[1991–92 GIB LR 172]

"THE ZEEPAARD"

WASILEWSKI and WILLIAMS v. ZEEPAARD COMPANY LIMITED

SUPREME COURT (Kneller, C.J.): September 4th, 1991

Civil Procedure—dismissal for want of prosecution—criteria—intentional and contumelious default (amounting to abuse of process) or inordinate and inexcusable delay—delay inordinate if materially longer than regarded by courts and legal profession as acceptable—inexcusable if substantial risk of no fair trial or serious prejudice to other party

Civil Procedure—pleading—further and better particulars—claim for account of moneys paid is general request requiring no further particulars if no sum specified or if only rough figure stated

The plaintiffs brought proceedings *in rem*, as the master and crew member of a motor yacht, for payment of their wages and other emoluments of employment and reimbursement of sums applied for repairs. The vessel was arrested in Gibraltar.

The owner of the vessel denied liability to the plaintiffs on the ground that their employment had long since been terminated. It similarly denied liability for the additional sums in the plaintiffs' amended statement of claim for legal costs, auditing costs and repatriation, plus interest. The defendant counter-claimed against the plaintiffs for an account of moneys sent to the first plaintiff as master of the ship on account of the ship (which exceeded a stated sum); repayment of sums left over; damages for negligence, loss of business, wrongful arrest of the vessel, conversion and trespass to goods, and breach of contract; and payment for a shortfall in the accounts and interest.

The plaintiffs asked the defendant for further and better particulars of its claim for moneys paid to the first plaintiff on account of the ship. The court made time-tabled orders for mutual disclosure by production and inspection of lists of documents and disclosure of the substance of expert evidence. The plaintiffs were ordered to give security for costs and the proceedings were stayed pending the giving of security. Three weeks before the date set for trial, the defendants served their list (over five months late) but had still not complied with the other orders save to give some further particulars in a non-standard form. The plaintiff gave

security three months late because of a dispute over the form of that security.

The plaintiffs applied for the striking out of the defendant's counterclaim for want of prosecution.

The defendant submitted that (a) the delay in preparing its list was due to the absence of its principal on business overseas; (b) the particulars supplied were as detailed as was possible without extensive research, and the plaintiffs were in possession of most of the accounting documents; and (c) the substance of its expert's report would depend on what the plaintiffs' expert said and might necessitate a further inspection of the vessel, which was now in Florida.

Held, dismissing the application:

(1) The court had a discretion to dismiss the counterclaim for want of prosecution if the defendant was guilty of intentional and contumelious default in prosecuting its claim, amounting to an abuse of process, or if there had been inordinate and inexcusable delay. An inordinate delay was a materially longer delay than would be regarded by the courts and legal profession as acceptable. That delay would be inexcusable if, from the plaintiffs' view-point or on an objective view (i) it would result in a substantial risk that a fair trial would be impossible, or (ii) it was likely to cause or have caused serious prejudice to the plaintiffs. The discretion had to be exercised judicially and not on the basis of prejudice, whim or fancy. If the defendant was guilty of deliberate default it could be assumed that he had no confidence in his case or did not wish to pursue the claim (paras. 17–18).

(2) The defendant's claim for a general account did not need to give particulars of the sums allegedly received by the first plaintiff. Only if a specific sum was claimed were particulars of each sum required. The court could, if appropriate, make an order that the defendant give the best particulars it could at the present time, with liberty to supplement them later (para. 20).

(3) The defendant had no adequate explanation for its delay in serving the list of documents, and the delay was unacceptable. However, it did not give rise to any substantial risk that the trial would not be fair, nor had it caused the plaintiffs serious prejudice. Its delay in providing an outline of its expert's report was inordinate but nevertheless excusable, as an adjournment of the trial could remedy the default, either by consent or on application (para. 23; para. 25).

(4) The defendant's request for an account of moneys sent to the first plaintiff for the ship was a request for a general account, not a specific sum, even though the defendant had stated a rough figure for those moneys. The defendant therefore did not need to give particulars but had done so anyway to the best of its knowledge. There was no prejudice to the plaintiffs in this, as their own accounts covered the sum indicated by the defendant and in greater detail (para. 24).

Cases cited:

(1) *Allen* v. *Sir Alfred McAlpine & Sons Ltd*., [1968] 2 Q.B. 229; [1968] 1 All E.R. 543, applied.
(2) *Augustinus* v. *Nerinckx* (1880), 16 Ch. D. 13; 43 L.T. 458, applied.
(3) *Birkett* v. *James*, [1978] A.C. 297; [1977] 2 All E.R. 801, applied.
(4) *Blackie* v. *Osmaston* (1884), 28 Ch. D. 119; 54 L.J. Ch. 473, applied.
(5) *Carr* v. *Anderson* (1901), 18 T.L.R. 206, applied.
(6) *Harbord* v. *Monk* (1878), 38 L.T. 411, applied.
(7) *Marshall* v. *Inter-Oceanic &c. Co.* (1885), 1 T.L.R. 394, applied.
(8) *Sharer* v. *Wallace*, [1950] 2 All E.R. 463; (1950), 66 T.L.R. (Pt. 2) 283, applied.
(9) *Wells, In re*, [1962] 1 W.L.R. 874; [1962] 2 All E.R. 826, applied.
(10) *Williams* v. *Ramsdale* (1888), 36 W.R. 125, applied.

L.W.J.G. Culatto for the plaintiffs;
A.V. Stagnetto, Q.C. for the defendant.

1 **KNELLER, C.J.:** The plaintiffs ask for an order that the defendant's counterclaim be dismissed with costs including the costs of and occasioned by their application. Alternatively, they ask for "unless" orders together with an order of stay of the defendant's counterclaim until it provides £10,000 as security for the plaintiffs' costs. The basis of the plaintiffs' move is its allegation that the defendant is guilty of a want of prosecution. The defendant approves the plaintiffs' application in all its forms and urges the court to dismiss it with costs.

2 The plaintiffs' application cites the court's inherent jurisdiction to punish the defendant for its inordinate and inexcusable delay in proceeding with its counterclaim and/or the defendant's default in complying with the directions of the court made on February 21st, 1991 to (a) serve further and better particulars of its pleadings; (b) make and serve its list of documents; and (c) disclose the substance of its experts' evidence on which it intends to rely.

3 Martin Wasilewski, the first plaintiff, and Jacqueline Williams, the second plaintiff, claim that the owner of the motor yacht *Zeepaard*, once called Zeepaard Co. Ltd. but now Zeepaard Co. S.A., the defendant, appointed them master and crew member respectively of the *Zeepaard* on May 9th, 1987. The *Zeepaard* was to be rebuilt, and it was rebuilt by March 31st, 1990. They claim from the defendant £21,261.55 in wages, cumulative interest on those wages, further wages also with interest, certain emoluments and a substantial bonus for the rebuilding of the *Zeepaard*, and so on. They issued a writ of summons in this Admiralty action *in rem* against the owner on December 7th, 1990, and had the *Zeepaard* arrested in the Port of Gibraltar.

4 The plaintiffs' amended statement of claim of January 9th, 1991 added on their legal and other expenses up to December 21st, 1990 for launching this action, which amounted to £3,500; the cost of having the "master's accounts" audited; their maintenance as master and crew of the *Zeepaard* until she was sold or their contracts of service were terminated; and sums to cover their repatriation from Gibraltar to their home in England.

5 The owner's defence is that it terminated the employment of the plaintiffs on November 13th, 1990. It denies it owes the plaintiffs anything for unpaid wages, emoluments, interest, bonuses, severance pay, their continued service, or repatriation expenses. The owner counter-claimed for an account of what is due from the master to the owner from moneys sent to him for and on account of the *Zeepaard* and payment of any sum found due; damages for negligence; US$360,000 for loss of business for the Mediterranean summer charter season; US$324,000 for loss of business for the Caribbean winter season; damages for wrongful arrest of the vessel; damages for conversion and trespass to its goods; £197,000 for a shortfall in the master's accounts; damages for breach of contract; and statutory interest on all such sums.

6 There is much more in the pleadings but that is enough to set the scene for what followed. On January 29th, 1991, the plaintiffs asked the defendant for further and better particulars of the alleged remittance by the defendant to the first plaintiff during the period from May 1987 to November 1990 and/or to his order of a sum in excess of US$809,000. They asked for details of the amounts and dates on which they were sent, specifying to whom or what account, where and in what currency they were sent.

7 On February 21st, 1991 this court directed mutual service of the parties' list of documents within 14 days, inspection within the next 14 days, service within 21 days of the further and better particulars, disclosure by the defendant within 14 days of the substance of the evidence of two surveyors on which it intended to reply and likewise by the plaintiffs within 14 days of their receiving that of the defendant.

8 The plaintiffs were ordered by this court on March 13th, 1991 to give £10,000 security for the defendant's costs and until they did the progress of their action would be becalmed. The trial of the action has been fixed for five days' duration, beginning on Monday, September 23rd, 1991, which is 19 days ahead.

9 On August 2nd, 1991, the plaintiffs' solicitors complained that (a) although the plaintiffs sent £10,000 to their solicitor here in March 1991 and the defendant knew this was so, it was not until July 5th, 1991 that the stay was lifted, because the defendant's solicitors would not approve

the relevant draft form; (b) the defendant sent, on June 25th, 1991, what it called further and better particulars of the sums it claims an account for, but they were not in the usual forms or those which were ordered by the court and the plaintiff asked for full particulars by the close of business on Thursday, July 18th, 1991; (c) the defendant had not served its list of documents on the plaintiffs; and (d) it had not disclosed the substance of its experts' evidence, all of which greatly prejudiced the plaintiffs in their preparations for the trial.

10 By September 3rd, yesterday, the defendant was still in default of the orders made by the court on February 21st this year save that it had served its list of documents on August 28th, 1991, which it should have done on or before March 8th, 1991, so they were 187 days out of time.

11 In reply, the defendant's counsel reminded the court that the plaintiffs were ordered to give security within 60 days of March 13th, 1991 for the defendant's costs in the sum of £10,000 by payment into court or by bond or guarantee to the satisfaction of the Registrar. The plaintiffs' solicitors had that sum by the end of March and asked the defendant's solicitor to accept their undertaking, and the defendant demurred. The plaintiffs' solicitors were then at liberty to pay the £10,000 into court or give security by bond or guarantee to the satisfaction of the Registrar. Instead, they pressed on the defendant their undertaking and it was not until June 20th, 1991 that their guarantee and undertaking and the Registrar satisfied the defendant.

12 The defendant's solicitor explained that the 187-day delay with the list was due to the fact that its *alter ego*, Mrs. Janet Choynowski, lives in the United Kingdom and has been forced to spend long periods of time in Poland this year looking after her business interests there, and it was not until she came to Gibraltar on August 20th, 1991 for four days that the list could be prepared.

13 The further and better particulars that the defendant had given specified the amounts, the dates and the currency that the plaintiffs had been sent by the defendant. Without laborious research over an extended period, they were the best particulars it could give. They might not tally with those of the first plaintiff but the defendant would go no further than those set out in its "master's accounts." All the accounting documents are with the plaintiffs or their solicitors.

14 The substance of the defendant's expert evidence on which it would rely at the trial would be with the plaintiffs' solicitors on or before Tuesday, September 10th, 1991. The *Zeepaard* was in Florida in the United States, and it was not yet known which experts that had or would survey it would be able to reach Gibraltar in time for the trial. The defendant underlined the fact that the plaintiffs had the £50,000 bail bond

as security for their claims and their costs and there was no call for an early trial.

15 At the moment the plaintiffs' experts are people who saw the *Zeepaard* in Gibraltar, but their evidence will depend on what the plaintiffs' experts allege and that, in turn, might call for the plaintiffs' experts to travel to Florida to examine the *Zeepaard* again or for the selection of experts in Florida to check her re-fit, and 10 days in which to accomplish that will be too short.

16 That concludes a brief summary of the main facts and the contentions of the parties in this application. The law follows.

17 An action may be dismissed for want of prosecution when a party has been guilty of intentional and contumelious default and/or where there has been inordinate and inexcusable delay: see *Allen* v. *Sir Alfred McAlpine & Sons Ltd.* (1) and *Birkett* v. *James* (3). Those are different but sometimes related circumstances. The dismissal or otherwise of the action is discretionary and the court's exercise of it all have to be judicial, which is to say that it should not be based on prejudice, whim or fancy. But otherwise the exercise of the discretion is unfettered. The principles apply to defaulting defendants as much as they do to defaulting plaintiffs.

18 Contumelious default is deliberate default in complying with a peremptory order of the court. It must amount to an abuse of its process. It can be assumed that the defaulter has no confidence in his case or does not wish to pursue his claim. Inordinate delay is materially longer delay than the time usually regarded by the profession and courts as an acceptable time: see *Birkett* v. *James* (3). Inexcusable delay is one that from the applicant's point of view or from an objective view is a delay that gives rise to a substantial risk that it will not be possible to have a fair trial of the issues in the action or it is a delay that is likely to cause or to have caused serious prejudice to the applicant: see *Birkett* v. *James* ([1978] A.C. at 318).

19 The time for the doing of any act in any proceedings by a party may be extended by the court on such terms as it thinks just even if the period for doing it has passed: see the Rules of the Supreme Court, O.3, r.5.

20 When it comes to a claim for a general account the applicant need not give particulars of the sums which he says the respondent has received: see *Augustinus* v. *Nerinckx* (2) (16 Ch. D. at 17); *Sharer* v. *Wallace* (8); and *In re Wells* (9). If a specific sum be claimed, particulars of each sum must be given: see *Blackie* v. *Osmaston* (4) (28 Ch. D. at 123); and *Carr* v. *Anderson* (5). Sometimes, where a party declares he cannot give any further particulars without exhaustive inquiry, an order is made that he shall deliver forthwith the best particulars which he can give at the moment, with liberty to supplement them within a specified period

after discovery and inspection: see *Marshall* v. *Inter-Oceanic &c. Co.* (7); *Williams* v. *Ramsdale* (10) and *Harbord* v. *Monk* (6).

21 Those are the relevant and sufficient matters of law that arise in this application. I shall now apply them to the facts.

22 The delay between the making of the order for security for the defendant's costs to be provided and the Registrar's approval of their guarantee was due to the plaintiffs' not paying £10,000 into court or persuading the Registrar to be satisfied with their bond or guarantee for that period. They chose instead to offer their solicitors' undertaking. The defendant was not responsible for that delay.

23 The defendant served its list of documents 187 days late. Its explanation for that tardiness is inadequate. The Choynowskis could and should have been brisker in sending their documents to their solicitors. The plaintiffs served their list earlier. So they were made to wait for the defendant's list and the exchange was not contemporaneous. The delay was materially longer than the time usually regarded as acceptable. It was not, however, one that has given rise to a substantial risk that it will not be possible to have a fair trial. Nor has it caused serious prejudice to the plaintiffs.

24 When the defendant asked the plaintiffs to account for the sum in excess of US$809,000 sent by it to the plaintiffs between May 1987 and November 1990 it was, in my view, asking for a general account and not for a specific sum. The defendant in effect said: "Account for all the money sent to you for that period: It amounted to more than US$809,000." Therefore, the defendant need not give particulars but it has so far, I accept, given the best particulars it can. Whether or not the defendant will be able to prove any claim with them is another matter and must await the outcome of the trial. I see no prejudice to the plaintiffs in this, because their own accounts are said to be in greater detail and cover the total amount and more which the defendant claims to have sent them.

25 The defendant's delay in providing the outline of its experts' advice until September 10th is inordinate. Both parties have known since the pleadings were closed on what issues the experts might have to give evidence, *e.g.* damages for negligence which led to dismasting, poor work in the re-fitting, and overcharging for it. The defendant's delay merely means it will not see the synopsis of the plaintiffs' surveyors' reports before the trial begins, because the plaintiffs have 14 days after September 10th, 1991 in which to serve on the defendant resumés of their surveyors' reports. If this causes either party sufficient embarrassment the adjournment of the trial by consent or on application is the remedy. At this juncture the court is not persuaded the late service of a precis of each surveyor's evidence is likely to give rise to a substantial risk that the plaintiffs will not have a fair trial or cause them serious prejudice.

26 As to the plaintiffs' informal application for an order that the defendant do provide £10,000 as security for costs, I hold that it was made very late in the history of this litigation and it was not made out since the plaintiffs until yesterday were seemingly content with the defendant's bond for £50,000, which included some provision for their costs in this litigation.

Order accordingly.
