A

STUDIO GLAMOUR

v.

A. S. FAREBROTHER & CO. LTD

B

[COURT OF APPEAL, 1974 (Gould V.P., Marsack J.A., Henry J.A.), 25th October, 4th November]

Civil Jurisdiction

Practice and procedure—application to dismiss action for want of prosecution—whether delay on appellant's part had severely prejudiced the feasibility of a fair trial—Rules of the Supreme Court 1968 0.2 *r.*2, 0.3 *rs.*5, 6, 0.19 *r.*1.

C

Six years had elapsed between the issue by the appellant of the writ of summons for breach of contract and the service of the statement of claim. Three months after service, the solicitors for the respondent issued a summons to dismiss the action for want of prosecution and the judge made such an order on the grounds of the delay on the part of the appellant which had seriously prejudiced the feasibility of a fair trial.

D

Held : 1. The fact that the respondent had accepted service of the statement of claim did not deprive him of his right to apply to set it aside for irregularity ; nor did the fact that the respondent was guilty of some delay after receiving the notice of intention to proceed as it was insignificant when compared to that of the appellant.

2. The correct general principles applicable to proceedings of this nature were set out in *Allen v. McAlpine* [1968] 1 All E.R. 543. The respondent must show that there had been inordinate and inexcusable delay, and that he was likely to be seriously prejudiced by that delay.

E

3. Although the case was not free from difficulties, a high degree of blame must be attributable to the appellant for the delay and the Court would not interfere with the judge's decision unless satisfied that he was wrong.

Other cases referred to :

F

Ernest Lyon v. William Sturges & Co. [1918] 1 K.B. 326.

Clough v. Clough [1968] 1 All E.R. 1179 ; [1968] 1 W.L.R. 525.

Austin Securities Ltd. v. Northgate & English Stores Ltd. [1969] 2 All E.R. 753 ; [1969] 1 W.L.R. 529.

Reggentin v. Beecholme Bakeries Ltd. [1968] 2 Q.B. 276 ; (1967) 111 S.J. 216.

G

Appeal from the order of the Supreme Court dismissing an action for want of prosecution.

K. C. Ramraka for the appellant.

I. C. Bond for the respondent.

4th November 1974.

H

The following judgments were read :

GOULD V.P. :

A This is an appeal from an order of the Supreme Court dismissing for want of prosecution, an action in which the appellant (described as a firm) was plaintiff and the respondent company was defendant. I will refer to them as plaintiff and defendant.

B C D The history of the matter is this, The plaintiff issued a Writ of Summons on the 14th June 1968 with a General Endorsement claiming damages for breach of a contract made on the 22nd July 1967, in respect of the distribution rights and sale of Seiko watches. An unconditional appearance by the defendant was entered on the 18th June 1968. There the matter rested until, on the 14th January 1974, Messrs. Ramrakhas, the plaintiff's present solicitors, gave notice of intention to proceed, under Order 3 Rule 6 of the Rules of the Supreme Court. On the 13th April 1974, a Statement of Claim was left at the offices of the defendant's solicitors and there is a notation of the acceptance of service by them on the 26th June 1974. According to Mr Bond, who signed the acceptance of service and who appeared for the defendant, there was difficulty in finding the original papers relating to the action. On the 11th July 1974, the solicitors for the defendant issued a summons to dismiss the action for want of prosecution and the order now under appeal was made on the 9th August 1974. The learned judge held that the delay on the part of the plaintiff was inexcusable and inordinate and had seriously prejudiced the feasibility of a fair trial.

E The agreement of the 22nd July 1967, annexed to the Statement of Claim took the form of a letter from the defendant to the plaintiff signed on behalf of each party, of which the following were the main points. The defendant appointed the plaintiff a distributor of Seiko watches for five years renewable for a further five years. The defendant was also to act as a distributor but accepted that six specified firms were the exclusive clients of the plaintiff. The defendant was to be the sole importer of the watches and a system of fixing the wholesale prices to be charged by each was agreed.

F The Statement of Claim lacks particularly. Paragraph 4 alleges that the " defendant has purported to rescind the said agreement " but does not state the plaintiff's attitude towards rescission. It is averred that the defendant was in breach of the contract in that (a) it dealt directly with the plaintiff's exclusive clients (b) it did not compile prices correctly (c) it gave special discounts to dealers and (d) it delayed orders placed by the plaintiff and prevented it functioning as a distributor. The relevant heads of the prayer are :

G (a) Damages

(b) Alternatively, an account be taken of all Seiko Watches sold by the defendant for a period of ten years from the 1st July 1967, and the defendant do pay to the plaintiff the profits to which the plaintiff would have been entitled under the said Agreement.

H I understood Mr Ramrakha's attitude to be that the plaintiff sued as on an existing contract and, if the alternative prayer is to have the slightest basis, that must be so.

If I understood Mr Ramrakha's opening argument correctly he contended that the application to dismiss the action was barred (a) by reason of defendant's delay in issuing the summons until after the Statement of Claim had been served. The defendant would, he argued, have been in a much stronger position had he acted immediately upon receipt of the notice of intention to proceed: (b) because the acceptance of service of the Statement of Claim by Mr Bond amounted to a waiver of his right to object to it, and (c) that once a Statement of Claim has been delivered it is too late to make an application under Order 19 Rule 1. I do not think that ground (c) was pressed. The authority which supported it, *Ernest Lyon Ltd. v. William Sturges & Co.* [1918] 1 K.B. 326, is no longer good law, as it was decided under the rule which preceded Rule 1 of Order 19, and which was in very different terms. See Clough v. Clough [1968] 1 All E.R. 1179 where it was held that the present rule confers a discretion to dismiss if the plaintiff fails to deliver a Statement of Claim within the specified time. It is true that in *Lyon v. Sturges* and also Clough v. Clough the summons to dismiss was taken out before the Statement of Claim was delivered, which was not the case here. I do not think that the sequence of such events is now more than one of the elements to be considered in deciding how the court will exercise its discretion.

The same might be said of Ground (a) above. The defendant's position would indeed have been stronger had he acted immediately upon the notice of intention to proceed, but the period of delay must be regarded in the context of the 5½ years which had elapsed since the Writ was issued. Mr Ramrakha cited *Austin Securities Ltd. v. Northgate & English Stores Ltd.* [1969] 2 All E.R. 753 as a case in which the defendants had been guilty of delay, and it is true that in his Judgment in that case Lord Denning, M.R. said " That month is given by the rules so as to enable the defendants to consider their position, and to apply, if so advised, to dismiss the action ". Here, the defendants were guilty of some delay, but it fades into insignificance when compared with that of the plaintiff; it could not be said, as it was in the Austin Securities Ltd. case (at p.755) that " the defendants were just as guilty of delay as the plaintiffs ".

As to ground (b) above—waiver—no evidence and very little argument was presented as to whether any special significance attached to the acceptance of service of a Statement of Claim in Fiji. No doubt, it would render proof of service of the document unnecessary if the question of service became an issue. But Mr Ramrakha argued that it amounted to an enlargement of time and a waiver of rights. That might well depend on the particular circumstances. Assuming, for example, that the Statement of Claim itself contained irregularities I would not consider that acceptance of service would deprive the defendant of his right to apply to set it aside for irregularity. Such an application would need to be made within a reasonable time under Order 2 Rule 2 but the recipient would not know of the irregularity until after service. Under Order 3 Rules 5 the time for service of a pleading may be extended by the parties by consent, given in writing. Acceptance of service, unless it be expanded to something like " due service " or timeous service does not, I think, amount to a consent in writing within that rule. Mr Ramrakha relied upon a reference to waiver by Lord Denning, M.R. in *Austin Securities v. Northgate Stores* (supra—at p.756); this reference, which was certainly not the main ground of Lord Denning's judgment, was directed to delay by the defendant, a question which I have dealt with above.

I come now to Mr Ramrakha's argument on matters more closely touching the merits of the decision of the learned judge in the Supreme Court. I have no doubt that the learned judge had in mind the correct general principles applicable to proceedings of this nature. They are set out in the Judgment of *Salmon, L.J. in Allen v. McAlpine* [1968] 1 All E.R. 543 and 561. In brief they are that the defendant must show (i) that there has been inordinate delay (ii) that the delay is inexcusable and (iii) that the defendant is likely to be seriously prejudiced by the delay. If these matters are established the court must take into consideration the position of the plaintiff himself and strike a balance.

There can be challenge to the finding that the delay in the instant case was inordinate and inexcusable. A delay approaching six years speaks for itself where no credible explanation is presented. The affidavit of the plaintiff's manager contains the bald statement that the delay was due to inaction by his former solicitors, whom he had supplied with all information. Without details of the steps he took to get his solicitors to prosecute the matter, of whether he had provided appropriate funds for their costs and whether there was any correspondence, and in the absence of any explanation of why, if his solicitors were inactive without cause, he did not years ago instruct others, I regard the plaintiff's case on this point as hopelessly inadequate. The inference is justified, in my opinion, that at least a large proportion of the blame must lie at the door of the plaintiff personally.

Mr Ramrakha argued strongly that the learned judge's finding that the delay had seriously prejudiced the feasibility of a fair trial was not supported by the evidence. The relevant portion of the Judgment reads as follows :—

> " Whether or not a defendant's position has deteriorated due to delay on the plaintiff's part would depend largely on the nature of the claim and the circumstances that may have arisen during the period of delay. In the present case the claim relates to importation and distribution of watches. Almost six years have passed since the entry of appearance. In a business venture of this nature, where circumstances are liable to change from time to time, one would expect a plaintiff who has genuine rights to protect to take immediate steps to prevent a continuation of the alleged breach. The plaintiff in this case did nothing for almost six years. The defendant submits, with considerable justification, that this delay led him to the belief that the matter was not being pursued and he recognised the " conduct of his business on that bases. "

The plaintiff contends that the defendant could not have been prejudiced by the delay because the case is largely one of accounts and the defendant is required to keep a record of them in any case. This, in my view, may be true of quantum but the issue of liability will depend mainly upon the conduct of the parties before and at the time of the alleged breach, which occurred about six years ago. If the pleadings had been served in accordance with the Rules, the defendant may have retained the services of some of its employees which it has now dispensed with ; it may also have kept correspondence and other records relevant only to this matter which it says it has omitted to do. According to the submissions by counsel, when the statement of claim was served on the defendant's solicitors they themselves had no recollection of the matter and took considerable time to locate the brief. "

The affidavits filed were of poor standard. In particular that of Mr R. J. Woodman or the defendant (though that of Mr N. Chew for the plaintiff is also at fault) contains hearsay and argumentative material. There is, however, no record of any objection having been taken to them in the Supreme Court and so it is not surprising that the learned judge did not delete parts of them on his own motion.

Mr Ramrakha contended that there was no validity in the defendant's contention, accepted by the learned judge, that relevant witnesses had become unavailable through delay. He pointed to the opening sentence of the agreement where it was said—" This letter supersedes all previous understandings and agreements between your Company and this Company ". The evidence of witnesses to events leading up to the agreement was therefore irrelevant. The action, the submission continued, was one which depended for its proof on the records of the defendant and other firms, showing the purchases, sales and prices of Seiko watches. If the defendant had destroyed such records it must have done in breach of the provisions of the Income Tax legislation.

The passage from the Judgment quoted above shows that the learned judge had considered the argument that the evidence would consist largely of records. He accepted it only in part, and indeed records do not prove themselves—they frequently require to be authenticated by witnesses who made or compiled the records. As to the requirement of the Income Tax legislation in relation to the retention of records, I doubt whether the commercial world is so ideally conducted as to make that a relevant and material consideration. I am not prepared to find that the learned judge erred in finding a likelihood that witnesses may have become unavailable. Memories would naturally suffer and, as Salmon, L.J. said in *Allen v. McAlpine* (supra—p.561)—" As a rule the longer the delay, the greater the likelihood of serious prejudice at the trial ".

Mr Ramrakha also emphasized that the period of limitation of six years had not expired and that accordingly the plaintiff could have discontinued the action and issued another Writ. This is a corollary to his submission that there was no rescission of the contract and that continuing breaches could be followed back for six years. Counsel relied upon the following dictum of Lord Denning, M.R. in the Austin Securities case (supra—at p.756)—

> " Finally, the period of limitation has not run. If this action were struck out, the plaintiffs could start another action tomorrow. So what good is it to strike out this one ? I would not place too much emphasis on this point. It is much less hard for plaintiffs to be struck out now than when the period of limitation has expired. If it were a proper case for dismissing for want of prosecution, I would not hesitate to strike it out, even though another action could be brought straight away. "

But, as Lord Denning points out, it is much less hard for plaintiffs to be struck out before the period of limitation has expired than later, and he would have no hesitation in striking out in a proper case. It is not for this court to determine whether a new action could or could not be brought at this juncture. It rests at the moment on Mr Ramrakha's submission, but the lack of particularity in the Statement of Claim as such that it provides no answer to the question. I trust it is not to do the document an injustice when I say that the absence of detail and dates is such as to convey the impression that it is designed to allege generally a breach of the contract in every way that it could possibly be broken. I do not think that this submission can avail the plaintiff.

The case is not free from difficulty. The defendant was inclined to vagueness in his allegations of prejudice—the passage of time may have contributed even to that. But I think the matter falls to be decided in the defendant's favour by the very high degree of blame which must be attributed to the plaintiff by reason of delay so inordinate and so inexcusable, when considered in relation to the close business relation apparently contemplated by the contract in question. My own strong impression is that the real reason for this five year sleep can never been put before the court. As Lord Denning, M.R. pointed out in *Reggentin v. Beecholme Bakeries Ltd.* [1968] 2 Q.B. 276 at 278, the decision in this matter lay in the first place in the discretion of the Judge in the Supreme Court. This court will not interfere unless satisfied that the Judge was wrong.

I am not so satisfied and would dismiss the appeal with costs. That being the opinion of my brethren also, it is so ordered.

MARSACK, J.A.

I agree and have nothing to add.

HENRY, J.A.

I concur.

Appeal dismissed.