[2017 Gib LR 149]

ESCARCENA v. GIBRALTAR HEALTH AUTHORITY

FINCH v. GIBDOCK LIMITED

SUPREME COURT (Jack, J.): July 21st, 2017

Limitation of Actions—extension of time—acquiring material facts—claimant granted extension of time to issue proceedings for damages for personal injury sustained in 2010 as court satisfied adequate evidence of causation not received until July 2014—court to grant extension under Limitation Act 1960, s.6(3) unless no case to answer

Civil Procedure—service of process—extension of time—extension sought after expiry of 4-month limit (CPR r.7.5(1)) may be granted under CPR r.7.6(3) if claimant took all reasonable steps to comply with r.7.5 but was unable to do so—if claimant did not take all reasonable steps to serve, court has no discretion and extension refused

The claimants brought claims for damages for personal injuries.

Escarcena v. *Gibraltar Health Authority*

The claimant, Ms. Escarcena, suffered a seizure in June 2010 and was admitted to a hospital run by the Gibraltar Health Authority. Following a second seizure in April 2011, the diagnosis was that Ms. Escarcena's seizures had been caused by an ischemic lesion. In January 2013, a visiting consultant neurologist reviewed Ms. Escarcena's scans and concluded that she had a tumour in her right occipital lobe. The tumour was subsequently removed. The claimant alleged that if the correct diagnosis had been made earlier she would not have suffered the loss of vision of which she now complained.

Following the diagnosis of the tumour, the Authority commissioned an independent investigation into the care that had been provided to Ms. Escarcena. A copy of the report (dated May 2013) was provided to Ms. Escarcena's legal representatives sometime between November 2013 and January 2014. In January 2014, Ms. Escarcena's lawyers wrote a letter in accordance with the Pre-Action Protocol for the Resolution of Clinical Disputes, summarizing the allegations of negligence and requesting a full medical report. A full medical report, dated June 26th, 2014, was sent to Ms. Escarcena's lawyers on July 11th, 2014.

In December 2015, Ms. Escarcena commenced proceedings for damages for personal injury against the Authority ("the first action"). By

agreement between the parties, there were various stays of the proceedings. The defence was only served in April 2017. The main defence advanced was that the action was barred by s.4(1) of the Limitation Act 1960. In June 2017, it was ordered that there be a trial of a preliminary issue as to whether the claim was barred by the 1960 Act. The trial was listed for hearing on July 28th. On July 20th, however, the parties lodged consent orders which purported to vacate the hearing of the preliminary issue and giving directions for obtaining expert medical evidence.

Ms. Escarcena's lawyers applied for an adjournment of the first action, which was supported by the Authority. It was anticipated that if an adjournment were granted the parties would be able to settle the matter.

On July 3rd, 2017, Ms. Escarcena issued an application ("the second action") seeking leave under s.6 of the Limitation Act to bring the proceedings pursuant to s.5(3) (*i.e.* on the basis that the facts had not been known earlier than three years before the date on which the action was brought). The date of knowledge alleged for the purposes of s.5(3) was July 11th, 2014, *i.e.* on receipt of the full medical report.

Finch v. *Gibdock Ltd.*

The claimant, Mr. Finch, had suffered significant injuries in a workplace accident in February 2014, which he alleged was the result of negligence by his employer, Gibdock Ltd. In January 2017, a claim form was issued seeking damages for personal injuries. The claim form was not immediately served on Gibdock Ltd. In April 2017, Mr. Finch changed solicitor. On the penultimate day for service of the claim form and particulars, a messenger was sent to lodge the particulars of the claim at the Supreme Court and to serve Gibdock Ltd.'s solicitor. The court returned the particulars of claim to the messenger with a note that the medical report relied on by the claimant should be exhibited to the particulars of claim, not merely attached. The messenger failed to serve Gibdock Ltd.'s solicitor. Mr. Finch's lawyer believed service to have been effected but did not ask the messenger to make a certificate of service, as should be standard practice.

On June 30th, 2017, an application was issued seeking to extend time for service of the claim form and particulars of claim pursuant to CPR r.7.6. In the alternative, Mr. Finch sought that service of the documents be dispensed with under CPR r.6.16.

Held, ruling accordingly:

Escarcena v. *Gibraltar Health Authority*

(1) Ms. Escarcena would be granted leave under s.6(3) of the Limitation Act. In many, if not most, cases, the fact that Ms. Escarcena's advisers had been able to send a full pre-action protocol letter in January 2014 would have been fatal to an argument that the date of knowledge of the material facts relating to the cause of action was later, but the court was just persuaded that Ms. Escarcena had made out a sufficient case that adequate evidence of causation was only obtained on July 11th, 2014, when she

received the full medical report. The threshold for satisfying s.6(3) was low; the court should only refuse to grant leave if there were no case to answer. Although Ms. Escarcena might face difficulties in showing that she was entitled to an extension of time under s.5(3), it would be wrong at this stage to prevent her from arguing the matter (paras. 19–24).

(2) An adjournment of the preliminary issue would only be granted if Ms. Escarcena's lawyers, who could not properly advise her on any potential settlement due to conflict of interest, found another firm to act for her by July 25th, 2017. While the parties might consider that the consent orders would best serve their respective interests, that was not of itself determinative. By CPR r.1.4(1), the court was under a duty to case manage actively. Any order made by the court was potentially liable to appeal (although case management orders were notoriously difficult to appeal successfully), but that could not be a proper ground for the court not to make an order which it otherwise considered appropriate (paras. 30–34).

Finch v. *Gibdock Ltd.*

(3) Mr. Finch's application for an extension of time would be refused. A claim had to be served within the jurisdiction within four months (CPR r.7.5(1)). The court had power to extend time for service. If, as in the present case, an application for an extension of time was made after the expiry of the four-month period, the court could make such an order under CPR r.7.6(3) if the claimant had taken all reasonable steps to comply with r.7.5 but had been unable to do so (r.7.6(3)(b)) and the claimant had acted properly in making the application. A claimant had to satisfy r.7.6(3)(b) before the court could exercise any discretion in accordance with the overriding objective. In the current case, the claimant had not taken reasonable steps to serve Gibdock Ltd., which was fatal to the application under r.7.6(3). The court therefore had no discretion to exercise. Even if it had such discretion, however, an extension would have been refused in the circumstances (paras. 45–49).

(4) Nor would service of the claim form be dispensed with under CPR r.6.16. That provision only permitted dispensation "in exceptional circumstances." It could not be used to subvert r.7.6(3). "Exceptional circumstances" in r.6.16 related to difficulties of service, of which there had been none in the present case. Even if it were proper to look at all the facts of the case when considering whether there were exceptional circumstances, there was nothing exceptional in the present case. Mr. Finch's lawyers had mistakenly failed to serve Gibdock. That the consequences were severe for Mr. Finch was not exceptional (paras. 50–52).

Cases cited:

(1) *Black* v. *Green* (1854), 139 E.R. 422; 15 C.B. 262, referred to.
(2) *Cassidy* v. *Gibraltar Health Auth.*, 2017 Gib LR 117, followed.
(3) *Clark* v. *Forbes Stuart (Thames Street) Ltd.*, *In re*, [1964] 1 W.L.R. 836; [1964] 2 All E.R. 282, followed.

(4) *Doe, on the demise of Bennett* v. *Hale* (1850), 117 E.R. 423; 15 Q.B. 171, considered.
(5) *Godwin* v. *Swindon B.C.*, [2001] EWCA Civ 1478; [2002] 1 W.L.R. 997; [2001] 4 All E.R. 641; [2002] C.P. Rep. 13, referred to.
(6) *Hashtroodi* v. *Hancock*, [2004] EWCA Civ 652; [2004] 1 W.L.R. 3206; [2004] 3 All E.R. 530; [2005] C.P. Rep. 17, distinguished.
(7) *Islington L.B.C.* v. *Harridge* (2003), *The Times*, June 30th, 2003, distinguished.
(8) *Justice Min*. v. *Marrache*, 2017 Gib LR 88, distinguished.
(9) *MG Engr. & Consultancy Ltd*., *In re*, 2015 Gib LR 354; on appeal, 2016 Gib LR 113, referred to.
(10) *Migge* v. *Dellipiani*, 1980–87 Gib LR 250, referred to.
(11) *Paston* v. *Genney* (1471), Y.B. Trin. 11 Edw. IV, fo. 2 pl. 2, considered.
(12) *Phillips & Co.* v. *Whatley*, 2007–09 Gib LR 82, referred to.
(13) *Seton* v. *Stasy* (1357), considered.
(14) *X (Minors)* v. *Bedfordshire County Council*, [1995] 2 A.C. 633; [1995] 3 W.L.R. 152; [1995] 3 All E.R. 353; [1995] 2 FLR 276, referred to.

Legislation construed:

Civil Procedure Rules, r.1.1(1):
"These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost."
r.1.4(1): "The court must further the overriding objective by actively managing cases."
r.6.16(1): The relevant terms of this sub-rule are set out at para. 50.
r.7.6(3): The relevant terms of this sub-rule are set out at para. 45.

Limitation Act, 1960, s.5: The relevant terms of this section are set out at para. 14.
s.6: The relevant terms of this section are set out at para. 14.
s.10: The relevant terms of this section are set out at para. 14.

C. Gomez for Ms. Escarcena on July 10th and 21st, 2017;
S. Catania for the Gibraltar Health Authority on July 21st, 2017;
C. Finch for Mr. Finch on July 20th, 2017;
O. Smith for Gibdock Ltd. on July 20th and 21st, 2017.

1 **JACK, J.:**

Background

In these cases claims for damages for personal injury are liable to fail as a potential result of failings on the part of the two claimants' professional advisers. It is for this reason that this judgment is given in these cases together.

The facts in *Escarcena*

2 On June 8th, 2010, the claimant ("Ms. Escarcena") suffered a seizure. She was admitted to St. Bernard's Hospital, run by the defendant health authority ("the GHA"). The following day she was taken to Algeçiras for a magnetic resonance imaging ("MRI") scan. On June 12th, 2010, she was discharged from St. Bernard's. On June 18th, 2010, as an outpatient, an electroencephalogram ("EEG") was carried out.

3 On April 17th, 2011, Ms. Escarcena suffered a second seizure and was again admitted to St. Bernard's. She was discharged the following day. On May 4th, 2011, she underwent a second MRI scan. Although it was intended that a further EEG should be carried out, this was not done. The diagnosis of both seizures was that they were caused by an ischemic lesion.

4 Subsequently she was seen by a number of consultants at the GHA. These consultants considered that the MRI scans were normal. It was only on January 11th, 2013 that a visiting consultant neurologist, Dr. Lawden, reviewed the two MRI scans and concluded that Ms. Escarcena had a tumour growing in her right occipital lobe. The tumour was subsequently removed.

5 Ms. Escarcena complains that if the correct diagnosis had been made earlier the tumour would not have grown as it did. In particular, if the tumour had been excised earlier, she would not have suffered the loss of vision of which she now complains.

The first Escarcena action

6 The first action was commenced on December 24th, 2015. By agreement between the parties, there were various stays of these proceedings. The defence was only served on April 20th, 2017.

7 The main defence advanced was that the action was barred by s.4(1) of the Limitation Act 1960. The defence admitted "that there was a breach of duty in its care and treatment of the claimant in failing to consider [the] MRI scans undertaken on 9 June 2010 and 4 May 2011 and diagnose a tumour." The claim for damages was not admitted but the allegations of causation made in the particulars of claim were not specifically traversed.

8 On June 15th, 2017, I gave case management directions. Mr. Corbett, who appeared for the GHA, indicated that the GHA was contemplating applying for summary judgment on the limitation defence. I instead ordered that there be the trial of a preliminary issue as to whether the personal injury claim brought by Ms. Escarcena was barred by the Limitation Act 1960. This trial is listed before me for hearing on July 28th, 2017.

9 On July 20th, 2017, the parties lodged a consent order in this first action. This purported to vacate the hearing of the preliminary issue on July 28th, 2017 with leave to have the matter relisted. The order gave directions for obtaining the expert evidence of ophthalmologists and neurosurgeons. I had an email sent as follows:

> "As regards 2015-Ord-231, the matter is set down for the trial of a preliminary issue on Friday 28th July 2017. The matter of limitation needs to be determined as a preliminary issue. There is no point giving directions for expert evidence when limitation is still a live issue.
>
> [The email then deals with the second action.]
>
> Jack J reminds the parties that CPR rule 1.1(2)(e) requires the Court to allocate an appropriate share of Court's resources to cases. With the greatly increased pressure on Court resources caused by the imminent reduction in the number of judges, it is important that adjournment be not granted unnecessarily. Accordingly the judge will hear all matters on Friday 28th July 2017."

10 Both parties made representations by email inviting me to vacate the hearing on July 28th, 2017 and give the agreed directions. I heard them today.

The second action

11 On July 3rd, 2017, Ms. Escarcena issued an application seeking permission under s.6(1) of the 1960 Act to bring proceedings pursuant to s.5(3) (facts not known earlier than three years before the date on which the action was brought).

12 The "date of knowledge" alleged for the purposes of s.5(3) was July 11th, 2014. I heard the application for permission *ex parte* on July 10th, 2017. I granted the application and said that I would give reasons for my decision later. These are those reasons.

The law

13 In *Cassidy* v. *Gibraltar Health Auth.* (2) I said (2017 Gib LR 117, at para. 10):

> "The general limitation period for most causes of action in Gibraltar is six years: Limitation Act 1960, s.4(1). However, the proviso to s.4(1) reduces the limitation period for actions claiming damages for personal injury to three years. The three-year limitation period can in turn, in certain circumstances, be extended."

14 Sections 5, 6 and 10 of the 1960 Act make the following provision for the extension of time:

"5.(1) Section 4(1) (which, in the case of certain actions, imposes a time-limit of three years for bringing the action) shall not afford any defence to an action to which this section applies, in so far as the action relates to any cause of action in respect of which—

(a) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(b) the requirements of subsection (3) of this section are fulfilled.

(2) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the claimant for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the claimant or any other person.

(3) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the claimant until a date which was not earlier than three years before the date on which the action was brought.

(4) Nothing in this section shall be construed as excluding or otherwise affecting—

(a) any defence which, in any action to which this section applies, may be available by virtue of any enactment other than section 4(1) (whether it is an enactment imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any enactment or rule of law or equity which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

Application for leave of court.

6.(1) Any application for the leave of the court for the purposes of section 5 shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications which are made after the commencement of a relevant action.

(2) Where such an application is made before the commencement of any relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on

evidence adduced by or on behalf of the claimant, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient—

(a) to establish that cause of action, apart from any defence under section 4(1); and

(b) to fulfil the requirements of section 5(3) in relation to that cause of action.

(3) Where such an application is made after the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the claimant, it appears to the court that, if the like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient—

(a) to establish that cause of action, apart from any defence under section 4(1); and

(b) to fulfil the requirements of section 5(3) in relation to that cause of action,

and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the claimant that the matters constituting that cause of action had occurred on such a date as (apart from section 5) to afford a defence under section 4(1).

(4) In this section 'relevant action', in relation to an application for the leave of the court, means any action in connection with which the leave sought by the application is required.

. . .

10.(1) In sections 5 to 9 'the court', in relation to an action, means the court in which the action has been, or is intended to be, brought.

(2) *Repealed.*

(3) In sections 5 to 9 reference to the material facts relating to a cause of action is a reference to any one or more of the following that is to say—

(a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting that cause of action;

(b) the nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty;

(c) the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.

(4) For the purposes of sections 5 to 9 any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice with respect to them, would have regarded at that time as determining, in relation to that cause of action, that (apart from any defence under section 4(1) or so much of section 7 of the Contract and Tort Act as requires actions under Part IV thereof to be commenced within three years after the death of the deceased) an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action.

(5) Subject to subsection (6) of this section [which is irrelevant for current purposes], for the purposes of sections 5 to 9 a fact shall, at any time, be taken to have been outside the knowledge (actual or constructive) of a person if, but only if—

(a) he did not then know that fact;

(b) in so far as that fact was capable of being ascertained by him, he had taken all such action, if any, as it was reasonable for him to have taken before that time for the purpose of ascertaining it; and

(c) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such action, if any, as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances . . .”

15 As I noted in *Cassidy* (2) (2017 Gib LR 117, at para. 11):

“These sections of the 1960 Act are taken word for word from the Limitation Act 1963 (UK) (which has since been replaced by a different scheme for extending time in the Limitation Act 1980 (UK)). The 1963 Act was the subject of comment in *In re Clark* v. *Forbes Stuart (Thames Street) Ltd.* . . . In that case, the plaintiff had issued proceedings against Forbes Stuart (Billingsgate) Ltd. for injuries sustained on a slippery floor at Billingsgate fish market. After the three-year limitation period expired, it transpired that the occupier of the premises was Forbes Stuart (Thames Street) Ltd. The plaintiff applied *ex parte* for leave to issue against this different

company out of time. He was refused leave at first instance and appealed. The Court of Appeal unanimously held that the plaintiff had shown a *prima facie* case against the Thames Street company and (Salmon, L.J. *dubitante*) a *prima facie* case that he could not with reasonable diligence have discovered that the Thames Street company was the occupier any earlier than he had done."

Grant of relief in the second action

16 It is convenient to deal with the second action first. Following Dr. Lawden's diagnosis of a tumour, the GHA commissioned an independent investigation into the care provided to Ms. Escarcena. This investigation made a report on May 26th, 2013. A copy of the report was provided to Messrs. Phillips, who were then acting for Ms. Escarcena, at some point between November 2013 and January 29th, 2014.

17 On January 29th, 2014, Messrs. Phillips wrote a five-page letter in accordance with the Pre-Action Protocol for the Resolution of Clinical Disputes. After reciting the facts, it summarized the allegations of negligence. It then had a section entitled "As a result of the above our client sustained the following injuries," which it then set out. The letter noted that "a full medical report on our client's condition and prognosis will be required."

18 A full medical report was obtained from Dr. Oliver Foster, a consultant neurologist. It is dated June 26th, 2014 but appears only to have been sent to Messrs. Phillips under cover of an email dated July 11th, 2014. Mr. Charles Gomez, appearing for Ms. Escarcena, submits that it was only following receipt of this medical report that Ms. Escarcena knew the "decisive fact" that causation could be proved. Time, he therefore argued, only ran from July 11th, 2014, so on July 10th, 2017 Ms. Escarcena was just in time.

19 It is of course a striking feature of this case that Ms. Escarcena's then advisers were able to send a full pre-action protocol letter as early as January 29th, 2014. In many, indeed probably in most, cases that would be fatal to an argument that the date of knowledge was later. I am, however, just persuaded that Ms. Escarcena has made a sufficient case that adequate evidence of causation was only obtained on July 11th, 2014.

20 In England, the Limitation Act 1963, as I noted in *Cassidy* (2), has been replaced by a different scheme under the Limitation Act 1980 which does not require a claimant to obtain the permission of the court to bring proceedings after the expiry of the primary three-year limitation period. Section 14 of this latter Act defines the "date of knowledge" from which time under the secondary limitation period under s.11 of that Act starts to run. There is very extensive case law in England on this definition. The terms of s.14 are, however, somewhat different to those of s.10 of the

Gibraltarian Act. It is in my judgment arguable that the reference to "decisive fact" in s.10(4) of the 1960 Act (which is not an expression used in the 1980 Act) makes it easier for a claimant to establish the right to an extension of time than under the 1980 Act. (The 1980 Act also gives the court a discretion to extend time after the expiry of the primary and secondary limitation periods, in effect a tertiary limitation period—see s.33—but this has no parallel in the 1960 Act. Because there is no such power in the 1960 Act, it may be right to construe the Gibraltarian legislation more favourably to a claimant than when applying the definition of the date of knowledge in the 1980 Act.)

21 I remind myself that on an application such as the present, I can only look at the "evidence adduced by or on behalf of the claimant" and that I have to determine the application on the artificial presumption that there is an "absence of any evidence to the contrary." This does not mean that the court is wholly blinkered from looking at the realities of a case. However, the threshold for satisfying s.6(3) is a low one. It is only if there is no case to answer that the court should refuse permission. Although Ms. Escarcena faces difficulties, and indeed may face formidable difficulties, in showing that she is entitled to an extension of time under s.5(3), it would, in my judgment, be wrong at this stage to prevent her from arguing the matter.

22 I note that if I refused the application Ms. Escarcena would have a right of appeal. That right may well, however, be nugatory. In *In re Clark* v. *Forbes Stuart (Thames Street) Ltd*. (3), the Court of Appeal heard the plaintiff's appeal on the last day before the expiration of the extended limitation period under the English equivalent of s.5(3). Lord Denning, M.R. held ([1964] 1 W.L.R. at 840): "It was essential that [the appeal] should be brought today because the new writ has got to be issued today if it is to be issued at all in time." In the current case, the Court of Appeal will next visit in September, which would be too late to save Ms. Escarcena's case.

23 In a case such as the present, it may be possible under the court's general case management powers to devise a procedure to avoid an appeal being rendered academic: Civil Procedure Rules, r.3.1(2)(m). If the Supreme Court refused the s.6(3) order, arguably the court could nonetheless permit the claimant to issue a claim form on condition that he or she obtained retrospective permission from the Court of Appeal to issue it: *Black* v. *Green* (1) (but *cf. In re MG Engr. & Consultancy Ltd.* (9) (2015 Gib LR 354); appeal allowed on other grounds (2016 Gib LR 113)). However, this is speculative.

24 These considerations are not, however, relevant to my determination to grant permission under s.6(3). I am not exercising a discretionary

power. Either the conditions in s.6(3) are met or they are not. I have held that they are met and therefore grant permission.

25 It will be necessary in due course to consider case management of this second action. Because limitation continues to be an issue, consideration will need to be given to whether there should be the trial of a preliminary issue as to when Ms. Escarcena's date of knowledge was for the purposes of ss. 5(3), 6(3) and 10(5) of the Limitation Act 1960. In the meantime, I direct that there be a stay of the second action for four months.

The application for adjournment of the first action

26 By email of yesterday, Mr. Charles Gomez made the following submissions, which had been agreed with and were supported by Mr. Catania for the GHA:

> "We are familiar with CPR rule 1.1(2)(e) and readily acknowledge its relative importance. In addition to that imperative, there are a number of other circumstances which have to be taken into account.
>
> One of these is to ensure finality of proceedings and the protection of litigants against expenditure which is capable of being avoided.
>
> The claimant is a lady of relatively limited means who, since her marriage in 2015 is no longer eligible to public funding under the legal assistance scheme. Moreover she has to contend not just with the effects of her medical condition but that of her infant child who has been very seriously ill indeed.
>
> The defendant is funded by an insurance company whose policy is also to avoid unnecessary litigation where possible. It provides insurance in the area of clinical negligence and is well versed in reviewing and contesting or settling claims.
>
> Both parties have agreed that their respective interests are best served by the making of the draft Orders which we filed yesterday. The very worst case scenario is the need to appeal which is inevitable one way or the other when the preliminary point is determined.
>
> It will be recalled that the last case on estoppel dealt with by the Supreme Court of Gibraltar went up to the Privy Council at untold cost initially to the public purse and eventually to the liquidator of Marrache & Co in *Prime Sight Limited v Lavarello* [2013] UKPC 22, 2013–14 Gib LR 226. Neither party wishes to expose itself to such or any similar result.
>
> The draft Orders that we submitted yesterday represent an effort to avoid as many risks as possible and is a *bona fide* attempt by the

parties to resolve all matters 'justly' and in full compliance with CPR Part 1.

The Court of Appeal recently acknowledged that whether or not any particular matter should be determined by the Court is a matter that is in the remit of the parties. In *Minister for Justice v Marrache and the Parole Board* (unreported, 5th May 2017) Sir Maurice Kay P said at para [11]: 'An undetermined application can be seen as still being the creature of the applicant, rather than the Court.'

Whilst that was a judicial review case where there were pervasive public policy issues which might give the Court greater justification for involvement regardless of the parties' wishes, these considerations do not, in our respectful submission, apply to the current case which is of a purely private nature involving only the parties only.

The rationale is that it is for the parties to carry out a risk balancing exercise involving exposure to adverse costs orders, risk of adverse awards on the merits and many other issues which are clearly in their remit and that of their advisers.

The Access to Justice reforms of 1999 strongly promoted a culture where litigants should seek to resolve issues amicably. CPR rule 1.4(2)(f) provides that in furthering the overriding objective by actively managing cases, the Court should be '. . . helping the parties to settle the whole or part of the case.'

The intended consent Orders are geared to promoting CPR rule 1.4(2)(f); the reason for the directions on expert evidence is for the parties to better understand the highly complex neurological injury which the Claimant claims to have suffered, and by so doing narrow the issues between the parties, and thereby to facilitate settlement. Hence why there is very good cause for these directions at this point in time.

Our own firm deals with a great many clinical negligence cases. The vast majority of these are settled before judgment as a result of intense and ongoing review of the kind reflected in the draft consent Orders. Indeed of the many cases against a multiplicity of defendants that we have dealt with in the last 10 years only one, *Rocca v Gibraltar Health Authority* 2013–14 Gib LR 300 (judgment of Prescott J 3rd December 2013), went to a full trial.

As the result of this tried and tested process, which is moreover recommended by the Rules, both sets of litigants are, in practice, re-assured that everything possible has been done to resolve issues justly in an orderly, careful, considered manner and at the minimum possible financial risk to them.

> The intended reduction in the number of Judges is of course a matter of regret to both parties, although it is understood that the Ministry of Justice considers that this measure has been taken because of its perceived decline in litigation. Even so it is respectfully submitted that there are other countervailing matters which, the parties have, with the benefit of legal advice and on very careful consideration, come to the conclusion are best dealt with in the manner set out in the draft consent Orders."

27 These submissions were amplified by counsel orally to me today. Mr. Gomez said that he was currently handling several medical negligence cases against the GHA and said that he anticipated most of those cases settling. He anticipated that, if the adjournment of the trial of the preliminary issue were granted, the parties would be able to settle the matter. He said that he was well aware of the potential conflict of interest between his firm and Ms. Escarcena. They had instructed English counsel, Mr. Isaac Jacob, to advise in view of the potential conflict.

28 Mr. Catania supported the application for an adjournment. He obtained his instructions from the GHA's insurers, a Lloyd's syndicate. They intended to take the limitation point in the second action as well as the first action.

29 I shall consider these points in the order raised in the email. I can well accept that Ms. Escarcena is a lady of limited means, whilst the defendant has well-funded insurers. This, however, means that the court should be particularly proactive in ensuring that issues are determined speedily and as cheaply as possible.

30 It may be that the parties consider that the consent orders best serve their respective interests (although I shall consider Charles Gomez & Co.'s position later). That is not determinative. By CPR r.1.4(1), the court is under a duty actively to case manage. Obviously, any order made by the court is potentially liable to appeal (although case management orders are notoriously difficult successfully to appeal). That, however, cannot be a proper ground for the court not to make an order which it otherwise considers appropriate.

31 *Justice Min.* v. *Marrache* (8) is, in my judgment, not in point. First, it was a public law case. Secondly, it decided that the Minister had the power to withdraw a Part 8 claim which he had issued. The same position applies generally in civil litigation to applications made under CPR Part 23. However, this is irrelevant to the powers to make case management orders, which it can do of its own motion.

32 I accept, of course, that the courts try to promote the settlement of claims. However, this is an aspect of the case which causes me great concern. Pending the trial of the preliminary issue in the first action, there

is no conflict of interest between Charles Gomez & Co. and Ms. Escarcena. They both have the same interest in succeeding on the preliminary issue. However, there is an impossible conflict of interest once the question of settlement generally arises, if the limitation point is not determined. In considering any offer made by the insurers before determination of the limitation defence, the risk of Ms. Escarcena losing on the limitation point will be highly material to the advice given. There is no way Charles Gomez & Co. can properly advise on such a settlement. They are impossibly conflicted. The instruction of English counsel does not overcome this difficulty.

33 So far as the reduction in the number of judges is concerned, my understanding is that this is primarily caused by Brexit-related austerity. However, the reasons are irrelevant. The Gibraltar courts will be under greater pressure because there will only be three judges. The Supreme Court must accordingly give even greater weight to "allotting . . . an appropriate share of the court's resources" to particular cases: CPR, r.1.1(2)(f).

34 Taking all these factors into account, I am only willing to grant an adjournment if, by Tuesday, July 25th, 2017, Charles Gomez & Co. find a firm which is not conflicted to act on Ms. Escarcena's behalf. I am not willing to grant an adjournment of the trial of the preliminary issue if Charles Gomez & Co. continue to act. To do so would be to turn a blind eye to the fact that Charles Gomez & Co. cannot properly advise their client on any settlement proposals made to Ms. Escarcena following the obtaining of the further medical evidence.

The facts in *Finch*

35 Mr. Gary Finch was born February 23rd, 1979. He worked as a manual labourer for Gibdock Ltd. ("Gibdock") at the Gibraltar Dockyard. On February 3rd, 2014, at about 3.30 p.m., whilst working at No. 3 Dock, he fell about three to four metres into a bamber (a painter's basket). That he landed in the bamber was fortunate, since otherwise he would have fallen some seven metres. Nonetheless, he suffered a fractured elbow and a complete tearing of the arterial and posterior cruciate ligament in his left knee, which required surgery in England. There is ongoing pain in the knee and a likelihood of premature osteoarthritis.

36 Mr. Gary Finch alleges that the accident was caused by the negligence of Gibdock. He also relies on various breaches of regulations made under the Factories Act 1956. Gibdock has always denied liability, but has voluntarily paid for Mr. Finch's medical treatment in England.

37 On January 26th, 2017, Moira Bossino of Bossino Chambers issued a claim form on behalf of Mr. Gary Finch seeking damages for the personal injuries suffered in the accident. The claim form was not immediately

served on Gibdock. Gibdock's solicitors, TSN, had indicated that they had instructions to accept service.

38 On April 10th, 2017, Verralls Barristers & Solicitors filed a notice of change of solicitor on Mr. Gary Finch's behalf. Conduct of the matter was taken over by Mr. Christopher Finch at Verralls, who is Mr. Gary Finch's father.

39 Precisely what occurred on May 25th, 2017, the penultimate day for service of the claim form and particulars of claim, is slightly unclear. Mr. Christopher Finch making his submissions somewhat amplified his witness statement. The outline is, however, not in dispute.

40 Verralls' messenger on that day was sent to lodge the particulars of claim at the Supreme Court counter and serve TSN at their offices over the road from the counter. The court returned the particulars of claim to the messenger with a note that the medical report relied on by the claimant should be exhibited to the particulars of claim, not just attached to the particulars of claim. The messenger then returned to Verralls, explained the problem at the court to Mr. Christopher Finch, but did not explain that he had failed to serve TSN. Mr. Finch believed that the messenger had served the claim form and particulars of claim on TSN but he did not ask the messenger to make a certificate of service as should be standard practice.

41 The court did not have good reason for rejection of the particulars of claim. CPR, Part 16, Practice Direction 16, para. 4.3, allows the claimant to "attach to or serve with his particulars of claim a report from a medical practitioner." There is no requirement to exhibit the medical report.

42 The court staff should not have returned the particulars of claim without a direction to that effect from the registrar or a judge. However, so far as the need to file the particulars of claim at the court is concerned, the erroneous rejection of the document would not have prejudiced the claimant. In *Islington L.B.C.* v. *Harridge* (7), counter staff at the County Court had told a solicitor seeking to apply for the suspension of a warrant for possession of a council flat to come back the following day (by which time the warrant would have been executed and the court would have lacked the jurisdiction to suspend the warrant under s.85 of the Housing Act 1985). The English Court of Appeal held:

> "It is arguable that if an application was made the previous day then the judge had jurisdiction on the following day, although by then the warrant had been executed. I say that on the basis of the case In re Keystone Knitting Mills' Trade Mark [1929] 1 Ch 92, where the court acted on a maxim actus curiae neminem gravabit: the action of the court, or in this case inaction, shall not harm anybody. There is, as it happens, more modern authority (and in English) to the same

effect. That is the case of National Westminster Bank PLC v Powney (1991) Ch 339, where Lord Justice Slade, delivering the judgment of the court, said this:

> 'It is in our judgment a cardinal principle of procedural law that no party should suffer unnecessarily from delay which is not his fault but rather a fault in the administration of justice.'

It is not an absolute principle of course, but it is something to be acted on if possible."

43 The position is, however, different in relation to service on TSN. They were simply not served with either the claim form or the particulars of claim.

The attempt to remedy the defective service

44 When the problem came to light, Verralls, on June 30th, 2017, issued an application seeking to extend time for service of the claim form and particulars of claim pursuant to CPR r.7.6 (the application erroneously names r.7.5, but nothing in my judgment turns on this). At the hearing before me, Mr. Finch (against objections by Mr. Smith for the defendant) sought in the alternative to argue that service of the documents should be dispensed with under CPR r.6.16.

45 The usual validity for a claim form for service within the jurisdiction is four months: CPR r.7.5(1). There is a power for the court to extend time for service. If the application is made after the expiry of the validity of the claim form, CPR r.7.6(3) provides that—

"the court may make such an order only if—

(a) the court has failed to serve the claim form; or

(b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and

(c) in either case, the claimant has acted promptly in making the application."

46 Mr. Finch submitted that the court had a discretion, which it should exercise in accordance with the overriding objective: CPR rr. 1.1(2) and 1.2. He relied on *Hashtroodi* v. *Hancock* (6). There are two difficulties with his reliance on this case. First, it was a case under CPR r.7.6(2), which applies to extensions of time applied for before, rather than after, the expiration of the validity of the claim form. Rule 7.6(2) does not have a provision corresponding to r.7.6(3)(b). In my judgment, a claimant must satisfy r.7.6(3)(b) before the court can exercise any discretion in accordance with the overriding objective. In the current case, the claimant has

not taken reasonable steps to serve TSN. That in my judgment is fatal to the application under r.7.6(3). I simply have no discretion to exercise.

47 Secondly, the Court of Appeal refused to grant an extension under r.7.6(2). Unusually, it was exercising the relevant discretion itself; it was not merely reviewing the discretion of the lower court. Dyson, L.J. (as he then was), delivering the judgment of the court, said ([2004] 1 W.L.R. 3206, at paras. 34–36):

> "34 Our review of the facts discloses that the only reason for the failure to serve the claim form within the four months' period was the incompetence of [the claimant's solicitors]. The deputy master observed that Mr Pike [the solicitor acting] sought to look after his client's interests, and it was not 'absolutely certain' that a negligence claim against the solicitors would succeed. On the material that has been presented to this court, we can see no answer to an allegation of negligence against the solicitors. It has often been said that a solicitor who leaves the issue of a claim form almost until the expiry of the limitation period, and then leaves service of the claim form until the expiry of the period for service is imminent courts disaster. That is precisely what occurred here . . .
>
> 35 It follows that this is a case where there is no reason for the failure to serve other than the incompetence of the claimant's legal representatives. Although this is not an absolute bar, it is a powerful reason for refusing to grant an extension of time. Despite this, Mr Gore submits that an extension should be granted. In relation to the application of the overriding objective, he relies on the following factors. First, the claim is very substantial. Secondly, the issues in the case were identified early on, so that a short extension of time would not undermine the case management process. Thirdly, the extension of time would not put the parties on a more or less equal footing than they would have been if the extension were not granted. Fourthly, the extension would not increase the cost of the litigation. Fifthly, it would be disproportionate to refuse the extension. Finally, the defendant has not suffered any prejudice as a result of the extension, since at the date of the claimant's application, the defendant had not yet acquired an accrued limitation defence.
>
> 36 We are in no doubt that the time for serving the claim form should not be extended in this case. The absence of any explanation for the failure to serve is, on the facts of this case, decisive. Sadly, the errors on the part of Mr Pike were particularly egregious. The other factors identified by Mr Gore are not sufficient to outweigh the complete absence of any reason which might go some way to excusing the failure to serve in time. If we were to grant an extension of time in the present case, it seems to us that the rule stated in CPR

r 7.5 would cease to be the general rule. Moreover, there would be a real risk that statements made by this court about the importance of the need to observe time limits would not be taken seriously. That would be most unfortunate."

48 The only way in which the current case differs from *Hashtroodi* (6) is that (at least if Mr. Christopher Finch's oral explanation is admissible as to how the messenger failed to serve) there is an explanation of the failure to serve. However, it is scarcely an adequate explanation. Like the solicitors in *Hashtroodi*, Verralls courted disaster by its lackadaisical approach to service.

49 If I had to exercise the discretion, I would refuse the extension, really on the same grounds as the Court of Appeal in *Hashtroodi*. I am, of course, aware that Mr. Christopher Finch is effectively acting *pro bono* on behalf of his son but that in my judgment is irrelevant in considering whether to grant the extension.

50 I turn then to Mr. Christopher Finch's fallback argument that service should be dispensed with under CPR r.6.16. This application is not formally before me, but since another application could be issued I will deal with it. Rule 6.16(1) only permits dispensation of service "in exceptional circumstances."

51 Mr. Smith submitted that "exceptional circumstances" in this rule related to matters regarding difficulties of service. In the current case, he said, there were no difficulties of service. TSN's offices were within yards of the court's counter which the messenger had attended with the documentation. Nothing could have been easier than to serve TSN, who had already indicated their willingness to accept service.

52 Mr. Finch submitted that the court should look at all the facts of the case when considering whether "exceptional circumstances" existed. I do not accept that and prefer Mr. Smith's submission. Rule 6.16 cannot be used to subvert r.7.6(3): *Godwin* v. *Swindon B.C.* (5). However, even I were wrong on this, there is nothing exceptional in the current case. Verralls made a mistake in serving TSN. The consequences are severe for Mr. Gary Finch. That is not, however, exceptional in my judgment.

53 Lastly, I should deal with what came as something of a *cri de coeur* from Mr. Christopher Finch. He said that the bar of Gibraltar had a tradition of accommodating its opponents. It was not in accordance with this tradition (he did not go so far as to say it was ungentlemanly) for Mr. Smith to take these unmeritorious points on service. I am afraid I disagree. The points on service were not unmeritorious, not least because they succeeded. Mr. Smith's duty was to his client. It has always been counsel's duty "while acting with all due courtesy to the tribunal before which he is appearing, fearlessly [to] uphold the interests of his client without regard

to any unpleasant consequences either to himself or to any other person": Sir William Boulton, *A Guide to Conduct & Etiquette at the Bar of England & Wales*, 6th ed., at 7 (1975). Mr. Smith did what he was obliged to do.

54 I refuse the application made on Mr. Gary Finch's behalf.

Obtaining independent legal advice

55 In the event that the preliminary issue in *Escarcena* is tried and she loses, Messrs. Charles Gomez & Co. will no doubt explain to their client that she should seek independent legal advice. Verralls will have to give the same advice to Mr. Gary Finch. A lawyer is always obliged to give such advice when there is the possibility that he or she has acted negligently and the client has been prejudiced.

56 There is, however, a problem in Gibraltar. The bar here is very close-knit. Whilst this is undoubtedly one of the strengths of the Gibraltarian bar, a consequence is that there is an understandable reluctance for any member of the bar to advise suing another member of the bar for negligence. There are only two reported cases of professional negligence against barristers and solicitors in *The Gibraltar Law Reports*: *Migge* v. *Dellipiani* (10) and *Phillips & Co.* v. *Whatley* (12). So far as I am aware, there are no claims for professional negligence pending against barristers or solicitors, nor have there been during my time on the bench here. In practice it is extremely difficult, and sometimes impossible, for someone in the position of Ms. Escarcena or Mr. Gary Finch to obtain representation to take proceedings against their former advisers.

57 The difficulty of parties like these in obtaining representation raises an important issue of access to justice and in turn to ensuring the rule of law in Gibraltar. The Government has published a Bill enacting the Legal Services Act 2017 (B14/17): *Gibraltar Gazette*, July 13th, 2017. This will provide for a new Code of Conduct for the Bar: cl. 16. The latest draft of the Code of Conduct includes this provision:

> "4. A Lawyer as a professional person must be available to the public and must not, without good cause, refuse to accept instructions from any client or prospective client for services within the reserved areas of work that are within the Lawyer's fields of practice."

58 On the face of it, this is a widely worded description of the cab-rank principle. However, the difficulty with it is that a lawyer can simply say that solicitors' or barristers' negligence is not a field in which he or she practices or has experience. Given that thitherto, such negligence claims have been rare in Gibraltar, most lawyers could (perfectly truthfully) say that such claims were not part of his or her practice.

59 One possibility so as to ensure that legal advice and representation is available to people like Ms. Escarcena or Mr. Gary Finch would be for the Bar Council (or its proposed successor, the Law Council) to keep a list of all litigation firms. The chairman of the Bar would allocate the next firm on the list to anybody complaining that he or she could not obtain representation. That firm would then be obliged on cab-rank principles to take the case, even if barristers' and solicitors' negligence was not a normal part of their practice.

60 Even if such a proposal is not adopted, there appears to be a common law power for the court itself to require counsel to act in a case where a litigant would otherwise be without representation. An early example is *Seton* v. *Stasy* (13), reported in an unprinted *Year Book*, the manuscript of which is held by Cambridge University Library. An account of the case is given in Sir John Baker, *The Common Law Tradition*, at 81 (2000). The background of the case is this. Lucy Cokeside obtained a decree of dissolution of her marriage to Sir Thomas de Seton from the Rota (the Pope's Court) in Rome. She alleged that Seton had forced her under duress to marry him solely so he could get her property. She had fled to the Bishop of Durham for help. The Rota's decree provided for Seton to return all the property, including the English land, which he had from her.

61 Seton did not honour the Pope's award and was in due course excommunicated. In the meantime, however, he brought proceedings against Cokeside (or perhaps her new husband, since she appears to have remarried) for her breach of the (first) Statute of Praemunire 1353 (27 Ed III st 1 c 1). The Statutes of Praemunire (of which a 1393 Act, 16 Ric 2 c 5, is the best known) were part of an ongoing attempt by the English monarchs to ensure that the common law courts rather than the ecclesiastical courts had jurisdiction over disputes concerning land in England. The 1353 Act prohibited litigants having recourse to foreign courts in cases where the King's courts had jurisdiction, on pain of forfeiture of their estates to the Crown. The Rota's order that Seton return all of Cokeside's English lands arguably breached the 1353 Act. (The statute does not appear to give a private law right for breach of statutory duty to the defendant in the foreign proceedings: *X (Minors)* v. *Bedfordshire County Council* (14) but this does not seem to have troubled the Court of Common Pleas.)

62 Seton by this time was a Justice of the Court of Common Pleas. (One of the privileges of officers of a superior court, including judges of such courts, is that he may sue and be sued in his own court. The privilege was abolished in England for solicitors of the Supreme Court, now the Senior Courts: County Courts Act 1984, s.141, since repealed.) The only advocates with rights of audience in the Court of Common Pleas were the serjeants-at-law. None of them was willing to act for Cokeside. It is

unclear whether this was, as Sir John Baker suggests, because they did not want to offend the King, who was interested in ensuring that the 1353 Act worked as intended, or simply because no advocate wanted to act as counsel in litigation against a judge of the court where he regularly appeared. The *Year Book* reports:

> "Et la feme pria consaille, et *Thorpe* comanda a *Whichingham, Chelre* et *Claymond* que ils serroient de conseille la feme sur peyne que ilz ne serroient mye oie en la court le roy."
>
> "And the woman asked for counsel, and Thorpe [C.J.] ordered [Serjeant] Whichingham, [Serjeant] Chelre and [Serjeant] Claymond that they be of counsel for the woman on pain that they would never be heard in the King's court." [Translation supplied.]

(Notwithstanding the assignment of counsel, the case did not go well for Cokeside, against whom the jury awarded heavy damages. On the announcement of the verdict, she let rip a rich stream of invective against her ex. Seton sued her again and for a long time it was thought that these fresh proceedings were an early case of slander. However, in fact, her liability was for contempt of court: A.K.R. Kiralfy, *The Action on the Case* at 115 (1951).)

63 The practice of assignment of counsel seems to have been reasonably common. In *Paston* v. *Genney* (11), Choke, J. in the Court of Common Pleas held (Y.B. Trin. 11 Edw. IV, at fo. 3 pl. 2):

> "[S]il ne voet ester de counsel per nostre assignement nous poiomus luy estranger al barre quant a ascun pleader."
>
> "If he [the nominated serjeant] did not wish to be counsel by our assignment we can remove him from the bar with respect to any pleading." [Translation supplied.]

64 Indeed, serjeants seem to have been required to act in the Court of King's Bench, where they shared rights of audience with barristers (apprentices-at-law). In the same *Year Book* case, Serjeant Genney recounted his own experience (*ibid.*):

> "Jeo voy mon maistre Cheine chief justice de Bank le Roy vener en cest court et require les serjants destre del councell en un plee que fuit devant luy, et sils ne voilloient il voilloit aver forjuge eux de pleder en Bank le Roy."
>
> "I saw my master Cheine, chief justice King's Bench, come into this Court and required the serjeants to be of counsel in a case which was before him, and if they did not want to, he wished to have them prohibited from [ever] pleading in the King's Bench." [Translation supplied.]

65 The power to appoint counsel seems never to have been used against attorneys-at-law or (in the Court of Chancery) solicitors. However, in the mediæval period, serjeants and barristers often took instructions directly from clients. Indeed, in *Doe, on the demise of Bennett* v. *Hale* (4), even as late as 1850, Lord Campbell, C.J. was able to say (117 E.R. at 428; 15 Q.B. at 182):

> "There certainly has been an understanding in the profession that a barrister ought not to accept a brief in a civil suit, except from an attorney . . . But we are of opinion that there is no rule of law by which it can be enforced."

It may thus be that the power to appoint counsel to appear for a party survived. The question was moot because by this time the cab-rank rule was a well-established part of the English bar's professional obligations.

66 The question of whether the power can still be exercised in a jurisdiction with a profession split between barristers and solicitors as in England is, however, not relevant to Gibraltar. All members of the bar have rights of audience before the Supreme Court and can take direct instructions from clients. I therefore conclude that, where no lawyer is willing voluntarily to accept a civil brief, the court has the power to nominate named members of the bar to take the case. This is subject to the would-be litigant having a *prima facie* case and to arrangements being made for the payment of counsel's reasonable fees.

Ruling accordingly.

This judgment was corrected under the slip rule, July 24th, 2017.
