*p54 Culbert v Stephen G. Westwell & Company Limited and John Bryant


No Substantial Judicial Treatment

Court
Court of Appeal (Civil Division)

Judgment Date
30 July 1992

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[1993] P.I.Q.R. P54

Court of Appeal

(Parker , Nolan and Kennedy L.JJ.):

July 30, 1992

Application to strike out—inordinate and inexcusable delay on the plaintiff's part—whether defendants estopped by their conduct from complaining of delay—whether further substantial prejudice caused by last period of delay

The plaintiff suffered personal injuries in a road accident in October 1981. A writ was issued in July 1984. An application to strike out the plaintiff's claim for want of prosecution was granted by the master in March 1987 but his decision was reversed by the judge in September 1987. The statement of claim was served later that month and the defence followed in November 1987.

In March 1988 the plaintiff served further and better particulars of his claim, and thereafter on four occasions, culminating in an “unless” order made in February 1990, the defendants had recourse to the courts to stimulate further progress by the plaintiff and his advisers. Subsequently in March 1990 the plaintiff swore a long affidavit setting out in detail his claim for loss of earnings, based on his own recalculations which were not understood by his professional advisers (the affidavit was subsequently described by Parker L.J. as “confusing and to a large extent incomprehensible”). Several months later the defendants commented on the affidavit and raised queries which largely went unanswered, as did a request for a further medical examination of the plaintiff.

A fresh application to strike out was made in May 1991 and granted by the master in October 1991 but again the master's decision was reversed by the judge, before whom it was conceded that there had been inordinate and inexcusable delay on the plaintiff's part, both before and after the affidavit of March 1990, but it was submitted and the judge in effect held that the defendants were estopped by their conduct from complaining of delay before March 1990, that consideration should accordingly be limited to delay which had occurred since that time and that the defendants had not succeeded in showing that further substantial prejudice to the prospects of a fair trial had been created by the last period of delay.

Held, allowing the appeal, that for a plaintiff to invoke the doctrine of estoppel successfully he must establish that he has been induced to act to his detriment, to something more than a minimal extent, by a clear and unambiguous representation on the part of the defendant. Though it was accepted that the obtaining of the “unless” order in February 1990 amounted to a sufficiently clear and unambiguous representation of the defendants' willingness at that stage to go on with the action, despite all the previous delay and consequential prejudice, that representation could not have been regarded as an intimation of willingness to accept further avoidable delay and consequential further prejudice. Further, the defendants had well satisfied the burden of showing that the final period of delay, which was admitted to be inordinate and inexcusable, had given rise to such additional prejudice as would put at risk the prospects of a fair trial. In addition the way in which the action had been conducted amounted to an abuse of the process of the court and the action could not be allowed to proceed.

Cases judicially considered:

(1) *Allen v. Sir Alfred McAlpine & Sons [1968] 2 Q.B. 229; [1968] 2 W.L.R. 366; [1968] 1 All E.R. 543; (1968) 112 S.J. 49* .
(2) *County and District Properties Ltd. v. Lyell [1991] 1 W.L.R. 683, C.A.*
(3) *Cresswell v. P.D. Sage Co. Ltd. (1968) 112 S.J. 173, C.A.*
(4) *Department of Transport v. Chris Smaller (Transport) Ltd. [1989] A.C. 1197; [1989] 2 W.L.R. 578; (1989) 133 S.J. 361; [1989] 1 All E.R. 897; (1989) 139 New L.J. 363, H.L.*

Cases referred to in judgment:

(1) *Halls v. O'Dell [1992] 2 W.L.R. 308, C.A.; [1991] C.L.Y. 2973* .
(2) *Reynolds v. British Leyland Ltd. [1991] 1 W.L.R. 675; [1991] 2 All E.R. 243, C.A.*
(3) *Spriggs v. Norrand Trawlers Ltd. [1969] 2 Lloyd's Rep. 627, C.A.*
(4) *Wallersteiner v. Moir [1974] 1 W.L.R. 991; 118 S.J. 464; [1974] 3 All E.R. 217, C.A.*

Appeal

by Stephen G. Westwell & Company Limited and John Bryant from the decision of H.H. Judge Phelan, sitting as a judge of the High Court, allowing the plaintiff's appeal from the decision of Master Topley granting the defendants' application to strike out the plaintiff's action against them for want of prosecution.

Representation

T. Lowe for the respondent (plaintiff).
J. Harvey for the appellants (defendants).

Nolan L.J.

On October 13, 1981, the respondent plaintiff was injured in a collision between the car which he was driving and a vehicle being driven by the second defendant in the course of his employment by the first defendant. Subsequently, the incident led to the second defendant being convicted of careless driving, on his own plea of guilty. Liability in negligence for the plaintiff's injuries has never been formally conceded by the appellant defendants, but Mr. Harvey accepts on their behalf that it cannot be regarded as a matter of serious dispute.

The plaintiff's writ was not issued until July 11, 1984, little more than three months from the end of the limitation period. For this and other reasons it was accepted by Mrs. Habershon in an affidavit sworn on behalf of the plaintiff's solicitors on March 10, 1987, that the matter had not been prosecuted as expeditiously as it ought to have been, and that both they and the plaintiff were to blame. That affidavit was sworn in response to an application by the defendants to strike out the plaintiff's claim for want of prosecution. The application was granted by Master Topley on March 18, 1987, but his decision was reversed on appeal by Roch J. on September 4, 1987. This was followed by the service of the statement of claim on September 18, 1987, and of the defence on November 4, 1987. There were no further pleadings and so, this being a personal injuries' claim, the action should have been set down for trial not more than six months and 14 days later. That requirement had still not been complied with when the present application to strike out was made by the defendants on May 24, 1991. This application too was granted by Master Topley, in a decision given on October 24, 1991, but once again his decision was reversed on appeal, this time by His Honour Judge Phelan, sitting as a judge of the High Court, on December 20, 1991. The defendants now appeal against that decision to this court with leave granted by Neill L.J. on March 4, 1992.

One of the reasons put forward by Mrs. Habershon in her affidavit of March 10, 1987, for the delay which had occurred prior to that date was that the plaintiff's injuries, which had initially been thought to have been little more than superficial, had proved by January 1982 to include severe internal injuries. He eventually underwent major surgery in the form of decortication of the right chest in July of that year. His physical incapacity ***p56*** forms the basis for one of the principal heads under which he claims damages, namely the loss of his earnings as a self-employed electrochemical process consultant. By October 31, 1985, however, his condition had improved to the extent that, as ultimately became clear in circumstances to which I shall later refer, his claim for financial loss terminated at that date. This is an important factor to bear in mind in the context of the present appeal, which largely turns upon the correctness or otherwise of the judge's approach to the risk of prejudice arising from the delay which has occurred.

The main relevant features in the chronology of events in addition to those which I have mentioned are that on March 13, 1988, the plaintiff served further and better particulars of his claim, particularising his loss of earnings to 1985 in the sum of £80,890. There followed no less than four occasions upon which the defendants were compelled to have recourse to the court in order to stimulate further progress by the plaintiff and his advisers. The stimulants consisted of an order made on July 22, 1988, to serve a list of documents within 28 days, an order on May 3, 1989, to produce copies of some of the listed documents, and to swear an affidavit dealing with the plaintiff's earnings, an order dated October 18, 1989, requiring the production within 21 days of tax computations and tax assessments of the plaintiff for the financial years 1982–83 to date, and finally an "unless" order dated February 22, 1990.

What led to the "unless" order was a letter written by the plaintiff's solicitors on November 22, 1989. This was the last day of a 14 day extension of time, agreed by the defendant's solicitors, for compliance with the order of October 18. The letter enclosed some but not all of the documents required to be produced by that order. The last paragraph of the letter read:

> "You will note that the documentation only relates up to the date of October 31, 1986. The reason for this is that our client's claim for loss of earnings is limited to the date of the accident until October 31, 1986. This was not appreciated by the writer at the time of the order which relates to up to the present day. However, as our clients claim ceases on the aforementioned date any further documents would be irrelevant."

In their reply dated November 28, 1989, the defendants' solicitors pointed out that the particulars of claim delivered in March 1988 had referred to a loss of earnings up to 1985, which had been taken to mean October 31, 1985, (October 31, being the plaintiff's accounting date). They asked whether another year was now to be added to the claim, and asked also for the production of the more recent tax assessments and computations, so that they could be studied for comparative purposes. Having received no response to these requests by December 14, 1989, the defendants' solicitors issued the summons which led to the making of the order of February 22, 1990. That order provided that unless the plaintiff complied with the order of October 18, 1989, within 28 days, and further stated on affidavit unequivocally whether he was claiming loss of earnings for any period after October 31, 1985, his claim for loss of earnings should be struck out.

The plaintiff then swore a long affidavit on March 20, 1990. In the course of it he confirmed October 31, 1985, as the closing date for his loss of earnings claim, but recalculated that loss to a total of £126,414, an increase of ***p57** more than 50 per cent. on the sum mentioned in the March 1988 particulars of claim. The recalculation was based upon inferences drawn by the plaintiff from several hundred pages of accounts, computations and other financial documents which were exhibited to the affidavit, and which had previously been supplied to the defendants on discovery. It was all his own work. Mr. Lowe, who presented the plaintiff's case with disarming candor, acknowledged that the plaintiff's professional advisers did not understand the recalculation. Mr. Lowe said it was only a possibility that the increased amount might in fact be claimed. The affidavit and its exhibits were, however, sent to the defendants' solicitors by the plaintiff's solicitors under cover of a letter dated March 21, 1990 which said:

> "You will see that our client is claiming total loss of earnings in the sum of £126,414.
>
> Please acknowledge safe receipt and let us know whether this figure is undisputed."

Commenting on this latter sentence, Mr. Lowe told us that it reflected the plaintiff's personal belief that he had put all his cards on the table, and that *quantum* could now be agreed. It is fair to say that several months then elapsed before the defendants' accountants felt able to comment and raise queries upon the affidavit and its enclosure. When these queries were transmitted to

the plaintiff's solicitors by the defendants' solicitors, however, they largely went unanswered, as did the defendants' solicitors' request for a further medical examination of the plaintiff. On February 8, 1991, we find the defendants' solicitors writing to say:

> "On reviewing our correspondence we see that we are without answers to our letters of September 12 and 24, the remainder of our letter of October 15, our letter of November 21, all of which were subject to an unanswered reminder dated December 21."

There were no further events of note until the present application to strike out was made by the defendants on May 24, 1991.

Against this background, Mr. Lowe very properly conceded before the learned judge, as he has before us, that there was inordinate and inexcusable delay on the plaintiff's part both before and after the affidavit of March 1990. He submitted, however, and the judge in effect held, that the defendants were estopped by their conduct from complaining of delay before March 1990, that consideration should accordingly be limited to delay which had occurred since that time, and that the defendants had not succeeded in showing that further substantial prejudice to the prospects of a fair trial had been created by this last period of delay. In support of the first part of this submission he relied upon the decision of this court in *County and District Properties Limited v. Lyell [1991] 1 W.L.R. 683, a decision which was given on July 12, 1977* , but which remained unreported until it had been cited in argument in *Reynolds v. British Leyland Limited [1991] 1 W.L.R. 675* . In the *County and District Properties* case the defendant, who was an architect, was sued for professional negligence said to have resulted in defects in a building which came to light in 1968 and 1969. On December 16, 1976, the defendants' solicitors issued a summons to strike out the action for want of prosecution. The application was granted by the judge at first instance, but his decision was reversed in the Court of Appeal. At page 684 of the report Stephenson L.J. said: ***p58**

> "There is no doubt that in pursuing their action against the architect the plaintiffs were guilty of inordinate, inexcusable and prejudicial delay… The plaintiffs contend in this court, as they contended before the judge, that in spite of their 'shocking delay,' as the judge described it, they ought to be allowed to go on with their action because of what the defendant did between June 18 and December 16, 1976.
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> On June 18, 1976, the plaintiffs gave the defendant notice of intention to proceed. On June 30 the defendants' solicitors thanked them for their letter 'which we accept as notice of intention to proceed.' 'We shall have to consider,' they wrote, 'the defendants' position and possibly take counsel's advice before we comment on the questions you raise.'
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> The next thing that happened was that on July 15 the plaintiff served some further and better particulars of their statement of claim which had been requested many years before and ought, of course, to have been served long before. But the defendants' solicitors took no point on that; and on July 21 they wrote:
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> 'to inform you that on the 19th instant we received your letter of the 15th instant, the contents of which we note, and the particulars enclosed, service of which by post we accept.'
>
> On August 17 the plaintiffs issued a fresh summons for directions. On August 23 the defendants' solicitors wrote:
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> 'We thank you for your letter of the 18th instant and acknowledge receipt of the summons for directions herein, the date of which we have noted.'
>
> That summons came on for hearing before Master Creightmore on November 10, 1976. He heard the summons, and by consent it was ordered: 'this action be transferred to an Official Referee and that the costs of the action and of this application be in the cause,' with liberty to apply.

> Then on November 17 the summons for directions issued from the Official Referee; and on November 24 the judge, sitting on Official Referees' Business, started to hear the summons and understandably expressed surprise or horror at the prospect of giving directions in an action relating to events in the early 1960s and begun by a writ issued in 1968. So the summons was adjourned, and it appears that it was at the instance of the judge himself that the summons was adjourned. Then there was over three weeks delay before, on December 16, the defendants' solicitors issued their summons to have the plaintiff's action dismissed for want of prosecution. Their application was granted by the judge on March 23, 1977, when he dismissed the action.
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> What the plaintiffs say is that the defendants' conduct in these months of 1976 clearly went beyond mere passive inactivity and consisted of positive steps encouraging the plaintiffs to believe that they were to be allowed to go on with their action without objection by the defendant and without an application to dismiss it for want of prosecution. They call attention in particular to the action of the defendant in agreeing to transfer the action to an official referee and to the fact, which appears from the recital which I have just given, that it was not until the judge, sitting on official referees' business, himself raised the question that ***p59** they considered taking the course which they successfully took in having the action dismissed. This action was, I think it has to be conceded, the brain-child of the judge, and it may be said none the worse for that. Indeed, I would accept that the judge is going to have a very difficult task in doing justice to the case, in particular the defendant's case, next year or whenever the action comes on for trial if we allow this appeal. But the question is whether what the defendant has done has entitled the plaintiffs, notwithstanding the shocking delay of which they have been guilty, to proceed with this very stale action."

At page 685 of the report Stephenson L.J. quoted the well-known passages from the judgments of Diplock L.J. and Salmon L.J. in *Allen v. Sir Alfred McAlpine & Sons Ltd. [1968] 2 Q.B. 229* on the subject of dismissal for want of prosecution. I repeat them for ease of reference. Diplock L.J. said, at page 260 of that report:

> "Since the power to dismiss an action for want of prosecution is only exercisable upon the application of the defendant, his previous conduct in the action is always relevant. So far as he himself has been responsible for any unnecessary delay, he obviously cannot rely upon it. But also, if after the plaintiff has been guilty of unreasonable delay the defendant so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiffs' delay, he cannot obtain dismissal of the action unless the plaintiff has thereafter been guilty of further unreasonable delay. For the reasons already mentioned, however, mere non-activity on the part of the defendant where no procedural step on his part is called for by the rules of court is not to be regarded as conduct capable of inducing the plaintiff reasonably to believe that the defendant intends to exercise his right to proceed to trial."

Salmon L.J. said, at page 272:

> "The only point that has caused me any hesitation upon this appeal arises out of the argument that the defendants have waived or acquiesced in the delay upon which they found their application. Clearly no defendant can successfully apply for an action to be dismissed for want of prosecution if he has waived or acquiesced in the delay. Mere inaction on the part of the defendant cannot in my view amount to waiver or acquiescence. Positive action, however, by which he intimates that he agrees that the action may proceed, is a different matter. If, for example, he intimates that he is willing for the action to

> proceed and thereby induces the plaintiff's solicitors to do further work and incur further expense in the prosecution of the action, he will be precluded from relying on the previous delay by itself as a ground for dismissing the action."

Continuing his judgment at *[1991] 1 W.L.R. 686* , Stephenson L.J. said:

> "[Counsel for the plaintiff] says that this case falls fairly and squarely within the observations of both those Lords Justices; the defendant here has so conducted himself as to induce the plaintiffs to incur further costs in the reasonable belief that he intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay; he has ***p60*** intimated that he is willing for the action to proceed and thereby induced the plaintiff's solicitors to do further work and incur further expense in the prosecution of the action; and both Lords Justices say, if that is the position, there is what [counsel for the defendant] I think has understandably called an absolute bar to dismissal of the action for want of prosecution."

At page 688 Stephenson L.J. said:

> "I think [counsel for the defendant] is right in submitting that both Edmund Davis L.J. in *Cresswell v. P.D. Sage Co. Ltd. 112 S.J. 173* and Sachs L.J. in *Spriggs v. Norrand Trawlers Ltd. [1969] 2 Lloyd's Reports 627* , 630 were leaving open the question whether waiver or acquiescence, or indeed what might ordinarily be estoppel, was more than a circumstance to be taken into account and was not an absolute bar, certainly where the conduct constituting such waiver or acquiescence or estoppel had led only to negligible or minimal expenditure of money. But as I read the authorities, including what Lord Denning M.R. said in *Cresswell's* case, on balance they state the law to be as submitted, not by [counsel for the defendant] but by [counsel for the plaintiff]. I hesitate to use the word 'waiver,' as I think did Sachs L.J. in *Sprigg's* case. It seems to me that this case at any rate is a case of estoppel, of conduct by the defendant inducing a belief that the action would be allowed to go on without objection, upon which the plaintiffs acted to their detriment by the expenditure of money."

He went on to say that the additional expenditure which the plaintiffs' solicitors had been induced to incur by the defendant's conduct could not be dismissed as being merely minimal.

Roskill L.J., in a concurring judgment, referred at the bottom of page 689 to an affidavit sworn on behalf of the plaintiffs' solicitors, in which the deponent said:

> "I and my clients were led to believe by the defendant's attitude not only that we have been right in our view that they were in agreement with the putting of the action against Mr. Lyell into abeyance while the action against Jenners was being dealt with, but also that they were now agreeable to the action continuing and being dealt with by an official referee. We were led by this belief into taking the steps reflected in the correspondence and, of course, in instructing counsel and in serving the further and better particulars, all of which steps involved expense."

At page 690 Roskill L.J. continued:

> "Accordingly, I think it is impossible to say, as Lord Denning M.R. said at the end of his judgment in *Cresswell v. P.D. Sage Co. Ltd. 112 S.J. 173* , that the impact of the defendant's actions would have been insignificant. To my mind there was a significant impact upon the minds of the plaintiffs and their advisers. It seems to me that in those circumstances this court, as I have already said, has neither the right nor the power to order this action to be dismissed for want of prosecution."

At page 690 Bridge L.J., also concurring said:

> "Going back to the locus classicus and looking at the language used by ***p61** Diplock and Salmon L.JJ. in *Allen v. Sir Alfred McAlpine & Sons Ltd. [1968] 2 Q.B. 229* , I cannot find in their formulation of the principle (assuming, as one would certainly do of those Lords Justices, that they used language precisely and accurately) any room for the kind of discretion for which [counsel for the defendants] contends. Diplock L.J. said, at page 260:
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> 'If … the defendant so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiffs' delay he cannot obtain dismissal of the action …'—not that he *may* not; the words are 'he *cannot* obtain dismissal of the action.'
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> Salmon L.J. said at page 272:
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> 'If … [the defendant] intimates that he is willing for the action to proceed and thereby induces the plaintiff's solicitors to do further work and incur further expense in the prosecution of the action, he will be precluded from relying on the previous delay'—not he *may* be precluded.
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> Indeed, if there were to be the amplitude of discretion for which [counsel for the defendant] contends, I find it very difficult to see how one could formulate any sensible principles for the exercise of discretion, or how one could draw a boundary to delimit the area which should enjoy the shade of the palm tree. Of course, to say that is not to overlook that there may be cases where the action taken by the plaintiff in reliance on the reasonable belief induced by the action of the defendant or the expense incurred may be so small as to be minimal, or, in Sachs L.J.'s language, 'negligible,' so as to justify the application of the maxim *de minimis non curat lex* ."

In *Reynolds v. British Leyland Limited [1991] 1 W.L.R. 675* Russell L.J., after quoting from the judgments in the *Lyell* case to which I have referred, said at page 680:

> "For my part I have to confess at once that this authority of *Lyell's* case has never been brought to my attention before. I have always laboured under the misapprehension that there is here an overall

> discretion vested in the court when confronted with an application to dismiss for want of prosecution, it being demonstrated that in some way the defendants have contributed to the situation that prevails when the matter comes before the court. With the utmost respect to their Lordships in *Lyell's* case, I find, for my part, some of the observations wherein it is said that in a case where the defendant has been, save minimally, responsible for the situation prevailing the discretion disappears from the court, a little surprising. But be that as it may, they must be loyally followed in this court and I proposed to follow them."

Having referred to the facts before him, however, he concluded at page 682:

> "In all the circumstances, and applying strictly the tests laid down by this court in *Lyell's* case, I, for my part, can see nothing in the conduct of these defendants that could conceivably have induced this plaintiff to believe that this action would be tried."

Staughton L.J. agreed. ***p62**

We too, are of course bound by the decision in *Lyell's* case. The decision establishes that if a litigant's conduct is such as to give rise to an estoppel, then in this as in all other branches of litigation it is an absolute bar to his succeeding in his claim. It is important, however, to be clear about the limits of the decision in *Lyell* , and about the facts upon which it was based. With great respect to Russell L.J., it is not, I think, correct to describe the members of the *Court of Appeal in Lyell* as having said that "in a case where the defendant has been, save minimally, responsible for the situation prevailing the discretion disappears from the court." The only references to minimal, or *de minimis* considerations which appear in their judgments are those to the effect that, if estoppel is to arise, the plaintiff must have been induced by the defendant's conduct to incur something more than minimal expenditure. The true position as I see it is that if the plaintiff is successfully to invoke the doctrine of estoppel, he must establish in accordance with the ordinary principles applicable to that doctrine that he has been induced to act to his detriment, to something more than a minimal extent, by a clear and unambiguous representation on the part of the defendant—the representation in this context being to the effect that the defendant intends to proceed to the trial of the action notwithstanding the delay and consequential prejudice for which the plaintiff has been responsible. In *Lyell's* case, as will have been seen, the defendant's application to strike out represented a complete change of front, prompted by observations of the judge, within a very short time of the defendant having participated in preparations for the trial without any expression of complaint or dissatisfaction over the delays which had occurred.

In the present case, by way of contrast, the application to strike out was not made until 16 months after the last step in the proceedings taken by the defendants, that step being only the latest (but by no means the last, as the subsequent correspondence shows) attempt by the defendants to stir the plaintiff and his solicitors into activity. I accept Mr. Lowe's well argued submission that this step amounted to a sufficiently clear and unambiguous representation, as at the date of the appearance before the Master on February 22, 1990, of the defendant's willingness at that stage to go on with the action, despite all the previous delay and consequential prejudice. I would also accept even without specific evidence to this effect, that it must have induced the plaintiff to prepare his affidavit in contemplation of the proceedings being continued, and that the cost of the affidavit must have been more than minimal. What I would not accept is that the representation implicit in the summons to and appearance before the Master in early 1990 could conceivably have been regarded as an imitation of willingness to accept further avoidable delay and consequential further prejudice. The effect of the representation was strictly limited both in duration and in content. It was the procedural equivalent of a *ne plus ultra line* .

I repeat, however, that I would accept Mr. Lowe's submission that the defendants are estopped from complaining of delay and consequential prejudice up to March 1990, and that accordingly their application must succeed or fail on the basis of what has occurred since that time. But it does not follow that the events and non-events of the previous years are to be left out of account in considering whether the final period of delay, admitted as it is to be inordinate and inexcusable, has given rise to

such additional prejudice as would put at risk the prospects of a fair trial. I bear in mind in this connection the remarks of Lord Griffiths in *Department of Transport v. Chris Smaller Ltd. [1989] A.C. 1197* at page 1208 where, speaking of the effect of delay before and after the issue of a writ, he said:

> "Furthermore it should not be forgotten that long delay before issue of the writ will have the effect of any post writ delay being looked at critically by the court and more readily being regarded as inordinate and inexcusable than would be the case if the action had been commenced soon after the accrual of the cause of action. And that if the defendant has suffered prejudice as a result of such delay before issue of the writ he will only have to show something more than minimal additional prejudice as a result of the post-writ delay to justify striking-out the action."

The same principle must apply, *mutatis mutandis* , to the delay and prejudice before and after March 1990 in the present case.

The learned judge in the present case, after referring to the facts, dealt with the matter in this way:

> "On behalf of the plaintiff on this appeal from a decision of Master Topley, it is said that, by applying for and getting a peremptory order, the court is limited to looking at the period of delay after that date but I also accept that the court is entitled to look at it in the context of all other delays before. I think that is correct on the authority of *Lyell's* case. It has also been conceded that there has been further inordinate and inexcusable delay since March 1990. I assent to the proposition that the onus is on the defendant and that he must show a causal link between the delay and any prejudice and I also agree that the relevant period is the more recent period from March 1990 and emphasise that there must be a causal link between this delay and prejudice. I refer to the case of *Hall v. O'Dells* , where those matters are set out and the need for causal link between delay and prejudice is emphasised.
>
> The defendants had grasped that nettle and said yes they have been prejudiced and that this must put the prospect of a fair trial at serious risk or must result in substantial prejudice to the defendants by the proper test in the *Department of Transport v. Chris Smaller Ltd.*
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> My view on the whole is that this is a case where I can find by a narrow margin that there will not be serious prejudice to the defendants if the case goes ahead and there will not be a substantial risk to a fair trial.
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> Much has been made of the complex material in the plaintiff's affidavit of March 20, 1990. If anything, it harms his own case. If the plaintiff wishes to pursue this claim on that evidence then he will have to seek leave of the court to amend his statement of claim. I do not think the plaintiff will get leave to amend to increase his claim by 50 per cent. His claim was crystallised as his medical condition has stabilised and his financial loss stops from October 31, 1985. This is a factor which has enabled me to cross the line and allow the appeal."

We were told that the learned judge, for the convenience of the parties, delivered his judgment extempore on the last day of term. Given more time, I have no doubt that he would have expressed himself more fully and clearly. The last paragraph of the judgment in particular is very difficult to follow, but on any reading does not appear to me to support the judge's decision to "cross the line." Regardless of whether or not an amendment ***p64*** to the statement of claim would be allowed, the defendants are faced with the necessity of preparing themselves, as best they can, to deal with the evidential contents of an affidavit of quite remarkable obscurity, relating to a period which ended five-and-a-half years before the application to strike out. In view of the

frank admissions made by Mr. Lowe about the deficiencies in the affidavit I have not explored them in any detail, but it will serve as an example if I mention that it is not clear whether the plaintiff's claim for loss of earnings relates solely to his business as a self-employed consultant, or extends also to the earnings of a company called Finaur Limited through which part of his activities are carried out. It must also be mentioned that even at the time of the hearing before us Mr. Lowe had received no clear instructions as to whether or not, if the case went to trial, leave to amend the statement of claim would be sought. While, of course, the burden of proving his loss rests upon the plaintiff, it is quite intolerable that the defendants should be left, at this late stage, trying to grapple with major uncertainties as to what his case really amounts to.

For my part, I feel no doubt that the continuing unwillingness or inability of the plaintiff to particularise his claim, lasting as it has done from March 1990 until this hearing, in respect of the increasingly distant period prior to October 31, 1985, provides ample evidence of additional prejudice for the purposes of the defendant's application. Although the judge referred to the *Chris Smaller Limited* decision, he does not appear to have borne in mind that the defendants needed only to show something more than minimal additional prejudice, nor to have appreciated that the continuing obscurity and increasing staleness of the plaintiffs' claim constituted evidence of such prejudice.

I would only add that, having had the advantage of reading the judgment of Parker L.J. in draft, I agree with the whole of it, including the additional grounds for striking-out the action to which he refers.

For all of these reasons I would allow the appeal.

Kennedy L.J.

I have had the advantage of reading in draft the judgments of both Nolan L.J. and Parker L.J. and agree with them both.

Parker L.J.

I also agree that this appeal should be allowed.

The limitation period in respect of the plaintiff's claim expired on October 12, 1984. By that time nothing had happened in the action save that the writ had been issued on July 11, 1984, service and acknowledgement of service had been effected and the action had been transferred from the District Registry to the central office.

In this state of affairs it behoved the plaintiff to pursue the action particularly diligently. Instead there was complete inactivity until on February 13, 1987, when, without having given notice of intention to proceed, he purported to serve a statement of claim. Thus it was not until some five years and four months after the accident that the defendants had any detail of the claim. It is not surprising therefore that the defendants should have applied to strike out the action. The delay to the defendants was admittedly inordinate and inexcusable and the prejudice plain and obvious. Nor is it surprising that on March 18, 1987, Master Topley should have acceded to the application on the two grounds:

(a) inordinate and inexcusable delay to the prejudice of the defendants; ***p65***
(b) failure to deliver a statement of claim pursuant to R.S.C., Ord. 18, r. 1 .

Although the Master's decision was reversed on appeal by Roch J. who considered that a fair trial could still be had, he restored the action and gave leave to serve a defence within seven days. By now in my judgment it became essential in the interests of justice that the plaintiff should pursue his action with even greater diligence and he had had fair warning of the consequences of failure to do so.

The defence was in fact served on November 4, 1987, and, there being no reply, pleadings were deemed to be closed on November 18, 1987. Under R.S.C., Ord. 25, r.8 discovery should have taken place within 14 days and the action set down within the next six months, *i.e.* by the end of March 1988.

Far from proceeding with exceptional diligence the plaintiff failed to give discovery until August 10, 1988, and only did so then pursuant to an order obtained by the defendants on July 22, 1988. Although pursuant to that order *a* list of documents was served it was inadequate. In the light of what had previously occurred this further delay in giving discovery was in my judgment clearly inordinate, inexcusable and prejudicial.

Thereafter the defendants, owing to the plaintiff's failure to give discovery and inspection, had to pursue the matter by the series of orders mentioned in the judgment of Nolan L.J. culminating in the "unless" order of February 22, 1990, pursuant to which the plaintiff swore an affidavit on March 20, 1990. That affidavit was itself confusing and to a large extent incomprehensible. The position now reached, put at its most favourable to the plaintiff, was that discovery which should have been given within 14 days of November 18, 1987, had not been properly given until March 20, 1990, and then only pursuant to a series of orders of the court. The action had still not been set down nor had it been set down by May 24, 1991, on which date the defendants again issued a summons to strike out on the ground of want of prosecution and failure to set down for trial. Again the defendants succeeded before Master Topley but again his decision was reversed on appeal with the result that the defendants are faced with a trial of a claim in respect of an accident which occurred 11 years ago. It would in my judgment be difficult to imagine a worse case of delay.

If the matter is considered simply as a matter of delay, I accept that, by reason of their conduct, the defendants are precluded from success unless they can show additional prejudice as a result of the delay between March 30, 1990, and May 24, 1991, which last period of delay was itself admittedly inordinate and inexcusable. But prejudice which exceeds what can properly be described as minimal will, in the light of the history and the obviously serious prejudice already suffered, be sufficient. I agree that on the evidence the defendants have well satisfied the burden upon them and that on that ground the appeal should be allowed.

There is however in my view another aspect of this matter. An action may also be struck out for contumelious conduct, or abuse of the process of the court or because a fair trial of the action is no longer possible. Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court. In my view however a series of separate inordinate and inexcusable delays in complete disregard of the rules of court and with full awareness of the consequences ***p66*** can also properly be regarded as contumelious conduct or, if not that, to an abuse of the process of the court. Both this and the question of fair trial are matters in which the court itself is concerned and do not depend on a defendant raising the question of prejudice.

In my judgment the way in which the action has been conducted does amount to an abuse of the process of the court and it would be a further abuse of process if the action were allowed to proceed. In my judgment also, a fair trial is no longer possible. I am aware that liability is not seriously in doubt, indeed it may already have been decided in the plaintiff's favour, but I can see no real possibility of a fair trial on *quantum* when even now the plaintiff's claim is still far from clear.

In *Wallersteiner v. Moir [1974] 1 W.L.R. 991* Lord Denning referred to the delays in the case being such as seriously to prejudice the course of justice and observed that the delays not only prejudiced the defendant but also the public at large since everyone has an interest in seeing that justice is done. In that case the delays were the responsibility of the plaintiff himself. In this case the responsibility is no doubt to a large extent the responsibility of the plaintiff's solicitors although he cannot in my view be regarded as blameless because he has still failed to produce a comprehensible properly particularised statement of his damage claim. It does not however in my view matter. The court is concerned to see that its process is not abused and that justice is done. If it is abused by the plaintiffs' action or if justice cannot be done if the trial goes forward it matters not whether it is the plaintiff himself or his advisers who are to blame. The action cannot be allowed to proceed. To the extent that the blame is that of his advisers he will no doubt have his remedy against them.

On these additional grounds also I would allow the appeal.

Order, Appeal allowed. Costs of the appeal to the Court of Appeal, of the appeal from Master Topley to the Judge in Chambers and of the application to Master Topley to be paid by the Plaintiff's solicitors personally. Application for leave to appeal to the House of Lords refused.

Solicitors —Moon Bevor for Cripps & Shore; Lawrence Graham.

