plaintiff's lawyers. We are now nine and a half years from the time of the accident. There is little hope, practically, of the case proceeding to trial for at least another year, by which time more than ten years will have elapsed. Witness testimony is required. Advocate Dorey, in her affidavit, deposes that when she corresponded with the defendant's witnesses in December, 1991, the incident had already become "significantly hazy". One of the witnesses apparently now lives in the United States.

In his turn, Advocate Le Cocq essentially made ten points:-

1. Eagle have never denied liability and were negotiating prior to the issue of proceedings.

2. Eagle have never stated that the action could not be resolved by negotiation.

3. The plaintiff has suffered a real physical injury.

4. Insurers contract with their insured and readily accept premia from them.

5. The plaintiff has always negotiated in good faith.

6. The action was adjourned *sine die* at Eagle's request in order for negotiations to continue.

7. Eagle made an interim payment and accepted a measure of liability.

8. The summons to strike out was withdrawn on the express basis that negotiations would continue.

9. There is no great disadvantage to the defendant. Neither party was aware of Rule 6/20(2) and there is no evidence that witnesses have been prejudiced. The witness who is in America left the jurisdiction before the second striking out summons was issued.

10. Eagle have "jumped on a procedural band wagon". They are attempting to use what is merely a "housekeeping rule" in order to avoid liability.

In deciding how we can exercise our inherent jurisdiction (which means that we can exercise a discretion) we can readily see that there is no direct equivalent of Rule 6/20(2) in the English procedure because the concept of setting down a case and adjourning it *sine die* is unique to this jurisdiction. There are no Jersey authorities to help us. Some guidance on how we should exercise a discretion of this kind is to be found within Order 17, Rule 11(9) of the County Court Rules. That rule states:

> ***"If no request is made pursuant to paragraph 3(d) within 15 months of the day on which pleadings are deemed to be closed (or within 9 months after the expiry of any period fixed by the Court for making such a request), the action shall be automatically struck out".***

The rule gives a plaintiff six months from the close of pleadings to request a hearing date and the action is automatically struck out if the plaintiff fails to do so within 9 months (or some other period specified by the Court).

As we have said, our Rules are not on all fours. Apparently, in Jersey the draftsman intended a draconian remedy with no apparent safeguard if the case were adjourned *sine die* and left unattended for five years. It cannot be that, in a case where the plaintiff can show that, by *cas fortuit* he has failed to take action, then this Court is deprived of all power to give him the remedy that he seeks. However, to have the power to exercise a discretion is one thing, the exercise of that power may be more complex. There are some useful guidelines expressed by the English Court of Appeal in Rastin v. British Steel (and five other cases) (17th February, 1994) Unreported Judgment of the Court of Appeal of England where the Court at page 5 said this:

> ***"(2) The exercise of discretion***
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> ***The proper approach to the exercise of any judicial discretion must be governed by the legal context in which the discretion arises. In considering the exercise of the court's discretion to extend time following an automatic striking out of the action the following matters are in our view relevant:***
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> ***(a) Delay has long been recognised as the enemy of justice. Order 17 rule (11(9) is the latest in a long series of measures aimed to curb delay and promote the expeditious trial of cases.***
>
> ***(b) Traditionally it has been assumed that a plaintiff's advisers can be relied on to serve his interests by driving his case forward to trial. Experience has shown this to be an unreliable assumption. Those acting for***

plaintiffs too often allow months and even years to pass with little or nothing done to press the case forward. Defendants are too often content to let matters rest, perhaps hoping that the claim will die a natural death, perhaps hoping that the time may come to dismiss for want of prosecution. Order 17 rule 11 recognises that protection of the public interest in the expeditious trial of cases cannot be left exclusively to the plaintiff's advisers. A hearing date must either be requested within 6 months after the close of pleadings, or the court itself must grant, and control the period of, any deferment. Plainly the court is intended to control the timetable if the plaintiff for whatever reason seeks to delay the trial. Automatic striking out after 15 months is the sanction.

(c) The duty to request the fixing of a hearing date is one which Order 17 rule 11(3)(d) lays squarely on a plaintiff. No corresponding duty is laid on a defendant. Under paragraph 9(4) of the rule it is in theory open to a defendant to apply for, or the court of its own motion to order, an extension of the 6 month period, but the first of these courses is not very likely and the second is very unlikely. In substance paragraphs (3)(d) and (9) are aimed at plaintiffs and their advisers and the object is to ensure that they do not sleep on their oars.

(d) The time limits provided by these paragraphs are generous, whether regarded as 15 months from the time when the duty to act arises or 9 months from the time when the prescribed period for action expires. Failure to act within these periods will not ordinarily be explicable or excusable by sudden forgetfulness, temporary indisposition, pressure of work or the vagaries of the post.

(e) In contrast with the familiar situation in which a defendant applies to dismiss an action for want of prosecution, it is plainly incumbent on a plaintiff seeking a retrospective extension of time to persuade the court that its discretion should be exercised in his favour.

(f) In the six cases before the Court, all personal injury claims, the limitation period had expired when the action was automatically struck out. This need not of course be so, but in cases where it is so the consequences of a refusal by the court to exercise its jurisdiction in the plaintiff's favour are likely to be more serious, at least to those acting for him.

These considerations lead us to reject the submission tha the discretion to extend time after automatic striking out of the action should be exercised on principles similar to those which obtain where a party seeks an extension of time to cure a procedural default ion the ordinary course of an action: see Costellow v. Somerset County Council [1993] 1 WLR 256. That submission gives quite inadequate weight to the fact that in this instance the action has been struck out. To accede to it would deprive rule 11(9) of its intended draconian effect. We also reject the submission that retrospective applications to extend time after automatic striking out should be treated as the obverse of applications to dismiss for want of prosecution, with particular attention paid to any prejudice suffered by the defendant. We would not readily extend the application of the rules laid down in Allen v. Sir Alfred McAlpine & Sons Ltd. [1968] 2 QB 229 and Birkett v. James [1978] AC 297 into this new field, and it would in any event be strange to concentrate on the position of the defendant when the object of the rule is to ensure diligent prosecution of the case by the plaintiff.

This last point in our view gives a crucial pointer towards the way in which the discretion should be exercised. A retrospective application to extend time should not succeed unless the plaintiff (in which expression we include his advisers) is able to show that he has, save in his failure to comply with rule 11(3)(d) and (4), prosecuted his case with at least reasonable diligence. That does not mean that there is no room to criticise any aspect of his conduct of the case but that overall he is innocent of any significant failure to conduct the case with expedition, having regard to the particular features of the case. The plaintiff's failure to comply with the rule can never be justifiable, but he must in all the circumstances persuade the court that it is excusable. If he is able to show that an extension of time for the requisite period, if sought prospectively, would in all probability have been granted, that will help him, and the more technical his failure the more readily it will be excused. If, but only if, the plaintiff can discharge these burdens should the court consider the interests of justice, the positions of the parties and the balance of hardship in a more general way. If it appears that the defendant might be expected to suffer significant prejudice if the action were reinstated which he would not have suffered if the plaintiff had complied with the rule, that will always be a powerful and usually a conclusive reason for not exercising discretion in the plaintiff's favour. The absence of such prejudice is not, however, a potent reason for exercising discretion in the plaintiff's

favour. At this stage, but not before, it is relevant to consider matters such as the availability of an alternative remedy to the plaintiff if the action is not reinstated, the expiry of the limitation period and any admission of liability or payment into court that there may have been."

One of the strongest arguments put forward by the plaintiff is that negotiations were always in train and that indeed the defendants attempted to pay a sum into Court. There does not seem to us to be much merit in that argument. As the headnote to Easy v. Universal Anchorage Co. Ltd. (1974) 2 All ER 1105 reads:

"The fact that negotiations for a settlement were in progress did not afford a sufficient reason for not serving the writ within 12 months of its issue, nor did it afford sufficient reason for the Court to exercise its discretion under RC Ord 6 18(2) to renew the writ; it was the duty of the plaintiff's solicitor to serve the writ in time even though negotiations were in progress".

The burden of satisfying us that there is some exceptional reason to exercise discretion in this case falls upon the plaintiff. Active negotiations cannot be a sufficient reason for delay. Denning MR said as much in Easy v. Universal Anchorage at 1107.

"The plaintiff's solicitors are under a duty to their client to serve the writ in time, even though negotiations are in progress. This is quite unlike the cases when an action is struck out for want of prosecution. In those cases there is much discussion whether the delay has been such as to prejudice a fair trial. But that does not enter into the renewal of a writ. The only principle is that a writ is not to be renewed except for good reason. That appears from the cases starting with the judgment of Megaw J in Heaven v. Road and Rail Wagons Ltd; and going on to the judgments of this court in Baker v. Bowketts Cakes Ltd. and Jones v. Jones. In Jones v. Jones Salmon LJ helpfully summarised all the authorities; and Karminski LJ went out of his way to say:

'We were told in the course of argument that sometimes writs are not served because, rightly or wrongly, it is thought that it might prejudice the possibilities of a settlement of a claim with the insurance company or underwriters concerned. I find this most difficult to accept as a valid reason. Negotiations for a settlement remain a matter of commercial judgment, and I find it very difficult to accept that the susceptibilities of those who

undertake this kind of insurance would be upset by the mere service of a writ on their assured'.

That is right. Negotiations for a settlement do not afford any excuse for failing to serve a writ in time or to renew it".

Advocate Le Cocq tells us that these cases based on the extension of an English writ are not of much assistance to us. We cannot agree. The reasoning behind these cases is of considerable assistance.

It is clear that the Rules are not written in tablets of stone.

As Mr. Le Cocq told us this Court may be a servant of the law but it is a master of procedure. The argument urged upon us is that by agreeing to the *sine die* adjournment, Eagle cannot claim any injustice and there is therefore no good reason to disallow the plaintiff's claim.

The plaintiff's legal advisers have been dilatory in prosecuting this claim. We regard much of the delay as being inordinate and inexcusable. We cannot see that the letters that passed between the respective lawyers in March 1988 constitute any specific agreement between them that the matter would not be advanced while negotiations were continuing. The prejudice to the defendant lies in the fact that if we were to allow the reinstatement, even if we attempted to set a rigorous timetable it might well be ten years on before the action could be heard.

We can see no reason in law (and we appreciate that the effect on an innocent victim of such delay by her solicitors will be harsh) to reinstate the action and we decline to do so.

Authorities

Royal Court Rules, 1992: 6/20(2); 1/5.

R.S.C. (1993 Ed'n): O.3 r.5; O.6, r.8; O.2, r.2.

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

Finance & Economics Committee of States of Jersey -v- Bastion Offshore Trust Company, Ltd (9th October, 1991) Jersey Unreported; (1991) J.L.R. N.1.

Rastin -v- British Steel (and five other cases) (17th February, 1994) Unreported Judgment of the Court of Appeal of England.

Easy -v- Universal Anchorage (1974) 2 All ER 1105.

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

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

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

Battersby -v- Anglo American Oil Co. Limited (1944) 1 KB 23.

Heaven -v- Road and Rail Wagons Limited (1965) 1 QB 355.

Jones -v- Jones [1970] 3 All ER 47.

Kleinwort Benson Limited -v- Barbrak Limited (1987) 2 All ER 289.

Paxton -v- Allsopp (1971) 3 All ER 372.

Costellow -v- Somerset County Council (1993) 1 WLR p.256 C.A.

County Court Practice (1993): O.9, r.10.
O.13, r.3, 4.
O.17, r.11.