Eckman v Sidem

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats King, Liddiard
Judgment Date:	07 December 2009
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Text

[2009] JRC 233

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats King **and** Liddiard.

Between
Carl Eckman
Plaintiff/Appellant
and
Sidem International Limited
First Defendant

and

Patrick Michault

Second Defendant/Respondent

Advocate P. M. T. Tracey **for the Plaintiff/Appellant**.

Advocate G. S. Robinson **for the Second Defendant/Respondent.**

Authorities

Royal Court Rules 2004.

Lescroel -v- Le Vesconte [2007] JLR 273.

Garfield-Bennett -v- Phillips 2002/214.

Birkett -v- James (1977) 2 All ER 801.

Ybanez and Mompo -v- BBVA Privanza Bank (Jersey) Limited [2007] JRC 131.

European Convention of Human Rights 2000.

Civil Procedure Rules 1998.

Pantano & Pantano Motorsport Limited -v- Super Nova Racing (2003) EWHC 255 QB.

Alhamrani -v- Alhamrani [2008] JCA 187 A.

Human Rights (Jersey) Law 2000.

Leeds United-v Admatch [2009] JCA 097.

Shtun v Zalejska (1996) 3 All ER 411.

Birkett -v- James (1997) 2 All ER 809.

Slade -v- Adco Ltd (1995) 27th December 1995 CA.

The Esteem Settlement [2000] JLR N 41.

Hately -v- Morris and others (2004) 1 BCLC 582.

Biguzzi -v- Rank Leisure plc (1999) 4 All ER 934.

Human Rights Act 1998.

THE COMMISSIONER:

1 On 4 th November, 2009, the Court allowed the plaintiff's appeal and reversed the decision of the Master taken on 2 nd June, 2009, by which he struck out the plaintiff's claim on the

basis of a failure to issue a summons pursuant to Royal Court Rule 6/26 and on the ground that there had been inordinate and inexcusable delay in the prosecution of the action. We now give our reasons.

Background

2 In or around 1992 the plaintiff entered into a contract with two companies, Sidem International Limited (the first defendant in these proceedings – "Sidem") and Saco Defence Limited ("Saco"). Sidem and Saco (as to 80%) were owned ultimately by Michault Family Trusts of which Pinnacle Trustees Limited ("Pinnacle") in Jersey was the trustee. Pinnacle administered those companies.

3 Sidem and Saco were involved in the business of the acquisition and sale of armaments. The second defendant, Patrick Michault, has been described by the plaintiff as the shadow director of Sidem. Iain Alexander Grant Moodie ("Mr Moodie") was the managing director of Pinnacle at the material time and has deposed that it was through these companies that the second defendant managed and controlled his and his family's interests in the acquisition and selling of armaments (paragraph 10 of his affidavit of 15 th October, 2009).

4 The second defendant denies that he was Sidem's shadow director but Miss Robinson accepted during the hearing that he had, through the Michault Family Trusts, an ultimate beneficial interest in Sidem.

5 On 10 th May, 1999, the plaintiff commenced proceedings against Sidem and Saco for breach of contract ("the first action"). The plaintiff obtained judgment in the Royal Court in relation to the first action on 17 th October, 2001. However, that judgment was appealed by Sidem and Saco, which appeal was dismissed on 18 th July, 2002.

6 The judgment was for account to be taken by the Master of the Royal Court of the profits under the contracts for the period commencing 1 st January, 1995. That process was not completed until 11 th April, 2005, when the Master gave the plaintiff judgment under the first action in the sum of US$1,427,027.

7 The plaintiff sought to enforce that judgment but found that there were no assets in either Sidem or Saco.

8 On 13 th October, 2006, these proceedings brought by way of Pauline action were issued by the plaintiff against Sidem as the first defendant, the second defendant and Raymond Sydney Harvey as trustee of the Michault Family Trusts as the third defendant. The second defendant's address in Switzerland was not known to the plaintiff and substituted service was effected against him through Capita Trustees Limited on 19 th January, 2007.

9 On 2 nd February, 2007, the case was placed on the pending list in relation to the second defendant.

10 On 15 th March, 2007, the second defendant filed an answer.

11 By 5 th April, 2007, a reply was due to be filed by the plaintiff and by the 5 th May, 2007, a summons was due to be filed by the plaintiff for directions pursuant to Rule 6/26(1) of the Royal Court Rules 2004.

12 In May 2008 the plaintiff instructed Sinels to represent him in the place of Viberts.

13 On 11 th December, 2008, Sinels submitted a request for further and better particulars of the second defendant's answer.

14 On 22 nd January, 2009, Sinels issued a summons on behalf of the plaintiff seeking responses to the request for further and better particulars and at the same time the second defendant issued a summons seeking to strike out the plaintiff's claim.

Pauline action

15 The plaintiff alleges that the second defendant has consistently sought to prevent the plaintiff from obtaining what was due to him under his contract and subsequently under the judgment. It is alleged that he has done this *inter alia* by carrying out transactions which have transferred money away from Sidem whilst the company was insolvent to third parties with the substantial intention of preventing the money being used to pay the plaintiff as a creditor. As against the second defendant, the plaintiff's claim relates to:-

The plaintiff's claim also seeks to set aside some $3,540,192 representing payments made from Sidem to the trustee of the Michault Family Trusts.

(i) Some £489,469.82 representing payments made from Sidem's bank account to the credit of the second defendant's personal American Express account.

(ii) Some $816,202 paid out of Sidem's bank account for the personal benefit of the second defendant and his immediate family comprising expenditure for school fees, antiques and a payment to an art gallery, payments to other family members and the second defendant's salary.

16 In his answer (and by way of summary) the second defendant takes issue with the dates upon which the plaintiff alleges he became a creditor of Sidem and the date upon which Sidem became insolvent. Whilst admitting that payments were made from Sidem's bank

account to meet payments due on an American Express card for senior managers of Sidem, the plaintiff is put to proof in respect of each of the transfers challenged. In respect of those transactions proved, the second defendant denies that they are within the scope of a Pauline action in that all payments were made in satisfaction of Sidem's business expenses and were not disposals of Sidem's assets to the second defendant or any other person. Further, or in the alternative, the second defendant was not the recipient of such payments, but Amex Europe. Furthermore, it is denied that any of the transfers were made with the dishonest intention of preventing the plaintiff from recovering amounts due to him.

17 In relation to the other payments, these are admitted by the second defendant but he asserts they represent part of his remuneration package, having worked for Sidem for some 20 years, and he denies that they were made with the dishonest intention of preventing the plaintiff from recovering amounts due to him or at a time that the plaintiff was a creditor or Sidem insolvent.

18 The second defendant pleads prescription in relation to transactions concluded on or prior to 19 th January, 1997, ten years before the Order of Justice was served on the second defendant (10 years being the prescription period for Pauline actions). The plaintiff argues that time does not begin to run until he first became aware of the relevant transactions during the course of discovery in the liabilities proceedings that is to say after 20 th March, 2000, and that the plaintiff's knowledge of Sidem's insolvency did not crystallise until some time after 11 th April, 2005, following the Master's account and the plaintiff finding himself unable to enforce his judgment against Sidem.

19 For completeness, we should mention that on 16 th March, 2007, the plaintiff obtained judgment in default against the first defendant, Sidem, and on 2 nd December, 2008, by consent the proceedings against the third defendant were discontinued. Thus, the only parties to the action remain the plaintiff and the second defendant.

Applicable law

20 Mr Tracey accepted that the Master set out the applicable law accurately and comprehensively. The relevant parts of Rule 6/26 are in the following terms:-

> ***"6/26 Summons for directions***
>
> ***(1) With a view to providing an occasion for the consideration by the Court of the preparations for the trial of an action so that-***
>
> ***(a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and***
>
> ***(b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical***

disposal thereof ,

The plaintiff must, within one month after the time limited for filing pleadings has expired, issue a summons for directions to be heard at least 14 days, and no more than 42 days, thereafter in the form (or substantially in the form) prescribed in Schedule 3.

(2) If the plaintiff does not issue a summons for directions in accordance with paragraph (1), the defendant or any other party to the action may do so or apply for an order to dismiss the action.

(3) On an application by a party to dismiss the action under paragraph (2), the Court may either dismiss the action on such terms as may be just or deal with the application as if it were a summons for directions.

(13) If 2 months have elapsed form the time limited for filing pleadings and no summons has been issued pursuant to any of the foregoing provisions of this Rule, the Court may of its own motion, after giving not less than 28 days notice in writing to all parties to the action, order that the action be dismissed, and the Court may make such consequential order as to costs or otherwise as it thinks fit."

21 In *Lescroel -v- Le Vesconte* [2007] JLR 273 the Court considered the approach to be taken in relation to 6/26(13) which approach the parties agreed would be equally applicable to an application under Rule 26/6(2). Quoting from the head note to that case:-

"(1) The appeal would be allowed and the appellant's action for damages would be reinstated. When considering whether to dismiss an action under r.6/26(13) of the Royal Court Rules 2004, the Master (or the Royal Court on appeal) should consider the following questions, bearing in mind that the rule was intended to ensure that civil litigation was conducted in a timely and cost-effective manner. First, he should consider whether the plaintiff had satisfied him that, apart from the failure to issue a summons for directions as required by the rule, he (including his legal advisers) had prosecuted his case with at least reasonable diligence, i.e. he was innocent of any significant failure to conduct the case with expedition, having regard to the particular features of the case. If the Master was not so satisfied, that would point strongly towards the dismissal of the action. If he was so satisfied, he should consider, secondly, whether the plaintiff had satisfied him that, in all the circumstances, the failure to apply for a summons for directions was excusable, i.e. that it should be forgiven. If not, then again that would point towards the action being dismissed. If the failure was excusable, the Master should consider, thirdly, whether he was satisfied that the balance of justice indicated that the action should be allowed to continue. If not, that would also point towards dismissal."

22 The Master also referred to paragraph 30 of the judgment of Birt, Deputy Bailiff, in *Lescroel* as follows:-

> ***"Even in cases such as this (where it is accepted that the issue of a summons for directions would not have enabled the case to progress any more speedily to trial) plaintiffs should always issue a summons for directions in accordance with r.6/26(1).*** This will ensure that the plaintiff will not subsequently face an application to strike out for failure to comply with the rule; but more significantly, it will give the Master an opportunity to ensure that the case does not fall into a black hole. Thus, even if he is satisfied on the hearing of such a summons that he should not in fact give any directions at the time and that the case cannot actively be progressed until (for example) injuries have settled down, he may choose to adjourn the summons for directions for a fixed period, thereby ensuring that the matter comes back before him at the end of that period. At that time, he can no doubt ask searching questions in order to ensure matters are being progressed as speedily as possible. The issue of a summons for directions achieves retention of judicial control so as to ensure that the case is not allowed to drift."

23 In relation to the law regarding dismissal of an action for want of prosecution the Master referred to *Garfield-Bennett -v- Phillips 2002/214* where Birt, Deputy Bailiff set out the principles drawn from *Birkett -v- James* (1977) 2 All ER 801 as follows:-

> ***"A convenient summary of the principles as they have developed is to be found in*** *Shtun v Zalejski* (1996) 3 All ER 411. ***With minor alterations, we would adopt those principles as reflecting the law of Jersey and would set them out as follows:-***
>
> > ***i. In a case where there has been no contumelious conduct by the plaintiff, the Court, if it is to strike out an action for want of prosecution, must be satisfied (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.***
> >
> > ***ii. The delay which must be shown to have caused such risk or such likelihood of prejudice is the delay after the issue of proceedings.***
> >
> > ***iii. But where the plaintiff delays in issuing proceedings and by such delay causes prejudice, the additional prejudice which must be shown to justify dismissal of the action need not be great, provided that it is more than minimal.***
> >
> > ***iv. Further, once the plaintiff is guilty of further delay causing more than minimal additional prejudice, the prejudice caused by the totality of the period of his delay can be looked at.***

v. The prejudice may take a variety of forms, but one recognised form is the impairment of the memory of witnesses. Another form consists of the prejudice to the defendant through having a serious claim hanging indefinitely over him. But the Court should only in exceptional cases treat the anxiety which accompanies all litigation as alone being sufficient to justify dismissing an action.

vi. Save in exceptional cases, an action will not be struck out for want of prosecution before the expiry of the relevant limitation period.

We would add two further points:-

vii. It is clear that the later a plaintiff starts his action, the higher his duty to prosecute it with all due speed. A pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before proceedings were issued. (See Lord Diplock in Birkett v James at 322). This is particularly important in the context of the lengthy limitation period of ten years under Jersey law. The need for a plaintiff to act with diligence and expedition in such circumstances is that much more necessary in Jersey. (See *Skinner v Myles* (1990) JLR 88 at 94.)

viii. Where the prejudice relied upon takes the form of impairment of witnesses' recollections, it is not necessary that there should be evidence of particular respects in which potential witnesses' memories have failed; the Court is entitled to draw appropriate inferences from delay (see Shtun v Zalejski (supra). Furthermore the Court can infer that any substantial delay at whatever period leads to a further loss of recollection (see Lord Browne-Wilkinson in *Roebuck v Mungovin* (1994) 1 All ER 568 at 574)."

24 Finally, the Master referred to the judgment of Bailhache, Bailiff in *Ybanez and Mompo -v- BBVA Privanza Bank (Jersey) Limited* [2007] JRC 131 for a detailed and up to date exposition of the law regarding dismissal for want of prosecution and the summary contained at 2007 JLR N 45:-

"Civil Procedure – dismissal for want of prosecution – delay

The plaintiffs instituted an action against the defendant bank in 2003 but, although it was not a complex commercial case, the pleadings had not been completed four years later. The action, in which the plaintiffs made allegations of fraud against certain of the defendant's employees, concerned events which had taken place between 1998 and 2000. Oral evidence was to be crucial in the case but a number of the main witnesses were no longer employed by the defendant and others had left the Island. Although some of the plaintiffs' claims were not time-barred, the Master dismissed the action on the ground that serious prejudice would be caused to the defendant by the plaintiffs'

inordinate and inexcusable delay.

Held: (1) The plaintiffs' appeal against the striking out of their action would be dismissed. An action could be struck out for want of prosecution if the court was satisfied that there had been inordinate and inexcusable delay which gave rise to a substantial risk that it was not possible to have a fair trial of the issues or was likely to cause or had caused serious prejudice to the defendant (*Garfield-Bennett v Phillips*, 2002 JLR N [42] ***applied).*** There had been a wholesale change of culture in Jersey since 2000 and it now had to be the objective of the parties to civil proceedings to progress those proceedings to trial in accordance with an agreed or ordered timetable, at a reasonable level of cost and within a reasonably short time (*In re Esteem Settlement*, 2000 JLR N-41 ***applied).*** Whenever possible, actions commenced after the Master's Circular Letter of October 31st, 2003 should be brought to a conclusion within 12 months and pre-existing actions, such as the present case, should be progressed as quickly as reasonably practicable. On the basis that actions should generally be concluded within 12 months, it was expected that even a complex case should be concluded within 24 months. A delay exceeding 24 months was likely to be inordinate. If a delay exceeded 36 months, it would only be in wholly exceptional cases involving highly complex issues of law or fact or other circumstances that the delay would not be regarded as inordinate. Earlier decisions in which long delays had been regarded as acceptable had to be viewed against the imperative to bring proceedings to trial within a reasonable time. If a plaintiff were to find time slipping away, he should comply with r.6/26(1) of the Royal Court Rules 2004 and make an application for directions or seek a stay (*Citco Jersey Ltd.* V Bank of Ireland (Jersey) Ltd. 2005 JLR N [28] ***applied).*** As the pleadings in the present case had not been completed in four years, the delay was inordinate and would have been so even if the case were a complex commercial dispute The delay was, moreover, inexcusable and the Master had correctly found that it was seriously prejudicial to the defendant and causes a substantial risk that it would not be possible to have a fair trial.

(2) Furthermore, the Master had correctly dismissed the action even though the time limits for some of the plaintiffs' claims had not expired. The previous rule that, save in exceptional circumstances, an action would not be struck out for want of prosecution before the expiry of the relevant limitation period, no longer applied as it was inconsistent and irreconcilable with recent reforms (*Birkett v James*, [1978] A.C. 297, ***not follows;*** *Garfield-Bennett v Phillips*, 2002 JLR N [42], ***applied;*** *Citco Jersey Ltd v Bank of Ireland (Jersey) Ltd.* 2005 JLR N [28] ***applied).*** The fact that the relevant limitation period had not expired should therefore no longer be regarded as a ground for not dismissing an action for want of prosecution."

25 Mr Tracey submitted that in the light of Article 6 of the European Convention of Human Rights 2000 (the right to a fair and public hearing within a reasonable time), the Court should move away from the "all or nothing" prescriptive approach and apply the principles of necessity and proportionality to applications for striking out for want of prosecution or

failure to comply with Rule 6/26. It should be guided by the broader approach of the English courts under the Civil Procedure Rules 1998 ("the CPR") as illustrated in *Pantano & Pantano Motorsport Limited -v- Super Nova Racing* (2003) EWHC 255 QB, where Fulford J summarised the approach of the English courts as follows:-

"THE LAW

[22] Under the Civil Procedure rr 1998 the keeping of time limits is accorded a high degree of importance, and the court has an unqualified discretion to strike out a case under CPR r3/4(2)(c) where a litigant fails to comply with the Rules or an order of the court. In *Biguzzi v Rank Leisure plc* [1999] 4 All ER 934, [1999] 1 WLR 1926 ***the Court of Appeal rehearsed the need for judges to ensure that this draconian step is only taken when the other broad powers at the disposal of the court provided an insufficient remedy or sanction.*** In essence, the court must mark its disapproval of delay while ensuring that the overriding objective of ensuring that cases are dealt with justly is met.

[23] Neuberger J's judgment in *Annodeus Entertainment Ltd v Vibson* ***(The Times 03.03.00) contains an extremely helpful summary of the principles that are applicable when the court entertains an application to dismiss a claim for want of prosecution;***

i) A Claimant has and always has had a duty to get on with proceedings, and is liable to sanctions if he does not.

ii) This duty was taken more seriously under the RSC even before the CPR came into effect.

iii) Following the coming into effect of the CPR, keeping to time limits laid down by the CPR or by the court itself is accorded more importance than it was previously; see in particular Biguzzi (supra);

iv) and v) The court is now prepared to dismiss a claim for delay even if neither of Lord Diplock's two requirements as laid down in *Birkett v James* [1978] AC 297, ***is satisfied (those requirements were that the default or delay had been intentional and contumelious or where there had been inordinate or inexcusable delay, giving rise to a substantial risk either that a fair trial would not be possible, or to serious prejudice); see Biguzzi (supra).***

vi) The duty of a Claimant to pursue an action expeditiously and in accordance with the rules, is all the more important where they have already had a significant benefit from the Defendant, such as an injunction or a search order.

vii) "…the CPR enable the court to adopt a more flexible approach. The previous "all or nothing" extremes of either dismissing the claim for delay or permitting it to continue are now merely the two ends of a spectrum. The court has other sanctions at its disposal which it can and, in appropriate cases, should impose, rather than adopting one of the two extreme positions. Those

weapons, those sanctions, are discussed in the judgment of Lord Woolf in Biguzzi at 1933D to 1934C and … they include payments into court, providing for no interest in favour of the Claimant or for high rates of interest in favour of the Defendant and for appropriate directions and supervision for the future conduct of the trial. As the decision of the Court of Appeal in *Ada Insurance Co. Ltd v Squire Fraser* ***(Unreported) 9 December 1999, shows, it is also possible for the court to exercise its jurisdiction to strike out parts of the claim (see the judgment of Tuckey LJ at para 25).”***

viii) Any sanction should be proportionate. “To dismiss a claim where the Claimant appears to stand a reasonable chance of success and of recovering substantial damages is a strong thing to do. Particularly so bearing in mind art 6(1) of the European Convention on Human Rights.

ix) The court will usually consider the following factors:

i. The length of the delay;

ii. Any excuses put forward for the delay;

iii. The degree to which the Claimant has failed to observe the rules of court or any court order;

iv. The prejudice caused to the Defendant by the delay;

v. The effect of the delay on trial;

vi. The effect of the delay on other litigants and other proceedings;

vii. The extent, if any, to which the Defendant can be said to have contributed to the delay;

viii. the conduct of the Claimant and the Defendant in relation to the action;

ix. Other special factors of relevance in the particular case.”

26 Mr Tracey referred us to the Court of Appeal judgment in *Alhamrani -v- Alhamrani* [2008] JCA 187 A, a case involving an appeal against the decision of the Royal Court to strike out a pleading for non compliance pursuant to the inherent jurisdiction of the Court and Rule 6/13 of the Royal Court Rules 2004. The appellant submitted that there had been a misdirection on relevant principles, valuable guidance in respect of which was offered by the Civil Procedure Rules in England, especially after the coming into force of the Human Rights (Jersey) Law 2000. The Court of Appeal found that there had been no misdirection or material error of law:-

“70. This jurisdiction has not adopted Rules such as the Civil Procedure Rules of England and Wales and the Applicant could go no further than to suggest that those Rules offered valuable guidance to the principles which should be

applied in this jurisdiction, particularly after the coming into force of the Human Rights (Jersey) law 2000.

71. Once it is accepted, as it is by the Applicant, that the practice in England shown by the CPR offers only valuable guidance, it cannot, upon the basis only of that comparison, be maintained the court below has misdirected itself as regards the principles in accordance with which the discretion has to be exercised.

72. For my own part therefore, I could not suggest that the test for the grant of leave to appeal was met upon the basis of this part of the applicant's argument."

27 Mr Tracey also referred us to the Court of Appeal decision in *Leeds United-v Admatch* [2009] JCA 097. In the context of the effect of Article 14 of the European Convention on Human Rights (Prohibition on Discrimination) on security for costs orders, Sumption JA said this at paragraph 24:-

> ***"One of the more reliable signs that a measure is disproportionate to its objective is that it is applied in accordance with a blanket rule, instead of being confined to cases where it is actually necessary.*** Under a proportionate system of procedure, a British Plaintiff would not be required as a matter of course to put up security for costs in cases where it is unnecessary, simply because if it were a Spanish Plaintiff, investigation might show that security was necessary."

28 The Master felt unable to import authorities from England which stem from a completely new regime of civil procedure. The Jersey courts have laid down definitive and clear statements of the principles which have to be applied and which were in any event binding upon him.

29 Mr Tracey submitted that the test set out in *Lescroel* should be amended so that if the Court was not satisfied as to the first and second questions, then instead of this pointing to dismissal, it should point towards "t *he imposition of necessary and proportionate sanctions including, only where there is no other viable alternative sanction open to the Court, denying the plaintiff a fair trial by dismissing the case"*. The third question should, in his view, be amended to read as follows:-

> ***"Has the plaintiff satisfied the Master that the balance of justice, to be balanced in the light of those matters helpfully set out in paragraph 23 of the English case of*** *Pantano and Pantano Motorsport Limited v Super Nova Racing* (2003) EWHC 255 QB ***indicates that the action should be allowed to continue?*** If not, then again this will point towards *the imposition of necessary and proportionate sanctions including, only where there is no other viable alternative sanction open to the Court, denying the plaintiff a fair trial by dismissing the case."* (Amendments emphasised)

30 Miss Robinson points out that the parties have competing rights under Article 6 ECHR in that the second defendant is entitled under that Article to have his civil obligations determined at a fair and public hearing within a reasonable time.

31 We will return to these submissions later but Mr Tracey submitted that dismissal of the plaintiff's action was disproportionate and he invited the Court to impose one or more of the following sanctions:-

Second defendant's submissions

(i) To disallow the plaintiff interest on his judgment debt from the liability proceedings for the period of the delay; and/or

(ii) To order the plaintiff to pay the costs of the hearing before the Master: and/or

(iii) To set down an accelerated and closely supervised timetable to bring this action to trial.

32 In her submissions to the Master and to us, Miss Robinson stressed the following:-

(i) The initial delay of some 21 months between the issuing of the Master's order of 11 th April, 2005, and the issuing of these proceedings.

(ii) The fact that a significant number of the transactions which the plaintiff was seeking to revoke were prescribed because they had occurred more than 10 years before the Order of Justice was served.

(iii) The issuing of the Order of Justice towards the end of the 10 year prescription period which applies to a Pauline action.

(iv) The inordinate and inexcusable delay between the filing of the answer of the second defendant on 15 th March, 2007, and the request for further and better particulars on 11 th December, 2008, some 19 months.

(v) No *prima facie* excusable or cogent or reasonable explanation had been put forward on behalf of the plaintiff for that delay.

33 In terms of a fair trial and prejudice, it is convenient to set out paragraphs 16 and 17 of the Master's judgment which summarises the second defendant's position:-

Master's decision

"16. Advocate Robinson also argued that the delays on the part of the plaintiff

had caused serious prejudice to the second defendant. Most, if not all, of the transactions which the plaintiff was challenging were between ten and thirteen years old. The second defendant's memory of those transactions was unclear and he had suffered from depression for some considerable time (especially between 1995 and 2003) and had spent time in clinics and was therefore unable to recall the exact details. The longer the matter is left the more difficult it would be for the second defendant to piece everything together. Impairment of his memory would inevitably worsen and it would be very difficult for him to embark upon an exercise of analysing the transactions under challenge. The second defendant would also face considerable difficulties after the delays in attempting to gather documentary evidence. For example, challenges were raised to various credit card payments between April 1996 and August 1999 which were made by the first defendant for or on behalf of the second defendant. The second defendant was not the direct recipient of any payments and would need to embark upon an expensive and time consuming exercise in attempting to retrieve and analyse records. Furthermore, the second defendant says that other transfers of funds which are challenged were, in fact, part of an established pattern which existed before 1996 and formed part of the second defendant's remuneration package. Again attempting to obtain and analyse documentary evidence would be a very difficult, time-consuming and costly exercise. Similar difficulties arose in the obtaining of accounts and accounting records which would inevitably need to be closely examined.

17. It was also contended on behalf of the second defendant that it would be difficult to obtain evidence from former directors and employees of the first defendant in relation to the transactions being challenged. Similar difficulties would arise on the alleged insolvency of the first defendant at the time. Advocate Robinson argued that it would be very difficult to obtain accurate witness evidence. The events in question occurred more than ten years ago and it would be unreasonable to expect anyone to remember what had happened in detail of [sic] with complete accuracy. It was also unclear whether any of the relevant employees would be available to give evidence. In her view the Court was entitled to draw inferences that, by reason of the delays, serious prejudice would be caused as a result of impairment of witness recollection. Such would be the prejudice to the defendant in the preparation and presentation of his case that it would not be possible to have a fair trial of the action by the reason of the delay. She argued that the delays were of such magnitude that it would be proper to take into account in the particular circumstances of this case the fact that matters had been hanging over the second defendant for a number of years."

34 Essentially, the Master accepted Miss Robinson's submissions. Applying the *Lescroel* case he did not consider that the plaintiff had prosecuted this case with reasonable diligence and in relation to the second question, he was not satisfied that the failure to apply for a summons for directions was excusable. In relation to the third question and the balance of justice, he said this:-

> ***"Furthermore, I am not satisfied having looked at all the circumstances which have been put to me, that the balance of justice means the action should be allowed to continue.*** Rather, I think the balance of justice lies with the second defendant. In all those circumstances I therefore consider that the failure to issue a summons of directions justifies dismissal of the action and I would dismiss it on that ground."

35 In terms of dismissal for want of prosecution, he found that there had been an inordinate delay which was inexcusable and concluded as follows:-

> ***"I have come to the conclusion, having regard to the affidavit sworn by the second defendant and all the material which it is necessary for me to consider, that this is a clear case where there would be serious prejudice to the second defendant and a substantial risk that it is not possible to have a fair trial."***

Jurisdiction of the Royal Court on appeal

36 Our task in this appeal is to consider the matter afresh and reach our own conclusions whilst of course taking due note of the decision of the Master and the reasons for his decision (see *Garfield-Bennett* at para 13). We had before us material that was not before the Master, namely an affidavit from Dr Geoffrey Moffatt dated 10 th June, 2002, an affidavit from Dr Ted Peters dated 10 th June, 2009, an affidavit from Dr Juan Bartolemi dated 29 th September, 2009, an affidavit from Dr Rehan Khan dated 12 th October, 2009 (all concerned with the plaintiff's health), an affidavit from Mr Moodie dated 15 th October, 2009, an affidavit from the plaintiff dated 16 th October, 2009, a second affidavit from Mr Moodie dated 21st October, 2009, a second affidavit from the second defendant dated 15 th October, 2009, and a third affidavit from the second defendant.

Plaintiff's ill health

37 From the evidence which was before us (and not before the Master) the plaintiff's history of ill health can be summarised as follows:-

> (i) In May 2007, the plaintiff had lost the full use of his right hand. He was diagnosed with carpal tunnel syndrome and underwent corrective surgery on 11 th May, 2007. The plaintiff underwent physical therapy for the next three months during which time he was significantly debilitated.
>
> (ii) During this period of debilitation, in fact within a month of undergoing surgery for carpal tunnel syndrome, on 2 nd June, 2007, the plaintiff fractured his hip. The plaintiff underwent corrective surgery on 4 th June, 2007, and was released from hospital on 9 th June, 2007. However, the injuries significantly debilitated the plaintiff and he remained under medical supervision until December 2007.

(iii) During the latter part of December 2007, the plaintiff began to lose use of his limbs. Following detailed examinations, advice and in the knowledge that the same might leave him permanently paralysed, the plaintiff underwent corrective spinal surgery to replace spinal discs C2 and C3 on 31 st January, 2008. The spinal surgery resulted in the plaintiff being paralysed from the neck down, bruising and swelling of the spinal cord, infection and two hematomas in his neck. The plaintiff then underwent treatment and therapy until 24 th March, 2008, at which time a blood vessel burst in his rectum and he lost 7 pints of blood. Once this had healed, the plaintiff underwent further treatment and therapy until he was eventually released from hospital on 6 th October, 2008, albeit that he remained, as he does to this day, under the supervision of a team of professional nurses, therapists and aides.

38 Miss Robinson drew our attention to an affidavit sworn by the plaintiff's wife on the 30 th September, 2008, in US Tax proceedings in which she deposes that his cognitive abilities are impaired with rare moments of lucidity, he has no use of his limbs and cannot control his bodily functions. He had apparently been diagnosed with “old man in a bed syndrome”. Miss Robinson points out, however, that between March and June 2007, the plaintiff and second defendant were involved in without prejudice negotiations in relation to settling the proceedings and between July 2007 and May 2008 the plaintiff and the third defendant's lawyers were involved in without prejudice negotiations in relation to the release of the third defendant from the proceedings. In addition, we have seen e-mails written by the plaintiff on 4 th July, 2007, over Viberts needing *“to get aggressive and start the legal machine moving post haste”* and on 22 nd May, 2008, to Viberts withdrawing his instructions to them.

Want of prosecution

39 We started our deliberations by approaching the second defendant's application for the plaintiff's action to be struck out for want of prosecution applying the *Garfield-Bennett* test.

40 We did not regard this as a case in which the plaintiff has delayed the issuing of proceedings to the end of the 10 year prescriptive period, thereby imposing upon himself a higher duty to prosecute it with all speed. His action was against Sidem and Saco which he pursued to judgment on 17 th October, 2001, assuming no doubt that any judgment would be enforceable against them. There is no assertion that he delayed in the prosecution of that action or that he had any reason to suspect that funds may have been moved in order to defeat his claim. That judgment was then appealed by Sidem and Saco to the Court of Appeal at a time when, according to paragraph 15(3) of the second defendant's answer, Sidem was unable to satisfy its debts as they fell due. Again there is no suggestion that the plaintiff was aware of this. It was only after he was unable to enforce his judgment that he had cause to consider proceedings against the second defendant by way of Pauline action.

41 It is not asserted that the plaintiff delayed in having the account undertaken by the Master. We have seen the affidavit of Stephen Milson of Moore Stephens dated 24 th March, 2005,

retained by the plaintiff, which details the extensive work undertaken by both his firm and by Deloittes, acting for Sidem and Saco in preparing for that account. Reference is made (in paragraph 11) to the records being voluminous and being contained in more than a dozen cardboard boxes. Attempts to agree a joint statement for the Master ultimately failed. Again, it would appear that on the second defendant's case Sidem was insolvent during this process.

42 There is an assertion that the plaintiff delayed between obtaining the Master's order on 11 th April, 2005 and the issuing of these proceedings. We take into account the fact that initially time would have been taken in seeking to enforce the order of the Master against the companies that had resisted judgment for so long. Having found nothing to enforce the judgment against, the plaintiff would then be engaged in considering entirely new causes of action, in particular against the second defendant. A Pauline action is not a simple form of action. It requires the plaintiff not only to identify transactions to be set aside (and this in relation to a company in respect of whose management he had no involvement) but also to prove:-

(i) That he was a creditor at the time of each transaction;

(ii) That Sidem was insolvent at the time of each transaction or rendered insolvent by it; and

(iii) That the transaction was carried out with the substantial intention of defeating the plaintiff.

43 Mr Moodie's affidavit of 15 th October, 2009, shows extensive advice being taken from counsel in January 2006 and letters before action being issued in March 2006. This is complex litigation which requires considerable investigation and care in its preparation and although the pace may not have been as fast as it might have been, we are not persuaded that the plaintiff can be regarded as having delayed its commencement.

44 We agree with the Master, however, that the delay between the filing of the second defendant's answer on 15 th March, 2007, and the request for further and better particulars on 11 th December, 2008, was inordinate by the standards of the profession and the Courts.

45 We gave careful consideration on the new evidence before us as to whether this delay was excusable in the light of the plaintiff's ill health. In our view there were substantial periods where through his ill health delays were excusable. It is difficult to be precise but even giving an arguably generous allowance of six months that still leaves a period of some 12 to 13 months during which the plaintiff was in a position to give instructions and receive advice and for which there is no excuse.

46 Sinels are critical of the legal advice given by Viberts before their instructions were

withdrawn and indeed, it would be possible to criticise Sinels themselves for failing to issue a summons for directions as soon as they were instructed and certainly before they issued a request for further and better particulars. However it is clear from the authorities that whether the fault lies with the plaintiff or his advisers is irrelevant (see *Shtun -v- Zalejska* (1996) 3 All ER 411 at page 426 and *Birkett -v- James* (1997) 2 All ER at page 809).

47 We therefore concluded in agreement with the Master that the inordinate delay, whether on the part of the plaintiff or his lawyers, was for the greater part inexcusable.

48 We therefore turn to the final part of the *Garfield-Bennett* test namely whether this delay will give rise to a substantial risk that it is not possible to have a fair trial or is such as is likely to cause or to have caused serious prejudice to the second defendant. Peter Gibson LJ in the Court of Appeal decision of *Shtun -v- Zalejska* said this a page 424:-

> ***"In my judgement, in order to determine whether a defendant has suffered the necessary prejudice when it is in the form of the impairment of witnesses' recollections as a result of inordinate and inexcusable post writ delay, the court must examine with care all the circumstances of the case, including both the affidavit evidence as well as the issues disclosed by the pleadings."***

He also made reference to the following extract from the judgment of Neill LJ in *Slade -v- Adco Ltd* (1995) 27 th December 1995 CA:-

> ***"The prejudicial effect of delay on a defendant and the effect of delay on the possibility of a fair trial would depend in large measure on the nature of the issues in the case.*** In some cases much of the evidence will be in documentary form or there will be in existence statements made soon after the relevant events which will enable witnesses to refresh their memories. In other cases, however, including many cases involving road accidents or industrial accidents, where claims for damages for personal injuries are made, the crucial evidence may be largely oral and any statements made shortly after the events may be imprecise or incomplete. It follows therefore that each case is likely to depend on its own facts."

49 In our view much of the evidence in this case will be in documentary form with the evidential burden falling predominantly on the plaintiff. It is clear that extensive records of Sidem exist and have already been the subject of detailed reviews, firstly by Deloittes, for the purposes of their report in September 2001, and subsequently by both Moore Stephens and Deloittes in 2005. Mr Moodie (who is assisting the plaintiff in the conduct of his case and who the second defendant does not regard as impartial for this and other reasons) was the managing director of Pinnacle during much of the material time and had a personal involvement in the affairs of the Michault Family Trusts and Sidem.

50 We have seen two unsworn letters from the second defendant's doctors. Dr Colum refers to

the second defendant having suffered from depression, anxiety and stress between 1994 and 2000 and to suffering a heart seizure in 1998, due to excessive levels of medication, alcohol and sleeping tablets. During 1999, he was severely addicted to different powerful medications, alcohol and sleeping tablets. In 2000, he spent most of his time in Switzerland where his Swiss doctor got him eventually to a specialised clinic since when he has been in remission. Dr Colum has seen little of him since then but concludes as follows:-

"It is certain that following so many years of addiction to powerful medications, sleeping tablets and excessive intake of alcohol, and age, memory, concentration are no longer reliable."

51 Dr Zurkinden, who is his Swiss family doctor, also makes reference to his chronic depression and serious addiction to medication and alcohol. He says that in September 2002, he, with his family, attempted to have him enter a clinic in Switzerland and he refers to being admitted on January 1 st, 2003 to the same clinic with a very serious and life threatening condition. He concludes as follows:-

> *"Following so many years of illness and massive abuse of substances at his age, Mr P Michaults memory and concentration have been severely impaired.* His recollection of events in those years obliterated."

52 As against that unsworn medical evidence, it is clear that the second defendant gave lengthy evidence at the hearing before the Royal Court on 13 th and 14 th September, 2001. We have seen the transcripts and although he makes two references to attending a clinic between 1999 and 2001, he demonstrates a detailed grasp of the affairs of Sidem. Furthermore, he has been able to give detailed instructions for the filing of his answer and for the responding by consent to the detailed request for further and better particulars submitted by Sinels.

53 Whilst the medical condition of the second defendant in the period up to 2003 may well place him at a general disadvantage in relation to the hearing of this action, we do not consider the delays to the extent to which we have found them inexcusable to have materially increased that disadvantage. Nor do we regard that delay as materially increasing the burden on the second defendant in terms of gathering documentary evidence and/or retrieving records (a task we assume his defence would have undertaken at the outset of these proceedings) and analysing the same.

54 Miss Robinson makes very general submissions about witnesses. We know that Mr Moodie is available but no other witnesses are identified by her who are now unavailable as a result of this delay. In our view this is a case where witnesses will be able to refresh their memories from the records and that task has not been made materially more difficult by this delay.

55 Of course any delay in the administration of justice is prejudicial but our task is to assess

whether this delay has given rise to a “substantial risk” or “serious prejudice”. It is a question of fact upon which we have to arrive at our own conclusion on the material before us and in all the circumstances of the case. We conclude that this delay has not given rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or has caused the second defendant serious prejudice. Accordingly the plaintiff's claim should not be dismissed for want of prosecution applying the *Garfield-Bennett* test.

Rule 6/26

56 We then went on to consider the second defendant's application under Rule 6/26 applying the *Lescroel* test.

57 It follows from our findings in relation to dismissal for want of prosecution that we agree with the Master as to his answers to the first questions in the *Lescroel* test, namely that because of the inordinate and inexcusable delay that we have found, we are not satisfied that the plaintiff has prosecuted his case with reasonable diligence, and that his failure to apply for a summons for directions was excusable.

58 Turning to the third limb and the balance of justice in this case, on the second defendant's side we took into account the prejudice (not amounting to serious prejudice) involved in any delay in the case brought against him, his rights under Article 6 ECHR and the importance of compliance with the Rule for the reasons set out in *Lescroel*. As against that on the plaintiff's side we took into account his rights under Article 6 ECHR and specifically the following:-

(i) From our examination of the pleadings and the evidence before us we regard the plaintiff's claim as standing a reasonable chance of success.

(ii) For the same reasons as set out above in relation to dismissal for want of prosecution, we do not consider that non compliance with this rule has made a fair trial impossible or caused the second defendant any serious prejudice.

(iii) Of particular concern to us is the claim that the plaintiff has deliberately been deprived by the second defendant of the fruits of his judgment in the first action. If this action were to be dismissed the second defendant would be able to retain funds it is alleged were withdrawn from Sidem with the intention of defeating the rights of the plaintiff under the judgment.

(iv) There had been no warning, either from the Court or from the second defendant, as to the risk of the claim being struck out (see below).

59 As McNeill JA said in *Alhamrani*:-

“..the ultimate decision is made in the exercise of a judicial discretion, exercised on the facts and circumstances of each case on its own merits;

and at the core is service to justice"

The balance of justice indicated to us that the action should continue and that dismissal of the plaintiff's claim for non compliance with Rule 6/26(1) would be disproportionate.

60 We would add one comment in relation to the conduct of the second defendant. He did not avail himself of his ability under Rule 6/26(2) to issue a summons for directions. Miss Robinson said this was because the second defendant was aware that the obligation was on the plaintiff to progress the litigation if he was serious about it and the second defendant did not want to incur further costs unnecessarily. Whilst we accept that Rule 6/26(1) places the burden upon the plaintiff, the second respondent's position in our view pays insufficient regard to the change brought about by the Court of Appeal judgment in *The Esteem Settlement* (2000) JLR N 41, namely that times have changed and it now had to be appreciated by all who are involved in civil proceedings that their objective had to be to progress the proceedings to trial in accordance with an agreed and ordered timetable at a reasonable level of cost and in a reasonably short time.

61 Practice Direction RC 05/31 is in the following terms:-

"Case Management

1. In recent years, the Royal Court has adopted a more active approach to case management with a view to achieving a more efficient, timely and cost-effective method of disposing of civil actions.

2. In furtherance of these objectives, the Bailiff has indicated the wish of the Royal Court to ensure that existing actions progress as quickly as is reasonably practicable. Furthermore, in relation to new actions it is the expressed wish of the Royal Court that all parties and their advisers should seek to have actions disposed of within twelve months of their commencement wherever that is possible. The Judicial Greffier and the Master have therefore been instructed to implement appropriate means to achieve these objectives.

3. Rule 6/25(2) OF THE Royal Court Rules 2004 provides that if three years after an action has been set down it has not been completed the Court may give notice of its intention to dismiss that action. Rule 6/26(13) allows the Court to consider dismissing an action if a summons for directions has not been issued within two months of the close of pleadings.

4. The Deputy Judicial Greffier and the Master have initiated a system whereby, once an action that comes before the Royal Court has been placed on the pending list, it will be reviewed after six months to ensure that appropriate progress has been made. If that is not the case then the Court will, of its own volition, institute such appropriate

case management steps as it considers necessary. This could include the use of its powers under Rule 6/26(13) in respect of any action which has become dormant.

5. It is the view of the Royal Court that the proposals described above which are being implemented are essential to ensure the due and proper administration of justice in civil proceedings."

62. There is no indication that the review by the Court envisaged in paragraph 4 took place after six months namely in August 2007 or of the Court ensuring that appropriate progress was being made or that the Court of its own volition took any case management steps. In any event it is quite clear from paragraph 2 of this practice direction that all parties, not just plaintiffs, should seek to have actions progressed as quickly as is reasonably practicable.

63 In *Hately -v- Morris and others* (2004) 1 BCLC 582, a case involving an application to strike out a petition on the grounds that it was an abuse of the process of the Court, Mann J made this comment:-

> ***"I have in mind the passage from Asiansky, set out above, which points out that it is not always appropriate for defendants to let sleeping dogs lie.*** This was not a case where the next step in the action was something which it was within the sole province of the petitioner to carry out. Nor is it a case in which there has been some express order with which the petitioner has failed to comply. The next step required in this petition after 9 April 2002 was a further CMC. The respondents could themselves have applied to re-fix the date, even though it might be said that the responsibility lay more naturally with the petitioner because it was his petition. They did not do so, and did not indicate which counsel was to be instructed in place of counsel had been acting up to that time. The picture would have been very different if the registrar had been correct in his finding that the petitioner had expressly assumed responsibility for re-fixing, but there is no evidence to support it."

In our view, similar sentiments now apply in this jurisdiction and in the light of *Esteem* and the practice direction, it is not always appropriate for defendants to let sleeping dogs lie. Issuing a summons for directions was not within the sole province of the plaintiff. The second defendant was in a position to issue such a summons or at least to have formally warned the plaintiff that failure to do so could lead to a summons for dismissal being issued. Such a warning, unheeded by the plaintiff without good excuse, could assist in tipping the balance of justice towards dismissal being the just and proportionate remedy.

Sanctions

64 Where the balance of justice comes down against dismissal, it is important that sanctions should apply to plaintiffs who are in breach of this rule for the reasons made clear in *Lescroel*.

65 We accepted therefore the plaintiff's invitation to apply the following sanctions, namely:-

We also referred the case back to the Master for directions to be given and a strict timetable to be set down to bring the matter to trial.

(i) We ordered the plaintiff to pay the second defendant's costs of the hearing before the Master on an indemnity basis.

(ii) We disallowed the plaintiff interest on his claim for the period of the delay.

66 In terms of the impact of indemnity costs, we note the following observations from Lord Woolf in *Biguzzi -v- Rank Leisure plc* (1999) 4 All ER 934 at page 941:-

"To that table can be added (in relation to a default such as that which has occurred in this case) the new power of the court to order money to be paid into court. The ability of the court to make an indemnity order for costs is an important power. Under the old rules there was little or no difference between an indemnity order and a standard order for costs. Under the new rules there is a significant difference. For a court to order certain parts of the costs to be paid on an indemnity basis and to be paid forthwith is a valuable sanction since a solicitor has to explain to his client why he has to be put into funds to pay costs on that basis forthwith. This is particularly valuable in bringing home to the solicitor and the party the consequences of default. It is more effective if the costs are assessed summarily than by a detailed assessment."

67 In relation to interest, we must express the reservation that the issue of the Court's power to make such an order was not tested by argument before us. Furthermore we did not have the opportunity of reviewing generally the sanctions, short of dismissal, available to the Court.

Convention Rights

68 In the circumstances it was not necessary for the Court to consider Mr Tracey's submissions that in the light of the parties' rights under Article 6 ECHR, the Court should move away from the *Lescroel* and *Garfield-Bennett* tests to the broader English test under the CPR.

69 Following the Human Rights (Jersey) Law 2000 ("the Human Rights Law") coming into force in December 2006, this Court is required under Article 4 of that law to read and give effect to legislation in a way which is compatible with Convention rights and under Article 7 it is unlawful for the Court to act in a way which is incompatible with a Convention right.

70 It is in cases involving Convention rights that the principle of proportionality applies, but it

would appear that in neither *Ybanez* nor *Lescroel* were the parties' Convention rights, ECHR case law thereunder and the principle of proportionality drawn to the attention of the Court. *Garfield-Bennett* predated the Human Rights Law, but it drew on English authority which predated the Human Rights Act 1998, which came into force in England in October 2000.

71 It is not immediately obvious to us, however, that consideration of the same would necessitate any change to the tests laid down in *Garfield-Bennett* and *Lescroel* in that each involves a careful exercise in balancing the interests and rights of both plaintiff and defendant.