[2010–12 Gib LR 373]

PODESTA v. G.L. DIG-IT LIMITED, SHELLY CP LIMITED and ATTORNEY GENERAL

SUPREME COURT (Prescott, J.): September 18th, 2012

Civil Procedure—pleading—striking out—no strike out for delay in pursuing claim unless amounts to flagrant abuse of process or renders fair trial impossible—delay explicable if caused by parties' attempts to clarify issues before trial, claimant's financial difficulty, or medical problems—fair trial not impossible by virtue of claimant's delay if defendant unable to find witnesses but should have sought witness statements earlier

The claimant brought proceedings against the defendants to recover damages for personal injury.

The Gibraltar Government, the third defendant, hired the second defendant to demolish a warehouse. The second defendant sub-contracted work to the first defendant, who contracted the claimant. In 1998, whilst working on the warehouse, the claimant fell through the roof, sustaining, *inter alia*, serious spinal injuries. A claim form was issued against the defendants in 2001, the day before the expiry of the limitation period, and served a day before expiry of the claim form. After defences and allocation questionnaires were filed, and case management conferences held, there was a delay of two years in which the claimant failed to exchange witness statements or communicate with the defendants, resulting in the defendants' applying to strike out the claim in 2006. The application to strike out was withdrawn on agreed terms, witness statements were exchanged, and directions for trial were incorporated into a 2006 consent order ("the 2006 order"). The 2006 order required, *inter alia*, the claimant to file the listing questionnaires, set down the matter for trial on the first available date after September 3rd, 2007, file a trial bundle and exchange skeleton arguments. The claimant failed to comply with the terms of the order, only taking further steps to pursue his claim in 2010. In 2008, the parties attempted to clarify certain issues before trial that concerned payments advanced to the claimant by the Department of Social Security, details of how he was funding the claim, and information about his income tax. The claimant had also had his legal assistance withdrawn (although it was restored in 2011) and continued to suffer from his injuries. The second defendant had been put into liquidation and the first and third defendants applied to strike out the claim.

The first and third defendants submitted that the claimant's material

breaches of the 2006 order were flagrant and/or made a fair trial impossible, as the delay made it impossible for them to find the necessary witnesses.

The claimant submitted in reply that (a) the delay could be explained by the parties' attempts to clarify the issues before trial and his financial and medical difficulties; (b) he was taking steps to pursue his claim; and (c) the difficulty of finding witnesses was of the defendants' own making, as the need for eyewitnesses should have been obvious from his particulars of claim in 2001.

Held, dismissing the application:

To strike out the claim would be disproportionate and unjust as the claimant's delay had not made a fair trial impossible nor made the claim a "flagrant" abuse of process. The only material breaches of the 2006 order were the claimant's failure to file the listing questionnaires, failure to set down the matter for trial on the first available date after September 3rd, 2007, and the resultant failures to file a trial bundle and exchange skeleton arguments. The delay in 2008 could be explained by the correspondence between the parties that attempted to clarify and resolve the issues before trial. The delay after 2008 could be explained by the claimant's financial difficulties in pursuing the claim after his legal assistance had been withdrawn and his ongoing medical problems. After applying in 2010 for his legal aid to be restored, he had taken steps to continue his action. The defendants' difficulties in identifying and obtaining witnesses could not be attributed to the claimant's delay. Any such difficulties were a consequence of their own inaction, as the need for eyewitness statements should have been obvious to them from the claimant's particulars of claim in 2001 or from the exchange of witness statements in 2006. Strike-out was, therefore, inappropriate, but the court would make an "unless order" so that the matter might be brought to trial without further delay (paras. 31–37; para. 40; paras. 42–52).

Cases cited:

(1) *Arrow Nominees Inc.* v. *Blackledge*, [2000] C.P. Rep. 59; [2000] 2 BCLC 167; [2001] BCC 591, followed.

(2) *Asiansky Television Plc* v. *Bayer-Rosin*, [2001] EWCA Civ 1792, *dicta* of Clarke, L.J. applied.

(3) *Biguzzi* v. *Rank Leisure Plc*, [1999] 1 W.L.R. 1926; [1999] 4 All E.R. 934, followed.

(4) *Canada Trust Co.* v. *Stolzenberg (No. 2)*, [1998] 1 W.L.R. 547; [1998] 1 All E.R. 318, followed.

(5) *Kent* v. *Griffiths*, [2001] Q.B. 36; [2000] 2 W.L.R. 1158; [2000] 2 All E.R. 474, *dicta* of Lord Woolf, M.R. applied.

(6) *Swaptronics Ltd., In re*, [1998] All E.R. (D.) 407; *The Times*, August 17th, 1998, followed.

Legislation construed:
Civil Procedure Rules, r.3.4(2): The relevant terms of this paragraph are set out at para. 13.

K. Tonna for the claimant;
I. Winch for the first and third defendants.
The second defendant did not appear and was not represented.

1 **PRESCOTT, J.:** This is an application by the first and third defendants for an order pursuant to the CPR, r.3.4(2)(c) that the claimant's statement of case be struck out for failure to comply with a rule and/or court order.

Background

2 On April 18th, 1998, the claimant was working on the demolition of a warehouse owned by the Government of Gibraltar. The second defendant was the main contractor engaged to carry out the demolition works. The second defendant is in liquidation. The first defendant was a sub-contractor for the second defendants.

3 The claimant was engaged by the first defendant to assist with the demolition work, and whilst he was working on the roof of the warehouse on April 18th, 1998, he fell approximately 15–20 ft. through the roof, sustaining serious injury to his spine, resulting in restricted mobility, and impairment of bladder and sexual functions.

4 The claimant originally instructed Messrs. Triay & Triay, although it is not apparent when this first instruction was made. Thereafter, Messrs. Cruz & Co. were instructed from October 2000 until April 2001. However, shortly before the limitation period expired, Messrs. Triay & Triay were once again instructed. Proceedings were issued by Messrs. Triay & Triay for the claimant on April 17th, 2001, a day before the expiry of the limitation period. Thereafter, on July 10th, 2001, Messrs. Isolas were instructed. No explanation is provided for the shift between legal firms, and in the absence of one it is a little unusual.

5 Service of proceedings took place on the day before the validity of the claim form would have expired under the CPR, r.7.5(1), on August 16th, 2001. The reason for this apparent dilatoriness is set out in Mr. Tonna's witness statement, thus:

> "It was the relevant insurer's, Norwich Union (International) Ltd., initial view that the first defendant, G.L. DIG-IT Ltd., was not covered by the relevant liability insurance policy. This resulted in protracted correspondence during which the insurer resolutely refused cover. This involved further long, drawn-out correspondence with Messrs. TSN Solicitors for G.L. DIG-IT Ltd."

6 On December 28th and 31st, 2001, respectively, the first and third defendants filed their defence. On January 23rd, 2002, the claimant filed the allocation questionnaire. Thereafter, there followed three case management conferences, on February 15th, 2002, April 29th, 2002, and March 25th, 2003.

7 On May 5th, 2003, the claimant provided disclosure. On September 8th, 2003, there was a further case management conference, followed by disclosure for the first and third defendants which took place on November 21st, 2003. On the same date, the claimant applied for legal assistance, which was granted some five months later on April 20th, 2004.

8 On January 7th, 2004, there was at least one request by the claimant for an extension of the time allocated for the exchange of witness statements. Thereafter, there was no further communication by the claimant for two years and eight months, when the claimant responded to an application on September 13th, 2006 by the first and third defendants for strike-out. The application for strike-out was, in due course, withdrawn on agreed terms.

9 Witness statements were eventually exchanged on December 5th, 2006. These consisted of a witness statement for the defendants by Graham Lutwyche and two witness statements for the claimant, one by Christopher Bell, and the other by the claimant himself. On December 19th, 2006, directions for trial were agreed and were incorporated into a consent order.

10 In February 2007, the claimant produced a schedule of loss which was challenged by the defendants and subsequently revised. Thereafter, during the course of 2008, there was some correspondence between the parties, in relation to payments advanced by the Department of Social Security to the claimant, details of the claimant's funding of the claim, and information regarding income tax.

11 As a consequence of the claimant's change in marital status, his legal assistance was withdrawn on July 4th, 2008. Thereafter, aside from some correspondence relating to income tax issues, there was no communication from either side until 2010.

12 By letter of September 24th, 2010, Isolas, for the claimant, suggested a split trial on liability and quantum, and the need for more experts. On the same date, the claimant renewed his application for legal aid in light of his separation from his second wife. Legal aid was granted six months later, on March 7th, 2011. Despite this, solicitors for the claimant did not write to the solicitors for the defendants again until six months later on September 2nd, 2011. This was chased by a letter on November 11th, 2011 which elicited a reply from the defendants on the same date indicating their intention to apply to strike out the claim.

Strike-out

13 Rule 3.4(2)(c) provides:

> "The court may strike out a statement of case if it appears to the court—
>
> . . .
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

It is apparent that the remit of this rule relates to the way the claim has been conducted, and its *raison d'être* is to discourage non-compliance with court rules directions and orders. It therefore has a crucial part to play in safeguarding the integrity of the litigation process and the observance of the overriding objective.

14 Counsel for the defendants relies on art. 6 of the European Convention, which enshrines the right to a fair trial. It is not in dispute that this is an irrefutable right which extends equally to defendants as well as claimants. Mr. Winch draws my attention to *Kent* v. *Griffiths* (5), in which Lord Woolf, M.R., said ([2001] Q.B. 36, at para. 38):

> "Courts are now encouraged, where an issue or issues can be identified which will resolve or help resolve litigation, to take that issue or issues at an early stage of the proceedings so as to achieve expedition and to save expense. There is no question of any contravention of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) in so doing. Defendants as well as claimants are entitled to a fair trial and it is an important part of the case management function to bring proceedings to an end as expeditiously as possible."

15 It is fair to say that given the draconian nature of a strike-out, which essentially results in depriving a party of his right to trial, the court should approach such an application with care and caution. The general principle expounded above must be viewed in the wider context of other authorities on point (*Arrow Nominees Inc.* v. *Blackledge* (1); *In re Swaptronics Ltd.* (6); *Canada Trust Co.* v. *Stolzenberg (No. 2)* (4)) which suggest that if the failure to comply with court rules, directions, or orders does not render a fair trial impossible, an order for strike out (1 *Civil Procedure* (2011), para. 3.4.1, at 69)—

> ". . . even for contumacious breach is likely to be a breach of ECHR art. 6 as being a breach of the respondent's right to a determination of their civil rights and obligations at a fair and public hearing within a reasonable time by an independent tribunal."

and further that (*ibid.*)—

"to strike out a claim solely on the ground of the claimant's delay where the claim has reasonable prospects of success is unlikely to be considered justifiable under ECHR art. 6(1): *Annodeus Ltd.* v *Gibson*, *The Times*, March 3 2000 Ch D."

16 Essentially, the decision whether or not to strike out is a matter for the court's discretion and the exercise of such discretion should, as in *Asiansky Television Plc* v. *Bayer-Rosin* (2) ([2001] EWCA Civ 1792, at para. 49, *per* Clarke, L.J.), be guided by consideration of "what is the just order to make, having regard to all the circumstances of the case."

17 In addition, a relevant factor in that consideration must be whether strike-out is disproportionate. Further, of note is the recognition by Clarke, L.J. that where a fair trial is still possible, the court would only strike out in a case of "flagrant" abuse.

18 It is relevant that the Court of Appeal in *Biguzzi* v. *Rank Leisure Plc* (3) highlighted the imposition of sanctions as an alternative to strike-out in cases of breaches of time limits, a view which was endorsed by Clarke, L.J. in *Asiansky Television Plc* v. *Bayer-Rosin*.

19 With the above in mind, the starting point must be to identify those rules which it is alleged have been breached. The relevant order is that of December 19th, 2006. In the words of Mr. Winch, it is a breach of "essentially that whole order" which forms the basis for this application. However, the nature of the remedy sought is such that broad generalizations will not suffice. It is vital to examine the order of December 19th, 2006, so as to ascertain with certainty exactly where the breach lies.

20 Paragraph 1 required no action by the claimant.

21 Paragraph 2 required that the claimant file and serve a fully particularized schedule of losses and expenses by February 2nd, 2007. The claimant filed a provisional schedule of loss on February 9th, 2007, followed by a definitive schedule on February 21st, 2007. Counsel advances the submission that it took nine years for a schedule of loss to be served. This is not quite accurate, as the claimant was only obliged to serve the schedule pursuant to the order of December 19th, 2007. The most he can be said to have delayed is 19 days, and whilst this may be a breach of the order it is not one that would merit strike-out.

22 Paragraph 3 required that the defendant serve a counter-schedule of losses and expenses by March 2nd, 2007. This was done on April 25th, 2007.

23 Paragraph 4 required no action.

24 Paragraphs 5–8 in relation to orthopaedic evidence fell away.

25 Paragraph 9 provided for evidence to be given by the report of a

single expert in the field of urology and, on January 23rd, 2008, the claimant disclosed a joint urology report which had been delivered to him.

26 Paragraph 10 provided that if the parties were unable to agree upon a joint expert by January 19th, 2007, it would be open to them to apply for further directions. So far as I am aware, neither party has made any such application.

27 Paragraph 11 required no action.

28 Paragraph 12 required that each party give his instructions to the single expert by February 2nd, 2007. I am ignorant as to whether either party has given instructions.

29 Paragraph 13 required no action.

30 Paragraph 14 provided that the parties could put questions to the single expert by June 1st, 2007. Both claimant and defendant put questions to the expert, but these went unanswered.

31 Paragraph 15 required that listing questionnaires be filed by July 13th, 2007. This paragraph was not complied with.

32 Paragraph 16 required that the trial of this matter be set down on the first available date after September 3rd, 2007. This paragraph was not complied with.

33 Paragraphs 17 and 18, on the filing of the trial bundle and exchange of skeleton arguments, were contingent upon para. 16 being complied with. Paragraph 19 related to costs and para. 20 gave liberty to apply.

34 It is apparent from the foregoing that the most material breach is in respect of paras. 15 and 16, and in particular that of para. 16. The defendants maintain that non-compliance with that rule in particular has delayed trial to the extent that a fair trial is now impossible.

35 For the claimant, it is said that the reason, initially at least, for not setting the matter down as directed was because the parties were engaged in constructive correspondence. This started with a letter from the defendants dated January 25th, 2008, raising queries in relation to injury benefits received by the claimant as well as the manner in which the claimant was funding the litigation. The claimant wrote to the Department of Social Security ("DSS") promptly on February 1st, 2008, requesting details of the payments of injury benefits received by him. On February 7th, 2008, the claimant wrote to the defendants advising them of the DSS's response to the effect that the claimant had received invalidity credits which were not deductible from any compensation he might receive and advising them that the matter had been privately funded until the issue of a legal aid certificate in February 2004.

36 Thereafter, the defendants wrote to the claimant on February 18th,

2008 requesting further details and again on April 8th, 2008 requesting access to the claimant's income tax records, information on how the claim was originally funded and details as to how the claimant could have been fit enough to work in 2001, but not at the time of writing. On April 14th, 2008, the claimant wrote again to the DSS seeking clarification, and on April 24th, 2008, the claimant wrote to the defendants explaining that they were attempting to clarify the DSS issue. The letter also addressed the other queries raised by the defendants. It is of note that the letter also provided a consent form for the DSS to release tax records appertaining to the claimant from 1997–2000 and an invitation to supply a consent form for tax records post-2000.

37 It is not in dispute that, as a matter of law, it is for the claimant to prosecute his case. It is undeniable that he did not seek to have the matter set down for trial on the first available date after September 3rd, 2007. It is evident that, in the time period discussed above, both parties were active in attempts to resolve and/or clarify issues prior to trial, so that whilst there may have been a *de facto* breach of the order, the background makes it understandable.

38 The real crux of the matter arises post-April 2008, because whilst the defendants accept that there had been some correspondence between the parties in early 2008, they nevertheless accuse the claimant of disengaging from the process of litigation when access to income tax records was requested. The letter of April 24th, 2008, which, incidentally, was not referred to me in the course of Mr. Winch's submissions, appears to suggest otherwise, given that by its contents it was evident that consent by the claimant for the DSS to release his tax records was forthcoming.

39 This notwithstanding, the fact remains that from mid-2008 to 2010 there was silence from the claimant. The reason for the lull is best described by Mr. Tonna, for the claimant, in his witness statement:

> "On July 4th, 2008, the claimant was informed that legal assistance was to be withdrawn, as his married status meant that his wife's assets were matrimonial assets which he was deemed to benefit from and that he would possibly have to repay the legal assistance provided to him since he became entitled."

He continued:

> "As explained above, the claimant is and has been experiencing very difficult financial conditions. Although the claimant now has the benefit of legal assistance he has had no way to fund the prosecution of this claim during extended and significant periods of time. His dire financial situation, to add to his health problems, has also affected his quality of life, as he depends on benefits alone. His

daughter is still under his care whilst his son is no longer in full-time education

Mr. Podesta is to this day undergoing treatment for the severe injuries suffered as a result of the accident. His life has been significantly affected and he still has to travel to the United Kingdom to London's Spinal Cord Injury Centre at least two times every year for multidisciplinary reviews of his condition. Each visit includes a series of appointments with a range of specialists for treatment of his conditions. These appointments are typically with gastroenterologists, with urologists, with a spinal injuries rehabilitation clinic, with an orthotics team, for the receipt of steroid injections, for colonoscopies, for biopsies, for urodynamics, for ultrasound scans and for Botox injections to his bladder.

Some of the on-going symptoms of the claimants injuries which have persisted and deteriorated in certain areas since the date of the accident are:

(a) loss of sensation and impaired sexual function;

(b) bladder infections from continual catheter use;

(c) reduced bowel function;

(d) bed sores;

(e) continual back and hip pain; and

(f) severe feet and leg pain due to calf wastage.

It has not been uncommon during my conduct of this claim to have the claimant cancel meetings due to exacerbation of one or more of his conditions thus restricting his mobility or requiring his attendance at hospital."

40 To my mind, the reason for the loss of prosecutorial momentum must be relevant to the considerations before me, for there must be a difference between the claimant who succumbs to temporary boredom or inertia in his efforts to litigate and the one who is unable to litigate because of financial and health constraints. From the period when funding was withdrawn to date, it would seem (subject to evidence) that the claimant has necessitated ongoing treatment for the injuries sustained, has not been able to secure employment and has experienced financial difficulty. Essentially, when legal aid was withdrawn in July 2008, it became untenable for the claimant to actively pursue his case. Thereafter, a change in the claimant's circumstances, *i.e.* a split from his wife, meant that he was able to re-apply for legal assistance and he did so via his solicitors on September 24th, 2010. A follow-up request was lodged with the Registrar

of the Supreme Court on January 17th, 2011, and legal assistance was granted on March 7th, 2011.

41 Shortly thereafter, counsel for the claimant contacted counsel for the defendant confirming his intention to seek a split trial on liability and quantum, and this prompted the current application to strike out.

42 To my mind, the breaches complained of (particularly the more serious ones at paras. 15 and 16 of the order of December 19th, 2006) are directly related to lack of funding and to ill health. They do not amount to a flagrant disregard of the court order such as would merit strike-out.

44 That said, the pressing question is whether the breaches have resulted in a delay such as would now make a fair trial impossible. Delay of itself need not result in rendering a fair trial impossible. Delay only becomes relevant to this issue if its effect is such that a fair trial becomes unfeasible.

45 I am not oblivious to the fact that this is the second application for strike-out, the first having been made on September 13th, 2006, on the basis that the claimant failed to progress his case from 2004 to 2006. The claimant maintains that during the relevant time his physical and mental condition deteriorated, he had difficulty in tracking down a witness of fact, and had to apply for legal aid. Be that as it may, I shall not delve into the background of that first application because it was withdrawn upon the agreement of directions which were embodied in the order of December 19th, 2006.

46 An ancillary point with regard to delay is the complaint by the defendants that the claimant did not issue proceedings until the day before the expiry of the limitation period and, thereafter, did not serve the claim form until the day before expiry of the period of validity. I do not explore the reasons for this last minute issue and service because the claimant is within his rights to serve at the eleventh hour if he so wishes. So long as he is within the regulatory time limits, his timing cannot be an actionable cause for complaint. It might vex a defendant and it might, in certain circumstances, be an indication of a somewhat sluggish attitude to litigation, but it can be no more than that.

47 The main thrust of the defendants' complaint in relation to the breaches is that they have so delayed the process that a fair trial is no longer possible, not least because, in their view, the action relates to an accident which occurred as far back as 1998 and (as set out in their skeleton argument)—

> "determination of the action will almost entirely depend upon the first-hand account of individuals present at the time, whose ability to give cogent evidence at trial must, at the very least, have been compromised by the passage of time. The defendants' difficulties are

compounded by the fact that Mr. Lutwyche is no longer in business on his own account and moving in the same circles, as a result of which he has lost contact with many of his former employees who witnessed the accident, again pointing to the impossibility of a fair trial . . . [T]he inescapable fact remains that determination of liability for the accident will depend upon first-hand evidence of those present on the day in question. Not only will their recollection have been severely affected by the passage of time, but also securing their co-operation at this stage cannot be guaranteed. Indeed, although contacting them would have been straightforward had the claimant prosecuted his case diligently, the defendants cannot be expected to keep in regular contact with them at a time when it appeared that the claimant had lost interest. It is, therefore, very unlikely that the defendants will be able to locate all the important witnesses so as to have them give evidence at trial."

48 In response to questions from the court, Mr. Winch, for the defendants, was unable to name or identify any of the crucial eyewitnesses who he submits are necessary for the trial of the issue. I find it quite incredulous that in the 14 years since the date of the accident the defendants are still unable to say what witnesses they require. The defendant submits that contacting the witnesses would have been straightforward had the claimant prosecuted his case with diligence. If that is indeed the case, it begs the question why those important witnesses were not contacted in the early days of the action, or at the very least when witness statements were being considered and drafted.

49 The defendants complain that from April 2008 two years went by where there was no correspondence from the claimant, so that in light of the claimant's apparent failure to prosecute the claim, the defendant cannot be expected to be disproportionately proactive in locating witnesses. I am not persuaded by this submission. Particulars of claim were served in August 2001; the defendants, at that stage, were on notice of the claim against them and could have begun enquiries as to what witnesses were necessary for them to be able to defend the allegations levelled against them.

50 Witness statements were exchanged in December 2006. The defendants had from service of the particulars of claim in 2001 until the exchange of witness statements in 2006—some 5 years—to settle upon which witnesses they were going to rely on. In 2006, they settled upon one witness and one witness only, Mr. Lutwyche, who was not an eyewitness. I do not ignore the fact that there was a strike-out application lodged by the defendants in 2006 for failure of the claimant to pursue his claim between 2004 and 2006, but that still does not explain why the defendants were unable to identify necessary witnesses (and take statements from

them) between 2001 and 2004, or for that matter from 2004 to 2006 when witness statements were exchanged.

51 Certainly if the defendant was unable, between 2001 and 2006, to locate and/or identify eyewitnesses and is unable to do so now, it would seem reasonable to assume that he will be unlikely to be able to do so in the future. But that difficulty is not attributable to delay resulting from the claimant's breach of a court order, but to the defendants' own actions or inactions, and thus it cannot form the basis of an application to strike out as prayed.

52 For all these reasons, the application to strike out the claimant's statement of case fails. That said, much time has elapsed since the date of the accident, and it is evident from the chronology that there have, at different times in the process, been some delays on both sides. The matter must now be brought to trial expeditiously. To that end I propose to make an "unless order," the terms of which I will decide upon once I have heard the parties on the question of a split trial.

Application dismissed.
