Crill Canavan v MacKinnon

Jurisdiction:	Jersey
Judge:	The Bailiff:
Judgment Date:	23 July 2012
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Text

[2012] JRC 140A

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, **Kt**., Bailiff, **and** Jurats Morgan **and** Kerley.

Between
Carol Elizabeth Canavan, Geoffrey George Peter Crill, Nuno Manuel Camillo Santos-Costa, Paul Ralph Harben, Jane Constance Martin, Philip Damian James and Dionne Gilbert together trading as Crill Canavan
Plaintiff
ANDrew Kinross MacKinnon
Defendant

Advocate J. D. Kelleher **for the Plaintiff.**

Advocate C. J. Scholefield **for the Defendant.**

Authorities

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

Royal Court Rules 2004.

B -v- MR [2007] JRC 139.

Re Esteem 2000/150.

European Convention on Human Rights.

Biguzzi -v- Rank Leisure PLC [1999] 1 WLR 1926.

Marstons PLC -v- Charman [2009] EWCA Civ 719.

Trust — appeal against the decision of the Master dated 9th November 2011.

The Bailiff:

1 This is an appeal by the defendant against a decision of the Master on 9th November, 2011, whereby he struck out both the Order of Justice and the defendant's Answer and Counterclaim pursuant to RCR 6/26 (13).

The claim and counterclaim

2 The Master set out the facts relating to the claim and counterclaim with commendable clarity and conciseness in a manner which contains sufficient detail for our purposes. We therefore gratefully adopt his summary with minor alterations.

3 The plaintiff's Order of Justice states that the plaintiff firm was instructed (through English lawyers) to advise the defendant on various trust matters. These related primarily to family trusts established by the defendant's mother with a view to benefitting her family. According to the plaintiff it was agreed that the defendant would be billed direct by the plaintiff for the services provided. A number of fee notes were rendered and paid by the defendant between August 2003 and October 2004. Nine further fee notes issued between November 2004 and March 2006 totalling £349,523.78 remain outstanding. The plaintiff claims this sum together with interest.

4 The defendant's Answer and Counterclaim (as re-amended) sets out in more detail the factual background to the relationship between the parties. In his defence to the claim, the defendant says that the plaintiff was retained by the UK lawyers, not himself and it is those

lawyers who are liable to pay any fees which may be due. The defendant denies that he had any contract or retainer arrangement with the plaintiff. Alternatively, he says that the work done by the plaintiff was useless and any “consideration” has failed under the contract and no sums are due. Alternatively, the defendant says that the sums claimed are excessive.

5 The defendant goes on to seek to set off any sums found to be due against the counterclaim which he brings. This arises from advice given by the plaintiff in relation to the validity of the family trusts established by the defendant's mother and intended to benefit the defendant and his brother (and their respective families) equally after her death. Advice had also been provided to the defendant by English counsel.

6 As a result of the advice which he received, the defendant (represented by the plaintiff) instituted proceedings by Order of Justice seeking to challenge those family trusts as shams or in breach of the maxim of Jersey law “ *donner et retenir ne vaut”*. The defendants to that claim were the trustees of the trusts, the defendant's brother and other potential beneficiaries. Part of the claims against the trustees included criticisms of their professional activities.

7 The Order of Justice in those proceedings was issued in December 2003 and in February 2004 the trustees brought an application that it be struck out. The Royal Court struck out the Order of Justice on 6th December, 2004. This was upheld by the Court of Appeal in May 2005. An application by the defendant for leave to appeal to the Privy Council was refused in December 2005. In the meantime, agreement was reached between the defendant and the trustees whereby the trustees were removed as a party to those proceedings, the allegations against them were withdrawn and they became entitled to their costs. The defendant says that this was done on the advice of the plaintiff.

8 In his counterclaim the defendant says that he was wrongly advised by the plaintiff on the matters described above. He claims damages for breach of contract and/or negligence. The defendant therefore denies owing the fees claimed by the plaintiff and counterclaims for the repayment of earlier fees paid by him and other payments made by him (including payments made under the various compromise agreements entered into on the advice of the plaintiff with the trustees). The total of these claims is in excess of £1.5 million.

9 In its Reply, the plaintiff denies any negligence or breach of contract and joins issue with the allegations made. The plaintiff asks that the counterclaim be dismissed.

The history of these proceedings

10 The Order of Justice was issued by the plaintiff as long ago as 22nd November, 2006. It was placed on the pending list on 15th December, 2006. On 18th January, 2007, the defendant issued a summons seeking a stay on the grounds that the English courts were a

more appropriate forum. That application was rejected by this Court on 10th May, 2007, and leave to appeal was refused by the Court of Appeal on 15th June, 2007.

11 Following that decision the defendant filed his Answer and Counterclaim on 13th July, 2007, which was amended by consent on 24th August, 2007. On 19th September, 2007, the plaintiff filed a Reply and Answer to the Counterclaim.

12 On 5th November, 2007, the plaintiff issued a request for further and better particulars of the Amended Answer and Counterclaim and these were filed by the defendant on 14th January, 2008. In the face of criticism by the plaintiff that the Answer and Counterclaim were prolix and unclear, a consent order was made on 31st March, 2008, providing for the filing of a Re-Amended Answer and Counterclaim so as to re-state the defendant's position in clearer terms. This was done on 21st April, 2008, and the plaintiff filed its Reply and Answer to that re-amended pleading on 20th May, 2008.

13 Between August 2008 and January 2010 the parties agreed a number of stays for periods of four months by consent order with a view to their seeking to resolve matters by mediation. The final order in that respect was issued on 19th January, 2010, and provided for a further stay to 8th April, 2010, to enable the parties to mediate. As with the previous orders, the order went on to provide that, if the dispute was not settled within the time period of the stay, the plaintiff would issue a further summons for directions within seven days from the next working day following the lapsing of the stay. The reference to a “further” summons for directions was because the plaintiff had filed one back in July 2008 but this had never been proceeded with.

14 The summons envisaged by the order has not been issued. Indeed, the last item of correspondence between the parties is a letter from Mr Goodman, an English solicitor advising the defendant, to Carey Olsen on 12th April, 2010. Since then, neither party has taken any step in the action.

15 On 24th May, 2011, the Master issued one of his standard periodic notices in the following terms:-

> ***“Notice is hereby given pursuant to Rule 6/25(2) and to Rule 6/26(13) of the Royal Court Rules 2004 that the Court intends to consider dismissing the actions listed in the Schedule hereto pursuant to the powers conferred upon it by the said Rules.***
>
> ***Any party objecting to an action being dismissed must do so by issuing a summons to show cause why the action should not be struck out.*** Any such summons must be issued before the expiry of 28 days of this notice with a view to the summons being heard before the Master of the Royal Court at the earliest opportunity. It is **not** sufficient to write to the Judicial Greffier requesting that the action be allowed to continue. A summons must be issued within the

specified time otherwise the action will be dismissed. Even if parties to an action all agree that it will continue, a summons must still be issued to show cause why that is appropriate.

It should not be assumed that the Master will readily agree to an action being allowed to continue. He will require the applicant to convince him that this is appropriate. If the Master does agree, then the summons hearing will be used as an opportunity to give directions for orderly and expeditious conduct of the action to trial as soon as possible. Parties issuing such a summons should, therefore, put forward proposals to be considered in any directions hearing." [original emphasis]

This case was listed in the Schedule to the Notice.

16 Within the 28 day period, the plaintiff and the defendant issued summonses in accordance with the Notice. The summons issued by the plaintiff sought orders that both the Order of Justice and the Answer and Counterclaim be dismissed or, alternatively, that the Order of Justice be allowed to continue and that directions be given. The summons issued on behalf of the defendant asked that the Answer and Counterclaim be allowed to continue and set out a list of directions which should be given if that application succeeded.

17 The matter came on for hearing before the Master on 6th October, 2011, and, as mentioned previously, he gave his decision on 9th November. He applied the test described in *Lescroel -v- Le Vesconte* [2007] JLR 273 and, for the reasons which he set out in his judgment, he dismissed both the Order of Justice and the Answer and Counterclaim. It is against that decision that the defendant appeals.

A preliminary objection

18 The relevant provisions of Rule 6/26 are in the following terms:-

"(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 that 42 days thereafter in the form (or substantially in the form) described 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 from 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.

(14) A person who was a party to an action dismissed pursuant to paragraph (13) may apply to the Court for the action to be reinstated.

(15) An application under paragraph (14) must be made by summons which:-

(a) states the grounds of the application; and

(b) is supported by an accompanying affidavit verifying the facts on which the application is based."

19 The Notice issued by the Master in this case as set out at paragraph 15 above was in the standard form habitually issued by the Master in relation to actions which he is considering striking out under the Rule. Advocate Scholefield submits that it is inconsistent with the Rule. He argues that paragraph (13) clearly envisages that the 28 day window should operate as a warning to the parties that the action is about to be dismissed. The purpose of that window is to allow them to issue a summons for directions so as to progress the action to trial. He argues that if they do issue a summons for directions within the 28 day period, the action will continue. The power to dismiss does not arise. If they do not issue a summons for directions within the period, the action will be dismissed. He submits that there is no requirement that cause be shown as to why the action should not be dismissed where a summons is issued within the 28 day period. The question of showing cause only arises after the 28 days have expired and the action has been dismissed. In that case, cause must be shown to have the action reinstated under paragraph (14). He points out that the process adopted by the Master in his circular is very different from this. The Master's circular gives notice that the Court is proposing to dismiss the action after 28 days but it then goes on to require the parties to show cause as to why the action should not be struck out, such summons to be issued before 28 days have expired. He submits that this is the opposite of the process envisaged by the Rule. The Rule supposes that cause need only be shown after the 28 days have expired and after the action has been struck out. Otherwise, he submits, what is the point of the 28 day window? And what is the purpose of paragraph (14)?

20 He submits therefore that the practice of the Master is contrary to the Rule and it is wrong to

require a party to show cause as to why an action should not be struck out when there is no such requirement on the face of the Rule. Such a requirement can only arise under paragraph (14); that is after the 28 days have expired. It follows, he says, that the *Lescroel* test should only apply to an application to reinstate under paragraph (14). It should not apply to paragraph (13). Accordingly the Master was wrong to apply the *Lescroel* test and wrong to require the defendant to show cause at all.

21 We reject Advocate Scholefield's submission. In our judgment the standard practice adopted by the Master is entirely consistent with Rule 6/26. We so hold for the following reasons:-

(i) The whole purpose of introducing the requirement for a plaintiff to issue a summons for directions within a short period of the close of pleadings was to avoid cases falling into a black hole and off the Court's radar. This had often happened under the old system in that it was entirely up to the plaintiff as to when he took steps following the close of pleadings. The Court had no way of forcing the pace or managing the process. The only remedy lay eventually in a defendant applying to strike out on the grounds of inordinate and inexcusable delay. The need to issue a summons for directions within a short period of the close of pleadings enables the Master – as he does by way of standard practice – to direct the parties to attend within a short delay upon the Bailiff's Secretary to fix a trial date. This enables the Court to manage the process to achieve that date or agree an adjournment only for good cause. Cases should no longer fall into a black hole.

(ii) If Advocate Scholefield's submission is correct, there is a continuing risk of this occurring. According to him, no matter how long the delay in issuing the summons for direction has been, a plaintiff can get out of jail free by issuing a summons for directions within the 28 day period after receiving notice from the Court under paragraph (13). The Court has no ability to strike out the action if that occurs, no matter how long the delay has been.

(iii) In our judgment, nothing in the wording of the Rule requires such an unreasonable result. Paragraph (13) simply provides that the Court may dismiss the action after giving 28 days notice. It is a discretionary decision and it must therefore be open to the parties to submit reasons as to why the Court should or should not exercise its discretion in a particular manner. Furthermore, if Advocate Scholefield is right, the Court may not dismiss an action if, during the 28 day period, a summons for direction is filed. In our judgment it would require clear wording in the Rule to suggest that the discretion apparently conferred on the Court by paragraph (13) could not be exercised in such circumstances.

(iv) We do not consider that the existence of paragraph (14) negates what would otherwise be the natural interpretation of paragraph (13). All that paragraph (14) is doing is making it clear that there is jurisdiction for the Court to reinstate an action even where it has dismissed it under paragraph (13). Clearly, in those circumstances, good cause would need to be shown.

22 For these reasons we consider that the Master is correct in his standard procedure and was correct to apply the *Lescroel* test when deciding whether the Order of Justice and the Answer and Counterclaim should be struck out or allowed to continue.

The legal test to be applied

23 The Master correctly applied the test laid down in *Lescroel* which is conveniently summarised in the head note as follows:-

> ***"When considering whether to dismiss an action under R6/26(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 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."

24 The test in *Lescroel* was elaborated in *B -v- MR* [2007] JRC 139 at paragraphs 25 and 26 as follows:-

> ***"We should at this stage mention one other point raised by Mr Le Quesne.*** He submitted that the questions posed in *Lescroel* ***must be considered sequentially; in other words the Court should only go on to consider the next question if the plaintiff has succeeded on the previous question.*** …
>
> ***26. We do not agree with that analysis. A decision as to whether to dismiss an action without considering the merits is clearly an important discretionary decision which should be taken on the basis of all the circumstances of the particular case. It would be inconsistent with the existence of such a discretion for the Court to be bound rigidly by a series of sequential hurdles which the plaintiff has to surmount if he is to succeed. In our judgment the three questions are simply an attempt to provide some guidance as to the matters which should be considered on such an application. …"***

25 In applying the test, the Court should bear in mind the overriding objectives described in *Re Esteem 2000/150* when the Court of Appeal said at paragraph 33:-

> ***"From now on it has to be appreciated by all who are involved in civil proceedings in the Royal Court that their objective has to be 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."***

26 However, the Court must also bear in mind the terms of Article 6 of the European Convention on Human Rights which confers a right to access to a court, and the need for any measure limiting this right, such as striking out, to be proportionate. In that context we would refer to the well-known observations of Lord Woolf MR in *Biguzzi -v- Rank Leisure PLC* [1999] 1 WLR 1926 at 1933 – 1934. These were in turn referred to by Rix LJ in *Marstons PLC -v- Charman* [2009] EWCA Civ 719 at para 21 as follows:-

> ***"21. Mr Zaman QC, who has said everything he could and has done so very nicely (if I may put it in that way) on behalf of Marstons, has cited to us the well known case of Biguzzi v Rank Leisure PLC [1999] 1 WLR 1926, almost the first and perhaps, in its way, to this day the leading case in this court from the judgment of Lord Woolf, the Master of the Rolls himself, on the case management powers of the then new Civil Procedure Rules. The essence of the decision in that case was that, while it had to be recognised that under the CPR, delays in complying with court orders would not be tolerated in the leisurely way in which they had perhaps been tolerated under the Rules of the Supreme Court, nevertheless courts exercising their new case management powers were not to abuse those powers by going to the extreme of striking out a case for delay in compliance with court orders when a more proportionate use of the much more flexible powers granted under the CPR would be more attune to the problems in question in a particular case."***

27 In relation to the approach on appeal, both parties accepted the well-established test that, on an appeal from the Master in relation to interlocutory matters, the Court exercises its own discretion whilst paying due regard to the decision of the Master.

The parties' submissions

28 The first issue is whether, apart from the non-issue of the summons for directions, the parties have prosecuted their claim with reasonable diligence. Advocate Kelleher submits that the defendant has not. In the course of his oral submissions, he took the Court through the correspondence in some detail. He pointed out that six months had been lost because of a meritless application under *forum non conveniens* by the defendant, that the Answer and Counterclaim had had to be amended twice in order to get it into proper shape, and that the defendant had completely failed to progress mediation between August 2008 and April 2010, when the stay expired. He made particular criticism of the fact that the possibility of mediation had been stymied by the unparticularised and unpleaded claim (said now to

be over £5 million) threatened against the plaintiff in respect of Inheritance Tax payable by the mother's estate ("the IHT claim").

29 The background the IHT claim is that on 11th July, 2008, Advocate Scholefield wrote to Advocate Kelleher informing him that the mother's estate faced a substantial IHT liability because of the faulty preparation of certain loan documentation prepared by the trustees or other advisers to the mother during her life. It was said that Crill Canavan should have spotted this and furthermore should not have allowed the defendant to enter into the agreement with the trustees and its personnel so as to give them wider protection than they were entitled to, thereby leaving the defendant without recourse in respect of the failure of the loan arrangements. Advocate Kelleher submitted that the mediation stalled because of this claim and that no clarification was produced until a letter from Mr Goodman of 12th April, 2010, although, apart from indicating that the claim could now well exceed £5 million, this did not really add very much to what had been said previously. Advocate Kelleher argued that, if it is ever pleaded, the IHT claim is doomed to failure as it is clear that the plaintiff agreed only to advise on Jersey law, not English tax law and that a claim in respect of the validity of the trusts had no connection with any alleged defect in measures designed to deal with English tax. However, the existence of a possible claim had rendered mediation impossible and that was the fault of the defendant. He contended therefore that the defendant was responsible for the long delay in progressing this case.

30 Advocate Scholefield argued to the contrary. He says that, given the complexities of the case, there has been no undue delay in progressing it. The defendant was entitled to take the forum point even if it ultimately turned out to be unsuccessful. Otherwise the delay has been caused by mutual agreement between the parties in staying the proceedings for the purposes of mediation. Both parties were equally responsible for the delays in that period and he pointed to various items of correspondence where it was clear that Crill Canavan were much engaged in the Alhamrani litigation and were asking for extensions of time in order to comply with various steps which were to be taken.

31 In relation to the second issue under *Lescroel*, namely whether the failure to apply for a summons for directions was excusable, Advocate Scholefield argued that it was. He pointed out that the Act staying the proceedings for mediation required the plaintiff to issue a further summons for directions within 7 days of the expiry of the stay. He accepted that, under Rule 1/1(2), references to a plaintiff in the Rules may, where the context admits, include reference to a party making a counterclaim but that was not applicable here where the Act itself was clearly referring to Crill Canavan when it referred to "plaintiff". At the time of the expiry of the stay, the defendant was acting in person, although it was accepted that he still had the benefit of advice from Mr Goodman. In those circumstances it was entirely excusable for him to think that the onus lay on the plaintiff to issue the summons for directions, not him. Furthermore, as explained in the affidavit of Mr Goodman, it was felt by the defendant's side that the reason for the delay was that the plaintiff was considering the contents of Mr Goodman's letter of 12th April, 2010, explaining the nature of the IHT claim and that was why no further steps were being taken.

32 Advocate Kelleher, on the other hand, submitted that, whilst it was accepted that the primary responsibility for issuing a summons for directions lay on the plaintiff and it had failed to do so, there had equally been a failure on the part of the defendant. It had never been communicated to the plaintiff that the defendant was acting in person. Viberts remained on the record and Carey Olsen had continued to receive correspondence either from Viberts or from Mr Goodman. It was clear that the defendant had at all time had access to legal advice should he wish to obtain it. Certainly he had at no stage written personally to Carey Olsen. In relation to the counterclaim, the defendant was the “plaintiff”. In all the circumstances the failure by the defendant to issue a summons for directions after April 2010 was not excusable.

33 As to the third issue, namely whether, on the balance of justice, the action should be allowed to continue, Advocate Scholefield argued that it would be unjust to refuse relief. Even if there had been default by the defendant, there was clearly much greater default by the plaintiff. Furthermore even the existing counterclaim greatly exceeded the claim and, if the IHT claim were included, the defendant had a very substantial claim indeed. It would be unjust to deprive him of the possibility of seeking justice in relation to his losses because of delay in issuing a summons which was primarily the responsibility of the plaintiff. The plaintiff would have achieved a result favourable to itself by doing nothing and then blaming the defendant. As to whether a fair trial was possible, he submitted that much of the evidence would turn on written documents. In relation to meetings, the other parties, whether the plaintiff or Mr David Brownbill, the English counsel concerned, would undoubtedly have file notes. It was not therefore a matter which would turn substantially on the recollection of oral conversations without contemporaneous written evidence to support or otherwise each party's version.

34 Advocate Kelleher, on the other hand, submitted that there was clearly a right that a fair trial would not be possible because of the lapse of time since the events in question, which took place between mid-2003 and mid-2006.

35 Finally, Advocate Kelleher submitted that the reason for the plaintiff being willing to see the Order of Justice and the Answer and Counterclaim dismissed was a purely pragmatic one. It was faced with the prospect of lengthy litigation in circumstances where, even if successful, it might be left with a substantial bill for unrecoverable costs because of the difference between the costs incurred and costs recoverable. If, however, the Court were to be against him, justice required that both claim and counterclaim should be allowed to continue, so that the true dispute between the parties could be resolved.

Decision

36 We agree with the Master that neither party has shown reasonable diligence in progressing their respective claims. The fact is that these proceedings started in November 2006 and that some three and a half years had elapsed by the time the summons for directions should have been issued in May 2010. The primary reason for the long delay is that successive stays for mediation were granted between August 2008 and April 2010. We

consider that both parties were to blame for the delay during that period. We accept that the threatened IHT claim complicated matters but, apart from a few isolated letters, we have not been referred to anything to suggest that the plaintiff was pressing hard for resolution of this issue or was threatening not to allow the stay to continue unless the matter had been resolved. In essence, nothing really happened during the period of the stay and we consider that both parties were to blame for this.

37 As to whether the defendant's failure to issue a summons for direction was excusable, we have been persuaded that it was. All the Acts ordering a stay, including the last one, directed the plaintiff to file a further summons for directions within 7 days of the expiry of the stay. From the heading of the Act, it is clear that the “plaintiff” meant Crill Canavan. It was for them to issue the summons. The fact that they did not do so was because they had taken a decision not to progress matters in the hope that the litigation would go away. It is clear from the affidavit evidence that the defendant, although he continued to have access to legal advice, was trying to do as much as possible himself and had put Viberts on a form of stand-by. We can understand that he felt that the onus lay with the plaintiff, not only because of the terms of the Act, but also because the last correspondence had been from Mr Goodman setting out details of the IHT claim and it was thought that the plaintiff was assessing how to respond to this.

38 Accordingly we come to the critical question of whether, on the balance of justice, the defendant's case should be allowed to continue. We accept that the delay may affect the oral evidence but we also accept the defendant's point that the plaintiff is a firm of advocates and that Mr Brownbill, the English counsel is an experienced barrister. One would expect there to be file notes of all important meetings which would assist in refreshing memories of events some years ago. The context of this litigation is that the defendant alleges that the plaintiff's negligence has cost him some £1.5 million. One must bear in mind the need to be proportionate in the measures which the Court applies where parties have failed to comply with the requirements of the Rules. In our judgment a fair trial can still be held. Given our finding that the failure of the defendant to file a summons for directions was excusable, we have just been persuaded that the balance of justice comes down in favour of allowing the defendant to continue with this counterclaim.

39 That then requires us to consider whether we should also allow the claim to proceed. It is clear that the plaintiff took a deliberate decision not to progress the matter. Nevertheless, we think it would be a source of injustice if we were to allow a counterclaim to proceed without the claim proceeding. If this matter is to proceed at all, it should be on the basis that each party has the opportunity of putting forward its respective case so that, if the plaintiff proves it is entitled, it can recover a substantial sum of legal fees outstanding and, if the defendant succeeds, he will recover damages for losses which he has incurred as a result of the plaintiff's negligence.

40 Accordingly we allow this appeal and re-instate both the Order of Justice and the Answer and Counterclaim. We shall however wish to hear the parties as to the directions which we should give in order to ensure speedy progress of this litigation hereafter. In particular, the

threatened IHT claim must either be pleaded promptly or foregone.