[2013–14 Gib LR 672]

PRATTS v. GOVERNMENT OF GIBRALTAR, GIBRALTAR HEALTH AUTHORITY and H.M. ATTORNEY-GENERAL

SUPREME COURT (Dudley, C.J.): July 18th, 2014

Civil Procedure—pleading—delay—sanction for party's failure to comply with time limits for pleadings to be approached by (a) identifying and assessing seriousness and significance of failure; (b) considering why failure occurred; and (c) considering all circumstances of case giving special weight to (a) and (b)

Civil Procedure—pleading—delay—not possible to state with precision how serious and significant delay must be before sanction invoked—affecting efficient progress of current litigation (and litigation generally) always important—relief usually granted if breach not serious and significant—providing schedule of loss four days out of time not disruptive of conduct of litigation

The claimant applied retrospectively for an extension of time in which to file his schedule of loss in proceedings against the defendants, which had been served four days late. The defendants opposed the application and applied to have it struck out.

The Supreme Court reserved its decision in order to consider the proper approach to take to the "relief from sanctions" provision of the CPR, r.3.9 but in the meantime the English Court of Appeal made and published a decision on this very question. The Supreme Court considered the implications of this decision for Gibraltar generally and for the case before it.

Held, granting the extension of time:

(1) The approach that should now be taken to litigants' failure to comply with court orders or rules was to follow a three-stage process which required the court to (a) identify and assess the seriousness and

significance of the failure to comply; (b) consider why the failure occurred; and (c) consider all the circumstances of the case so as to deal justly with the application, giving particular weight to (a) and (b) (para. 4).

(2) "Seriousness and significance" could not be given precise limits but affecting the efficient progress of the litigation before the court—and of litigation generally—would always be important considerations. In the present case, providing the schedule of loss four days late did not disrupt the conduct of the litigation, or litigation generally. Once a decision had been made that the breach was not serious or significant, relief from sanctions would usually be granted and it would be unnecessary for the court to consider the other two factors (paras. 5–6).

(3) It was the case that instructions could have been provided to counsel more quickly but it was clear that there had been a misunderstanding between counsel as to the size of the task of settling the schedule of loss. The task clashed with senior counsel's judicial commitments and he also suffered a family bereavement at this time—which in the context of a four-day delay was a sufficient explanation (para. 8).

(4) The proceedings had been bedeviled by constant delays, responsibility for which could be laid at the doors of both parties. The just solution would be to grant the extension (paras. 9–10).

Case cited:

(1) *Denton* v. *T.H. White Ltd.*, [2014] 1 W.L.R. 3926; [2014] 4 Costs LR 752; [2014] C.P. Rep. 40; [2014] EWCA Civ 906, followed.

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132, as amended), r.3.9:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need—
>
> (a) for litigation to be conducted efficiently and at a proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence."

K. Azopardi, Q.C. and *T. Hillman* for the claimant;
S.V. Catania for the defendants.

1 **DUDLEY, C.J.:** On June 2nd, 2014, I heard detailed arguments in relation to two applications. The first was a retrospective application (by one day) for an order seeking an extension of time of four days for the filing and serving of the claimant's updated schedule of past and future loss, which was due on March 24th, 2014 and was served out of time on March 28th, 2014. That application was opposed by the defendants who

also filed an application seeking the strike-out of the claim. It is noteworthy that the parties had already previously agreed an extension of 28 days.

2 The submissions centred upon the recent CPR amendments brought about by the Jackson reforms and in particular the approach to be taken in applying the relief from sanctions provision at CPR, r.3.9.

3 I reserved my decision but subsequently there has been a further English Court of Appeal decision heard by a bench which included the Master of the Rolls and Jackson, L.J. It dealt with three appeals, *Denton* v. *T.H. White Ltd.*, *Decadent Vapours Ltd.* v. *Bevan* and *Utilise TDS Ltd.* v. *Cranstoun Davies*, and I shall refer to it as the *Denton* case (1). It was noteworthy that both the English Bar Council and Law Society intervened in the appeal.

4 In *Denton*, the court restated the approach to be taken and expressed the hope that following that case there would be no need in the future to resort to the earlier authorities. The approach that must now be taken is a three-stage process which in the context of the present case can be summarized as:

(a) identify and assess the seriousness and significance of the failure to comply with the court order;

(b) consider why the failure occurred; and

(c) consider all the circumstances of the case so as to deal justly with the application, with the two factors stated in the rule being given particular weight.

Seriousness

5 In the judgment in *Denton* (1), the Master of the Rolls and Vos, L.J. dealt with the seriousness and significance of the breach in the following terms ([2014] 1 W.L.R. 3926, at para. 26):

> "It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which 'neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation.' Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most useful measure of whether a breach has been serious or significant. But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example of such a breach is a failure to pay court fees. We

> therefore prefer simply to say that, in evaluating a breach, judges should assess its seriousness and significance."

The breach in providing the schedule four days late did not imperil hearing dates and, other than the fact that the present applications were contested, did not disrupt the conduct of the litigation. Neither has it had an impact on the conduct of litigation generally. A later paragraph in *Denton* is also instructive (*ibid.*, at para. 28):

> "If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater importance."

6 However, Mr. Catania submits that the failure to provide the schedule of loss in a case where liability has been admitted is serious in itself even if the delay is only by a few days, as the defendant is entitled to know the quantum claimed. That this is so irrespective of whether the delay is long enough to disrupt the proper conduct of proceedings. I disagree. The measure of seriousness or significance of delay in the provision of pleadings is the impact it has on the progress of the action and litigation generally. It may be that there are other examples other than court fees where breach can be serious irrespective of impact upon litigation, but provision of the schedule of loss is not.

7 I shall therefore deal with the remaining two stages only briefly.

Why the failure occurred

8 It is certainly possible to say that the instructions could have been provided to counsel in more timely fashion but what is also clear is that there was a misunderstanding between Mr. Hillman and Mr. Leighton Williams, Q.C. who was settling the schedule as to the size of the task. The task clashed with certain judicial commitments on the part of Mr. Leighton Williams who also suffered a family bereavement. In the context of a four day delay, it is in my view a sufficient explanation.

All the circumstances of the case and dealing with the application justly

9 Given the foregoing, it must follow that the just outcome is to grant the extension. It is true to say that this is a case that has been plagued with delay and was only reactivated, at least in so far as the court process was concerned, following judicial intervention. However, for present purposes and when the delay has not been significant, I think it wholly unnecessary to trawl through historic delays, which can be attributed to both sides.

10 Nor do I think it is necessary to examine earlier extensions granted for the provision of the schedule of loss. Evidently those applications were considered at the time and should not now be re-opened in the context of a breach, which is neither serious nor significant. Whilst I acknowledge that there has been historic non-compliance by both sides with rules and orders, I disagree that somehow a line in the sand should be drawn as at November 2011 when I started to manage the case very proactively. All the circumstances would require an examination of breaches from the time that the claim was issued in 2003. Given the nature of the present breach, that exercise is not necessary particularly as the matter is now essentially ready for trial.

11 For these reasons the extension of time is granted and the strike-out application is dismissed.

Orders accordingly.