

[1991–92 Gib LR 195]

G.W. HARPER AND COMPANY LIMITED v. PIZARRO and PIZARRO

SUPREME COURT (Kneller, C.J), December 13th, 1991

Civil Procedure—dismissal for want of prosecution—burden of proof—applicant to show prejudice if action proceeds, or substantial likelihood that fair trial impossible, due to respondent's inordinate and inexcusable delay—presumption that inordinate delay inexcusable unless respondent shows reasonable excuse—action not normally struck out within limitation period

The plaintiff brought proceedings against the defendants for non-payment of its professional fees.

The plaintiff company acted for the defendants to negotiate the terms of an agreement with their landlords in connection with the redevelopment of premises of which they were life tenants, and related issues. The company initially pursued the landlords for its fees but their agreement to this arrangement had been conditional on the defendants' vacating the premises during the redevelopment work, which they had not done. The company later brought proceedings against the defendants for its fees. The court gave directions that the company should serve a list of its documents within 14 days, a copy of which order was served on the defendants' solicitors.

The company then changed solicitors and neither the original nor the replacement firm (because of a dispute over arrears of fees) supplied the list of documents. A year later, the company instructed further solicitors, who then served the list, together with the plaintiff's affidavit stating that the original solicitors had had instructions to pursue the proceedings to trial. However, the partner handling the order for directions had been disbarred and had not handed over the case to his colleagues, and the plaintiff company's principal had been unaware of the situation because he had been out of the jurisdiction on business during much of the intervening 13 months. He had instructed another firm promptly following his return.

The first defendant having died, the second defendant (his widow) applied for the proceedings to be struck out for want of prosecution.

She submitted that (a) the plaintiff's delay was inordinate and inexcusable in the circumstances, and if caused by the plaintiff's solicitors, its remedy was to sue them for negligence; (b) the delay would cause her prejudice if the action proceeded to trial because her husband

had died and she was elderly and her recollection of the relevant facts had faded; and (c) there could be no fair trial if the action proceeded.

The plaintiff submitted in reply that the proceedings should not be struck out because (a) the delay was not inordinate; (b) even if it were inordinate it was excusable in the circumstances; (c) the limitation period for the claim had not yet expired, and a new writ could be issued if the action were struck out, resulting in further delay and increased costs; and (d) the death of the first defendant was unconnected with the delay, and the recollections of the remaining defendant's daughter (who had been involved in the negotiations with the landlords) and her solicitors would supplement her own.

Held, dismissing the application:

(1) The court had a discretion to dismiss the plaintiff's action if the defendant could show that due to the plaintiff's inordinate and inexcusable delay, she would be seriously prejudiced if it were allowed to proceed or there was a substantial risk that a fair trial would not be possible. The court was not concerned with the merits of the respective cases. As there was a natural inference that an inordinate delay was inexcusable until a credible excuse was made out, it was for the plaintiff to show that it was excusable. However, if the limitation period for the proceedings had not yet expired, the action would not normally be dismissed (paras. 11–12).

(2) The plaintiff's delay in serving the list of documents, at 13 months, was materially longer than the time usually regarded professionally as an acceptable period. Furthermore, it had not made out a credible excuse for the delay, since it could have resolved the difficulties it had with its solicitors. The defendant had suffered prejudice because her husband, her co-defendant, had died before he could give evidence, though it was unclear whether the hearing would have taken place before his death if the list had been served at the correct time. The limitation period for the action had not expired and, as the remaining defendant and her daughter would probably be able to address the defence issues adequately, it had not been shown that the delay gave rise to a substantial risk that there could not be a fair trial of the issues. The application to strike out would therefore be dismissed (paras. 13–15).

Cases cited:

- (1) *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 2 Q.B. 229; [1968] 1 All E.R. 543, applied.
- (2) *Austin Secs. Ltd. v. Northgate & English Stores Ltd.*, [1969] 1 W.L.R. 529; [1969] 2 All E.R. 753, applied.
- (3) *Birkett v. James*, [1978] A.C. 297; [1977] 2 All E.R. 801, applied.
- (4) *Paxton v. Allsopp*, [1971] 1 W.L.R. 1310; [1971] 3 All E.R. 370, applied.

Legislation construed:

Rules of the Supreme Court, O.24, r.16:

“(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1), the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.”

R.A. Triay for the applicant;

C.A. Gomez for the respondent.

1 **KNELLER, C.J.:** Mrs. Pizarro, by her counsel, Mr. Triay, asked this court to dismiss the action of G.W. Harper & Co. (a firm) (“Harper”), which Mr. Gomez, counsel for Harper, resisted. The application was by summons in chambers dated September 18th, 1991 and was expressed to be brought under O.24, r.16 and on the grounds that Harper had failed to comply with the order for directions dated October 15th, 1990 made by Alcantara, A.J. It was supported by an affidavit of Mr. Triay dated January 16th, 1991, which asserted that Harper’s claim against Mr. and Mrs. Pizarro was for £5,496 with interest, for its fees for professional services rendered by it to the Pizarros between August 16th, 1988 and July 3rd, 1989.

2 Harper’s writ was issued from this court’s registry on February 16th, 1990 and its service acknowledged by the Pizarros’ solicitors on March 22nd, 1990. The Pizarros’ defence was filed on April 18th, 1990. I now set it out in full:

“1. The indorsement of the writ in the above action is denied.

2. The plaintiff is a firm engaged in and conducting the business of Chartered Quantity Surveyors, projects management and claims consultancy. The plaintiff, on its letterhead, is referred to as a division of Just Promotions & Services (Gibraltar) Ltd., and is managed generally by G.W. Harper of Apartment 6, Block 24, Tennis Apartment, Sotogrande, Cadiz, Spain, a Chartered Quantity Surveyor (hereinafter called ‘Mr. Harper’).

3. The defendants are retired and reside at Flat 3, 74 Main Street, Gibraltar (hereinafter called ‘the flat’), being the life tenants of the said property by virtue of a deed of lease dated February 6th, 1979.

4. The landlords of the building of which the flat forms part are Jyske Bank (Gibraltar) Ltd. (formerly A.L. Galliano’s Bank), a

company incorporated in accordance with the laws of Gibraltar, with a registered office situated at 74 Main Street, Gibraltar.

5. On or about July 29th, 1988 the defendants received notification by way of letter, from the landlords, that the landlords intended to redevelop the building known as 74 Main Street, Gibraltar (hereinafter called ‘the Building’).

6. The landlords offered the defendants alternative accommodation during the continuance of the works. At this stage in early August 1988 Mr. Harper, on behalf of the plaintiff, offered his services to the defendants to negotiate the terms of an agreement with the landlords in connection with the intended redevelopment, whereby the defendants’ interests would be suitably represented.

7. The defendant was mindful of the costs of engaging the plaintiff and, on Mr. Harper’s advice, signed a letter drafted by Mr. Harper addressed to the landlords, dated January 16th, 1988, enquiring whether the defendants’ costs of engaging professional advisers would be met by the landlord. The defendants also proposed that Mr. Harper advise them over the issues which had been raised by the redevelopment proposals.

8. The landlord agreed to meet the defendants’ costs of engaging professional advisers, by way of letter dated September 21st, 1988, but intimated that such costs would be relatively minimal. The landlord did make the proviso that such fees would only be met once the defendants had moved out of the premises.

9. In the letter referred to above in para. 8 the landlords expressed reservations that Mr. Harper should act for the defendants as he had previously represented the bank. The defendants will aver that in the plaintiff’s previous dealings with the landlords, the plaintiff had been instructed by the landlords to procure that the building was vacant in order to enable the landlords to carry out the proposed redevelopment.

10. In spite of the matters and particulars alleged in paras. 8 and 9 above, the plaintiff assured the defendants that its costs would be met by the landlords, notwithstanding the proviso that these costs would only be met once the defendants had vacated.

11. Mr. Harper was at all times aware of the fact that the landlords had imposed the condition that his costs would only be met if the defendants vacated the flat. Notwithstanding this condition, Mr. Harper continued to reassure the defendants that his costs would be met by the landlords, and at the same time attempted to negotiate an agreement with the landlords whereby the defendants would remain in occupation of the flat during the continuance of the works.

12. The defendants were offered alternative accommodation by the landlords which they found to be unsuitable, and were advised by Mr. Harper that the works that the landlords intended to carry out on the building, in so far as these affected the flat, could be carried out in sections, thereby obviating the necessity of vacating the premises. On this basis Mr. Harper proceeded to attempt to negotiate an agreement with the landlords.

13. The plaintiff has on several occasions submitted its invoice for its professional services to the landlords for settlement, and has never looked to the defendants for settlement of its fees, until November 28th, 1989.

14. On April 21st, 1989, and at the plaintiff's suggestion, the defendants instructed Messrs. Triay & Triay, of 28 Irish Town, Gibraltar, by a letter drafted by Mr. Harper, to obtain an injunction against the landlords, restraining the landlords from proceeding with the works. Mr. Harper again assured the defendants that both his costs, and Messrs. Triay & Triay's costs would be met by the landlords.

15. The defendants will aver that during the continuance of the negotiations between the defendants and the landlords, Mr. Harper took charge of the conduct of all correspondence, meetings, discussions and negotiations entered into on behalf of the defendants, with the landlords. The defendants relied on these representations, and continued to instruct the plaintiff accordingly until July 27th, 1989 when the defendants wrote to the plaintiff, informing the plaintiff that its services were no longer required, and requesting Mr. Harper to provide the defendants with a note of his charges, in order that the defendants could submit the same to the landlords once a final agreement had been reached.

16. The defendants have engaged the services of Mr. Harper on the basis that his professional charges would be met by the landlords and have not at any time requested Mr. Harper to render any services which were not to be paid for by the landlords, and Mr. Harper was at all times aware of the defendants' position in this respect."

Thus by April 19th, 1990 the pleadings were closed.

3 A summons for directions was taken out by Harper on May 30th, 1990, and on October 15th, 1990, Alcantara, A.J. ordered, among other things, that Harper should serve the Pizarros with a list of its documents within 14 days (*i.e.* by October 30th, 1990). A sealed copy of the order for directions was served on the Pizarros' solicitors by October 30th, 1990. The next day Harper's solicitor was asked for them by the Pizarros' solicitor. Harper changed its solicitor on December 5th, 1990, saying that

they had no “current” instructions, so they could not supply Harper’s list of documents.

4 Between December 5th, 1990 and September 18th, 1991 (when the summons to dismiss the action was filed), there were sporadic telephone calls between Harper’s second solicitors and the Pizarros’ solicitors, but still no list of documents came from Harper.

5 The first defendant, Mr. Alfred Pizarro, died in March or April 1991.

6 Harper instructed Mr. Gomez on Friday, December 6th, 1991 and Harper’s list of documents was served on Mr. Triay for Mrs. Pizarro on Monday, December 9th, 1991, which is the date when the summons was heard. There are 87 documents of Harper’s, relating to his services to the Pizarros. At the same time Mr. Gomez filed and served his affidavit in opposition to the application in which he stated:

“3. The action was originally handled by Mr. John Ross-Jones of Messrs. John Ross-Jones & Partners, who duly attended to the filing of the writ herein and duly settled the said order for directions.

4. The matter was left in the hands of the said Mr. Ross-Jones who had standing instructions to pursue the case to trial.

5. The said Mr. Harper is the plaintiff’s sole partner and was away from Gibraltar on business for several periods of time in 1990 and 1991.

6. During these periods it would appear that Mr. Ross-Jones was disbarred and left Gibraltar. Messrs. Stephen Bullock & Co. who appear to have taken over many of Mr. Ross-Jones’s cases claim they had no instructions on this matter.

7. Mr. Harper first came to know of the default in compliance with the first paragraph of the order after his return to Gibraltar on or about November 22nd, 1991.

8. Mr. Harper was not able to instruct any firm until Wednesday, December 4th, 1991, as I was unable to see him before then due to other commitments. Mr. Ross-Jones’s file was not transferred to me until Friday, December 6th, 1991. On that day a list of documents was prepared and served on the defendants’ solicitors.

9. The plaintiff’s claim has a good foundation in law and fact and it is therefore humbly submitted that it should be allowed to proceed.”

7 Mr. Triay acknowledged that by the time he began to urge Mrs. Pizarro’s summons, Harper had complied with the order of Alcantara, A.J. of October 15th, 1990, but just 13 months and 10 days out of time.

Mrs. Pizarro wished to continue with her application to strike out Harper's action, by invoking the inherent jurisdiction of the court to do so. Harper's delay was inordinate, inexcusable and caused her such great prejudice that she would be denied a fair trial if it continued.

8 Harper's action and her defence were based on oral representations as to whether the landlords or the Pizarros would pay Harper's fees for the work it did for the Pizarros. She, her husband and their adult daughter had taken part in negotiations with Harper and the landlords about alternative accommodation for the Pizarros while the landlords redeveloped the building of which they were the life tenants. Her husband had died since the pleadings were closed on the April 18th, 1990. She is in her 70s and so her memory of who said what, where and when might fade.

9 Mr. Triay submitted that there was a manifest want of prosecution by Harper. It had failed to instruct its second solicitors, or put them in funds or on deposit so that they would release its papers to its third solicitors. The earliest hearing date would be in mid-June 1992. There was no tariff in these matters and a delay of 13 months might or might not be inordinate delay according to the circumstances. Had Mrs. Pizarro not brought this summons, Harper might still have made no move. If its solicitors had been negligent and were insured or not impecunious, Harper could sue them and the dismissal of its action would not be prejudicial.

10 Mr. Gomez countered with these points. If Harper's action were to be dismissed, it would spring back with a new writ because it could still do so within the limitation period. Striking out would penalize Harper in costs but would also extend the delay and increase the costs in resolving its action and so further prejudice Mrs. Pizarro. The tragic demise of Mr. Pizarro was not caused by Harper or its delay. Their daughter's recollection and that of Mr. Triay whose firm was instructed by the Pizarros on April 21st, 1989 would reinforce Mrs. Pizarro's memory of these events.

11 The power of the court to dismiss an action is discretionary. The burden of proof is on Mrs. Pizarro. She must show that she will be seriously prejudiced if Harper's claim is allowed to proceed: see *Paxton v. Allsopp* (4). There is a natural inference that delay is inexcusable until a credible excuse is made out for it: see *Allen v. Sir Alfred McAlpine & Sons Ltd.* (1). Harper must provide the adequate excuse for delay. Mrs. Pizarro does not have to show it is inexcusable. The court is usually not concerned with the merits of the claim or defence, but with the course of the legal proceedings: see *Austin Secs. Ltd. v. Northgate & English Stores Ltd.* (2) ([1969] 2 All E.R. at 754).

12 Prolonged or inordinate delay on the part of Harper or its lawyers such as will give rise to a substantial risk that it is impossible to have a

fair trial of the issues in the action, or such as is likely to cause or to have caused serious prejudice to Mrs. Pizarro must be shown by her: see *Allen v. Sir Alfred McAlpine & Sons Ltd.* (1). If the limitation period has not expired that is generally a conclusive reason for not dismissing a pending action: *Birkett v. James* (3).

13 Harper has not made out a credible excuse for the delay in serving its lists of documents. His first solicitor was suspended by the Law Society of England and Wales. He fell out with his second who would not act before his claim for arrears of fees were met, and Harper, on the balance of probabilities, could have put that right in some way. The delay is one of 13 months for serving a list of documents, and is materially longer than the time usually regarded by the profession and courts as an acceptable period (see *Birkett v. James* (3)). It has caused Mrs. Pizarro prejudice because Mr. Pizarro has died before he could give evidence. He died in March or April this year. However, it is not clear that the hearing would have come on by then if Harper had served its lists of documents by the end of October 1990.

14 The delay has not been shown to give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action. Mrs. Pizarro and her daughter may be able to deal with them adequately. The action is pending and the limitation period has not expired.

15 Weighing those matters together, I now exercise the discretion vested in this court by rejecting this application to dismiss Harper's action.

Application dismissed.
