Christopher Gordon Trill Patrick Rose Glanville v. Elizabeth Jane Sacher Simon John Sacher Steinberg & Sons Limited Christopher Trill Limited Anthony Stanbury
QBEN191/1402E
In the Supreme Court of Judicature
Court of Appeal (Civil Division)
On Appeal from the High Court of Justice
Queen's Bench Division
6 May 1992

1993 WL 964236

Lord Justice Neill and Lord Justice Glidewell

Wednesday, 6th May 1992

Analysis

Representation

- MR. A.G. POLLOCK Q.C. and MR. J. SMOUHA (instructed by Messrs S.J. Berwin & Co.) appeared on behalf of the Appellants/Defendants.
- MR. R.D. BURKE-GAFFNEY O.C. and MR. A. CONNERTY (instructed by Messrs Bear Wilson & Lloyd) appeared on behalf of the Respondents/Plaintiffs.

JUDGMENT (REVISED)
LORD JUSTICE GLIDEWELL:

This is an appeal against a decision of Mr P J Cox QC sitting as a Deputy High Court Judge who, on 30 April 1991, dismissed an application by the defendants to dismiss this action for want of prosecution. The Deputy Judge then made consequential orders, to some of which I shall refer later.

The history

The plaintiffs, Mr. Trill and Miss Glanville, are designers of high fashion handbags, belts and other fashion accessories. Before 1982 they had both achieved considerable success and reputation in that field. They wished to form a new company to manufacture and sell articles designed by them. For this purpose they needed financial backing. They therefore entered into discussions with the first defendant, Mrs Sacher, who was the controlling director of a company called Argohome Ltd. Mrs Sacher is the wife of the second defendant, Mr John Sacher, who is, or was at the material time, a director of Marks & Spencer Plc.

By a written agreement made on 15 July 1982 between the two plaintiffs, Mrs Sacher, Argohome Ltd, Mr Jasper Conran (a fashion designer) and his company Jasper Conran Ltd., the parties agreed to form a new company, Christopher Trill Ltd, which

is now the fourth defendant. All four individuals, parties to the agreement, became directors of the new company. The company had 100 issued shares, of which 75 were issued to Argohome and 25 were agreed to be issued to the plaintiffs to be shared between them in such proportions as they should decide. The agreement was expressed to last for five years in the first instance. The plaintiffs agreed to work full-time for the company, in return for salaries and commission. Argohome agreed to provide finance by guaranteeing bank borrowing by the company, together with management services, in return for a management fee.

The company was formed and in July 1982 started to trade. Its products were shown for the first time at the London Designer Collection in October 1982.

In their Statement of Claim in this action, the plaintiffs make the following allegations about Mrs Sacher's conduct from October 1982 onwards:

- a) In or about October 1982 Mrs Sacher represented to the plaintiffs that she would be unable to obtain further overdraft facilities, which was untrue. As a result Mr. Trill obtained a loan of £10,000 from his father and himself loaned this amount to the company. Mrs Sacher also loaned £10,000 to the company.
- b) In May 1983 Mrs Sacher made it clear to the plaintiffs that neither she nor Argohome Ltd was prepared to invest any more in the company, which the plaintiffs allege was a breach of the agreement of 15 July 1982.
- c) Also in breach of that agreement, Mrs Sacher refused to devote sufficient time to the management of the company.

It is common ground that the plaintiffs were then introduced to Mr Stanbury, the fifth defendant, a friend of Mr John Sacher. Mr Stanbury controlled the third defendant, Steinberg & Sons Ltd. Steinberg was a major supplier to Marks & Spencer.

On 8 July 1983 the plaintiffs entered into a new agreement to sell their shares in Christopher Trill Ltd to Argohome at a nominal price and to resign as directors of the company. In return it was agreed that both plaintiffs would be employed as senior designers by the third defendant, Steinberg, at a salary subject to six months notice, and would be paid compensation for loss of their offices in Christopher Trill Ltd.

The plaintiffs allege that on 25 August 1983 they were summarily dismissed from their employment with Steinberg by the fifth defendant, Mr Stanbury, and paid six months salary in lieu of notice. In addition to the allegations of breach of contract against Mrs Sacher, the plaintiffs in their statement of claim as amended allege that they entered into the agreement of 1 August 1983 as the result of an inducement held out to them by all the defendants except Christopher Trill Ltd, end that these defendants had conspired together to defraud them. The nub of the allegation is that the offers of employment by Steinberg were sham offers which Steinberg and Mr Stanbury never intended to honour or be bound by.

In the statement of claim as pleaded and indeed after amendment in May 1985, the plaintiffs claimed rescission of the agreement of 8 July 1983, an order for the return to the plaintiffs of their shares in Christopher Trill Ltd, and damages including exemplary and aggravated damages. However, this claim for damages was not quantified in any way in the statement of claim.

The progress of the action

The action got off to a speedy start. The cause of action as alleged arose on or about 8 July 1983. On 26 September 1983 the writ was issued against the first, second and third defendants. The fourth defendant was added on 3 November 1983. On 23 November 1983 the statement of claim was served.

On 5 December 1983 the defendants took out a summons to strike out the writ and statement of claim as disclosing no reasonable cause of action. This application was heard by Master Topley on 16 March 1984. He dismissed the application, gave leave to add Mr Stanbury as the fifth defendant, and extended time for service of the defence until after any appeal against his order.

The first four defendants duly appealed, and the appeal was heard on 13 June 1984 by Mustill J. He allowed it to the limited extent of striking out two paragraphs alleging fraudulent misrepresentation, but otherwise dismissed the appeal.

The defendants appealed to this court, which heard the appeal on 3 September 1984. Griffiths LJ, in a judgment with which May LJ agreed, referred to the separate causes of action alleged in the statement of claim as originally drafted, and said:

> "What has been submitted by Mr Lightman is that nowhere on the face of the pleadings does that allegation, namely, "You induced us to waive all our rights under the 1982 agreement by a bogus promise of employment by Steinberg Ltd' appear clearly set out.
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> I am bound to agree with Mr. Lightman that this pleading is not an elegant document. It does appear to me to have shied away from setting out the real gravamen of the complaint. Nevertheless, at the end of the day, I have arrived at the same conclusion as did Mr. Justice Mustill, which is that, reading the pleading as a whole, the nature of the allegation does emerge. As Mr Lightman has said, this being a serious matter the defendants are very anxious that it should be brought to trial as quickly as possible, because of course he points out that he is arguing this case upon the basis that he must accept what appears in the statement of claim, whereas in fact it will be seriously contested.
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> That being so, it seems to me that it is preferable that this action should proceed on the pleading as it stands at the moment, rather than that we should take the alternative course suggested by Mr Lightman, namely, to strike out the pleading in its present form and allow Mr Godfrey to recast it, setting out, certainly with greater clarity, the true nature of the allegation that the defendants have to meet."

The appeal to this court was therefore dismissed.

So, a year had passed since the issue of the writ, nine months of it on the defendants' application to strike out and subsequent appeals. At least those proceedings had the effect of clarifying the plaintiffs' allegations.

On 20 May 1985 the statement of claim was amended to reflect what Griffiths LJ had said, and re-served. We have had no explanation why, after the judgment of this court, it took over eight months to make this amendment, save that during this period the plaintiffs applied for legal aid.

On 9 July 1985, on an application by the plaintiffs for judgment against the defendants for failing to serve their defences (or in the case of the fifth defendant for failing to serve notice of intention to defend), the application was dismissed. The time for service

of Defence was extended to 2 July 1985, the date on which a defence and counterclaim had already been served. A timetable for further steps in the action was then laid down. This provided for service of a reply to the defence within 21 days, exchange of lists of documents within 28 days, inspection seven days thereafter, and setting down for trial within 42 days thereafter.

On 31 October 1985 legal aid was granted to the plaintiffs.

On 12 December 1985 a defence to the counterclaim was served, four months outside the period limited by the order of 9 July 1985.

On 11 February and again on 15 April 1986, further orders were made for a timetable for the remaining steps in the action. The order of 15 April 1986 provided for lists of documents by 25 April 1986, inspection seven days thereafter, and setting down within 42 days thereafter. This timetable required the action to be set down not later than 14 June 1986.

The solicitors seem not to have taken the slightest notice of the order of 15 April 1986. Nothing more happened between the parties until 24 April 1987, when the plaintiffs' solicitors purported to serve a list of documents on the defendants' solicitors. The defendants' solicitors wrote pointing out that under RSC O.3 r.6 notice of intention to proceed was required. On 30 April 1987, the plaintiffs' solicitors therefore served such a notice, and on 30 May 1987 again served the plaintiffs' list of documents.

As to the defendants, they finally served their list of documents on 6 August 1987.

On 28 October 1987 there were without prejudice negotiations between the respective solicitors which were not successful. For the next three months the parties were engaged in exchanging documents. Up to this time the plaintiffs had changed solicitors on two occasions. In June 1988 there was a further change of solicitors to Messrs Beor Wilson and Lloyd, the plaintiffs present solicitors. Shortly after they were appointed, the defendants' solicitors made a further approach for a discussion of a possible settlement. Without prejudice negotiations then ensued which continued until 11 January 1989, when it became apparent that they had failed.

From that date until 12 June 1990 there was no further exchange of correspondence or activity between the parties. Affidavits filed on behalf of the plaintiffs disclose what the plaintiffs' advisers were doing during this time, but the action itself made no progress. During this period to June 1990, namely in July 1989, the limitation period expired.

The action awoke from its sleep when, on 12 June 1990, the plaintiffs purported to serve an amended list of documents. However, the plaintiffs' solicitors had again failed to serve the necessary notice of intention to proceed required under RSC O.3 r.6 . Such a notice was finally served on 11 September 1990. On the following day, the limitation on the plaintiffs' legal aid certificate, which until then had covered the proceedings up to the end of discovery plus counsel's advice, was removed.

On 30 October 1990, the plaintiffs' solicitors issued summonses relating to applications for leave to re-amend the statement of claim and for interrogatories, both returnable on 25 February 1991. On 4 December 1990 they issued a further summons seeking specific discovery.

On 4 February 1991 the defendants' solicitors issued the application to dismiss for want of prosecution, for hearing on the same day as the plaintiffs' applications. It was then agreed that all the matters should be put in front of a judge.

There is unfortunately a disagreement between the respective parties' solicitors as to what occurred before the defendants issued their application to dismiss. The defendants' solicitor asserts that he informed his opposite number early in November 1990 of his intention to issue an application to dismiss for want of prosecution. The plaintiffs' solicitor does not recollect receiving this notification until shortly before the issue of the summons in February 1991. Whichever be correct, the plaintiffs had already issued their two summonses on 30 October 1990 before any such conversation took place. For the purposes of this appeal we cannot resolve this dispute, and in my view must therefore proceed on the basis that there was no notification of intention to apply to strike out until shortly before the application itself was made.

The Deputy Judge delivered his judgment on 30 April 1991, but the resulting order was not drawn until 22 May 1991 nor sealed until 3 June 1991. Meanwhile on 13 May 1991 the plaintiffs' solicitors set down the action for trial. In addition to refusing to dismiss the action for want of prosecution, the judge gave the plaintiffs leave to re-amend the statement of claim with leave to the defendants to make consequential amendments to the defence. The judge also made two “unless” orders requiring the plaintiffs to serve full and proper particulars of the quantum of their clalm by 11 June 1991 provided that if such particulars be not served by midnight on that date the plaintiffs' claim should be struck out and judgment be entered for the defendants with costs, and also requiring the plaintiffs to serve by the same time any accountant's report in support of their claim for damages, failing which they would be barred from calling or relying upon expert evidence at the trial.

Within the time-scale a copy of an accountant's report was served by the plaintiffs, with a letter indicating that they took the view that this served as further and better particulars. The defendants took the opposite view and the parties made their positions clear in correspondence. On the plaintiffs failing to serve any different form of further and better particulars, the defendants entered judgment in default on 12 June 1991. On 17 July 1991 on the plaintiffs' application it was ordered by Macpherson of Cluny J that the judgment should be set aside if particulars were served by 22 July 1991.

On 25 July 1991 the defendants' notice of appeal was served, with a respondents' notice being served on 13 August 1991.

The issues

The principles to be applied are those set out in the speech of Lord Diplock in Birkett v. James [1978] AC 297 at 318F :

> “The power (to strike out for want of prosecution) should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants …”

These principles were derived from the decision of this court in Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 2 QB 229 , which was expressly approved in Birkett v. James . In particular in his judgment in that case, Diplock LJ (as he then was) explained at pp 258D-258F the reasons which led him to the conclusion that:

> "It is thus inherent in an adversary system which relies exclusively upon the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the court to dismiss the plaintiff's action for want of prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible.

After setting out the principles to which I have already referred, Diplock LJ said:

> "Since the power to dismiss an action for want of prosecution is only exercisable upon the application of the defendant, his previous conduct in the action is always relevant. So far as he himself has been responsible for any unnecessary delay, he obviously cannot rely upon it. But also, if after the plaintiff has been guilty of unreasonable delay the defendant so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay, he cannot obtain dismissal of the action unless the plaintiff has thereafter been guilty of further unreasonable delay. For the reasons already mentioned, however, mere non-activity on the part of the defendant where no procedural step on his part is called for by the Rules of Court is not to be regarded as conduct capable of inducing the plaintiff reasonably to believe that the defendant intends to exercise his right to proceed to trial. But it must be remembered that the evils of delay are cumulative, and even where there is active conduct by the defendant which would debar him from obtaining dismissal of the action for excessive delay by the plaintiff anterior to that conduct, the anterior delay will not be irrelevant if the plaintiff is subsequently guilty of further unreasonable delay. The question will then be whether as a result of the whole of the unnecessary delay on the part of the plaintiff since the issue of the writ, there is a substantial risk that a fair trial of the issues in the litigation will not be possible."

The main issue in Birkett v James was whether the court should strike out an action on the ground of inordinate delay (as opposed to disobedience to a court order) when the application to strike out is made before the period of limitation has expired. The House of Lords decided that normally in such circumstances the action should not be struck out. To quote Lord Diplock again at page 320E:

> "So in such a case, at any rate, time elapsed before issue of the writ which does not extend beyond the limitation period cannot be treated as inordinate delay; the statute itself permits it."

At page 322 Lord Diplock added:

> "It follows a fortiori from what I have already said in relation to the effect of statutes of limitation upon the power of the court to dismiss actions for want of prosecution that time elapsed before the issue of a writ within the limitation period cannot of itself constitute inordinate delay however much the defendant may already have been prejudiced by the consequent lack of early notice of the claim against him, the fading recollections of potential witnesses, their death or their untraceability. To justify dismissal of an action for want of prosecution the delay relied upon must relate to time which the plaintiff allows to lapse unnecessarily after the writ has been issued."

In the present case, there was argument in the court below as to whether the plaintiffs had been guilty of intentional and contumelious delay. The judge held that the delay could not properly be described as contumelious. In this court Mr Pollock for the defendants, rightly, in my view, does not seek to re-open this question.

The issues for this court's decision can therefore be summarised as follows:

- 1. Has there been inordinate and inexcusable delay since the issue of the writ on the part of the plaintiffs in the conduct of the action? If so,
- 2. Are the defendants estopped by their own conduct from relying on that delay? If not,
- 3. Does the delay give rise to a substantial risk that it will not now be possible to have a fair trial of the action, or is it likely to cause, or has it caused, serious prejudice to the defendants?

I will deal with each of these matters in turn. In doing so, I remind myself of Lord Diplock's words in Birkett v. James at page 317D about the approach which this court should adopt to such questions:

> "It is only very exceptionally that an appeal upon an interlocutory order is allowed to come before this House. These are matters best left to the decision of the masters and, on appeal, the judger. of the High Court whose daily experience and concern is with the trial of civil actions. They are decisions which involve balancing against one another a variety of relevant considerations upon which opinions of individual judges may reasonably differ as to their relative weight in a particular case. That is why they are said to involve the exercise by the judge of his 'discretion' . That, and the consequent delay and expense which appeals in interlocutory matters would involve, is also why no appeal to the Court of Appeal from his decision is available except with the judge's leave or that of the Court of Appeal. Where leave is granted, an appellate court ought not to substitute its own 'discretion' for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which ho had decided the matter. They should regard their function as primarily a reviewing function …"

Delay

As the history I have summarised reveals, during the course of this action there have been three substantial periods of delay for which the plaintiffs or their legal advisers were responsible. They were:

- 1) from 3 September 1984 to 20 May 1985 when the statement of claim was amended;
- ii) from 15 April 1986 to 24 April 1987,
- iii) from 25 February 1989 to 12 June 1990.

The defendants could not seek to strike out during the first or second periods of delay since both fell within the limitation period. The question therefore arises, as a result of the third period of delay, should the court now take account of all three periods in deciding whether to strike out?

In Rath v. C.S. Lawrence & Partners [1991] 1 WLR 399 this court held that inordinate and inexcusable delay by the plaintiffs after the issue of a writ but within the limitation period could be relied upon to support the defendant's application to strike out after the expiry of the limitation period. Farquharson LJ said at 406D-E:

> "Once a plaintiff has issued his writ and set the treadmill of litigation into motion, he is bound to observe the rules of the court. If he flouts them to the extent that the plaintiffs have in the present case I can see no reason why the defendants should not rely upon it, after the limitation period has expired, to support an application to strike out."

Slade LJ, with whom Nicholls LJ expressly agreed, said at page 411C:

> "Having once again studied Birkett v. James, however, I can find no support for the proposition that time elapsed after the issue of a writ but before the expiration of the limitation period cannot constitute inordinate delay for the relevant purpose. The late issue of a writ is one thing; by itself it cannot be regarded as culpable. The casual and dilatory conduct of proceedings in breach of the rules, after a writ has been issued, is another thing. If a person who claims to have a cause of action chooses to take advantage of the process of the court by issuing a writ at whatever time during the limitation period, he has, in the words of Lord Diplock [1978] A.C. 297, 323, 'a corresponding right to continue to prosecute it to trial and judgment so long as he does so with reasonable diligence' (emphasis added). Though I do not think they bind this court, I respectfully agree with the observations of Stuart-Smith L.J. in Hollis v. Islington London Borough Council, 27 January 1989, Court of Appeal (Civil Division), Transcript No. 67 of 1989, quoted by Farquharson L.J., in which he found:
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> 'no warrant for equating the effect of prejudice due to delay which inevitably is caused by permitted and non-culpable delay in issuing proceedings, with prejudice caused by culpable delay, even though the right to strike out has not yet arisen because the limitation period has not expired.'
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> In my judgment, therefore, the full period of inordinate and inexcusable delay in the plaintiffs' conduct of their action running between about October 1984 and February 1989 falls to be taken into account for the purpose of applying the principle of Birkett v. James referred to above."

It follows that in the present case all three periods are relevant. Together they amount to three years in total, out of a period of six years five months between the issue of the writ and the application to strike out. I have no doubt that all this delay was inordinate. It may be said that there was some excuse for the first period, since during it the plaintiffs (in January 1985) applied for legal aid. But this cannot have been a major reason for not amending the statement of claim in accordance with the suggestions made by Griffiths LJ, since an amended statement of claim was finally served on 20 May 1985, although legal aid was not granted to the plaintiffs until October of that year. Most, if not all, of this three years delay was therefore inexcusable.

In his judgment, the judge said of the earlier periods of delay:

> "On any view, the case did not proceed as expeditiously as one would have wished, and it is accepted by Mr. Beveridge on behalf of the plaintiffs that proper particulars of the way in which the plaintiffs' claim is calculated have not even today been given. However, this is far from saying that there has been inordinate and inexcusable delay on the part of the plaintiffs or their solicitors in the prosecution of this case. As Mr. Beveridge pointed out in the course of his argument, this is not a case, as is so often before the courts, where nothing is done for years.
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> This is a case where something was being done, unfortunately not always very effectively, and it is that picture which really prevails throughout the chronology in this case.
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> It is not, however, necessary, in my judgment, for me to analyse in detail the history of this action up to the end of 1988, because between October 1987 and early January 1989, it is clear that without prejudice negotiations for a settlement were going on between the parties. Sometimes the defendants themselves were seeking information with a view to the possibility of a settlement. I find therefore, that the defendants, by taking part in these negotiations, acquiesced in the slow progress of the case, and when the negotiations were broken off, they must have contemplated that the case would then proceed to trial. I have to bear in mind that had an application to dismiss the action for want of prosecution been made before the expiry of the limitation period in July 1989, the plaintiff would have had the right to issue a fresh writ. This was made clear by the House of Lords in the case of Birkett v. James .

It is clear, therefore, that the judge did not regard the earlier periods of delay as relevant. For the reasons I have already explained, he was wrong not to do so.

As to the last period of delay, the judge said simply:

> "Since July 1989 it is clear that progress has still been somewhat slow. But again, in my judgment, the additional lapse of time has not prejudiced the chances of a fair trial …"

The judge made no finding whether this period of delay was inordinate or inexcusable. In concluding that this delay deserves both adjectives, I am thus not trespassing on any exercise of the judge's discretion.

Estoppel

Mr. Burke-Gaffney for the plaintiffs argues that even though his clients' solicitors may have been guilty of inordinate and inexcusable delay, at the time when they issued the application to dismiss for want of prosecution in February 1991 the defendants were estopped by their own previous conduct from relying on that delay.

I have already quoted the passage from the judgment of Diplock LJ in Allen v.Sir Alfred McAlpine & Sons Ltd which referred to this question. In a more recent decision of this court given on 12 July 1977, County & District Properties Ltd. v. Lyell , reported as a note at [1991] 1 WLR 683, both Stephenson and Roskill L.JJ said that they preferred to regard the concept as one of estoppel. Bridge LJ, agreeing with them both, said:

> "I share the opinion of both Stephenson and Roskill L.JJ. that the principle with which we are concerned in this appeal may not be altogether aptly labelled by the terms 'waiver' or 'acquiescence' . If one looks to the classic and precise expressions of principle in the two passages from the judgments of Diplock and Salmon L.JJ. cited by Stephenson L.J. from Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 2 Q.B. 229, 260, 272 , one finds that the elements which are present are the familiar elements of the principle of estoppel understood in its broadest sense. To disentitle a defendant from relying upon inordinate and inexcusable delay which has caused substantial prejudice to secure the dismissal of an action for want of prosecution, two things must be shown: first, that the defendant's own conduct has reasonably induced in the plaintiff a belief that the action is to be allowed to proceed; secondly, action taken upon that reasonable belief by the plaintiff to alter his position or to act to his detriment, action which will take the form in the ordinary case of incurring expense."

This decision has recently been relied upon and applied by Russell and Staughton L.JJ in Reynolds v. British Leyland [1991] 1 WLR 675 .

Mr. Burke-Gaffney makes the point that after the plaintiff's solicitors had given notice of intention to proceed on 11 September 1990, the defendants' solicitors did not at once make an application to dismiss for want of prosecution. RSC O.3, r.6 requires one month's notice, so the plaintiffs could not take any further steps in the action until a month had elapsed. In the ordinary way the application to dismiss would be made within that month. As it was not made, Mr. Burke-Gaffney continues, the plaintiffs on 30 October 1990 issued summonses for leave to amend the statement of claim and for leave to interrogate some of the defendants, and on 4 December 1990 a further summons seeking specific discovery. It was not until 4 February 1991 that the defendants' solicitors issued the application to dismiss for want of prosecution. By this time they were estopped, since the plaintiffs had incurred further cost in issuing the summonses in the belief that the defendants were content that the action should continue.

In reply Mr. Pollock argues that O.3 r.6 places no obligation on a defendant to apply to strike out within the period of notice under that rule. He accepts that if such an application is not made within the month, the plaintiff at the end of that time may set down the action for trial, after which it will of course be too late to apply to dismiss for want of prosecution. But provided that the defendant takes no active step which induces in the plaintiff a belief that he consents to the action continuing, he is not estopped. While it is true that the plaintiffs' solicitors did issue the summonses, between September 1990 and 4 February 1991 the defendants had taken no steps at all to induce such a belief. Therefore although they had waited a long time to issue their application, they were not estopped.

In my view, the defendants' advisers were taking a risk in not issuing the application to dismiss for want of prosecution within the month following the service of notice of intention to proceed, but nevertheless I would hold that Mr. Pollock's argument is correct. I therefore conclude that the defendants were not estopped from applying to dismiss for want of prosecution.

Mr. Burke-Gaffney also argues that by their conduct following the judgment of Mr. P. J. Cox QC, the defendants are estopped from pursuing this appeal. He advances this argument under two heads.

- a) I have already said that Mr. Cox not merely ordered that the application to dismiss for want of prosecution should be dismissed, but ordered that unless the plaintiffs served certain further and better particulars of this claim by nidnight on 11 June 1991, their claim should be struck out and judgment be entered for the defendants. In the event the plaintiffs served an accountant's report within this time-scale, and sought to have it treated as further and better particulars. The defendants said that they were not prepared to accept it as compliance with the order for further and better particulars.

> On the plaintiffs' failure to serve particulars as such, the defendants entered judgment in default on 12 June 1991. On 17 July 1991 this judgment was set aside by Macpherson of Cluny J on condition that the particulars requested were served by 22 July 1991, as they were.

The point made by Mr. Burke-Gaffney is that by entering judgment, the defendants estopped themselves from appealing against the judge's decision when that judgment was set aside. Mr. Pollock's answer to this is that the defendants' entry of judgment, although very likely to be set aside in the circumstances, did not induce the plaintiffs to do anything to their detriment. In my view this argument is also correct.

> • b) There then followed some correspondence between the parties about the possibility of splitting the trial on liability from the issue of damages. It commenced with a without prejudice letter from the defendants' solicitors dated 22 July 1991 making the suggestion. The letter however says:
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> > "Our present advice to our clients would be to appeal the order of Philip Cox QC and to apply to strike out the particulars but if we can hear from you before notice of appeal is given on the issue of the split trial we can take instructions as to whether that alternative course can be taken."

The plaintiffs' solicitors replied by fax on 23 July 1991 saying they were taking instructions and giving an estimate of time. On the same day the defendants' solicitors wrote saying that they had been instructed to appeal the order of Mr Cox QC and a notice of appeal would be served shortly. On 25 July 1991 the plaintiffs' solicitors sent a letter by fax agreeing to a split trial, but on the same day the defendants' solicitors served notice of appeal against the judge's decision. There followed some further correspondence about a split trial, but in their letters the defendants' solicitors made it clear that this was without prejudice to the appeal to this court.

I can find nothing here that estops the defendants from pursuing this appeal. On the contrary, I think it was sensible to seek to deal with issues leading to the trial of this action at the same time as giving notice of appeal but without prejudice to that appeal.

Prejudice

I use this as a title for the last issue, namely, have the defendants shown that the "delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause, or to have caused, serious prejudice to the defendants …" I have found this in some ways the most difficult of the issues to decide. In his judgment the judge referred to the speech of Lord Griffiths in Department of Transport v. Chris Smaller (Transport) Ltd [1989] AC 1197 , where he said at page 1209:

> "I would, however, express a note of caution against allowing the mere fact of the anxiety that accompanies any litigation being regarded as of itself a sufficient prejudice to justify striking out an action. Mr. Connell did not seek to argue that the anxiety occasioned by the extra 13 months in this case should be regarded as a sufficient ground of prejudice to justify making a striking out order. There are, however, passages in some of the judgments that suggest that the mere sword of Damocles, hanging for an unnecessary period, might be a sufficient reason of itself to strike out. On this aspect I repeat the note of caution I expressed in the Court of Appeal in Eagil Trust Co. Ltd. v. Pigott-Brown [1985] 3 All E.R. 119, 124 , where I said:

> ‘Any action is bound to cause anxiety, but it would as a general rule be an exceptional case where that sort of anxiety alone would found a sufficient ground for striking out in the absence of evidence of any particular prejudice …’”

The allegations of fraud and conspiracy made in the statement of claim against these defendants are extremely serious, and it is wholly wrong that they should have not been able to have them brought to trial as soon as could be done. The delay must therefore have caused them anxiety. Nevertheless, Mr. Pollock on their behalf, no doubt having Lord Griffith's words in mind, has not sought to argue that this of itself amounts to sufficient prejudice to justify striking out.

In his judgment the learned judge gave the following reason for not striking out:

> “In my judgment, this is not a case which will depend upon the witnesses' recollection of fine points of detail such as frequently occur in road accident cases and in cases involving personal injury at work and so forth…
>
> If this case proceeds to trial, it will be essentially a case where the judge will have to decide which of two entirely conflicting accounts is the truth. Even after the passing of many years, it seems to me that each of the parties present at the various meetings who are likely to be witnesses at the trial will retain a pretty clear recollection of the essentials of what took place, and indeed affidavits of these witnesses were sworn on behalf of the plaintiffs and on behalf of the defendants at a comparatively early stage in this history.”

It is true that when he said this, the judge was considering only the period of delay from February 1989 onwards. Nevertheless, we have to decide whether the same considerations apply to the whole of the delay. On the one hand, it is true that the trial of this issue will depend to a considerable extent upon the oral evidence of the parties and perhaps some other supporting witnesses. No doubt, some of them will be subjected to substantial cross-examination. Moreover, the plaintiffs' solicitors, for reasons I do not understand, have sought to administer interrogatories to some of the defendants, thus showing that they seek to go into a fair amount of detail.

On the other hand, in the end the main question which the court of trial is going to have to decide is, does the evidence prove that these defendants conspired together to defraud or damage the plaintiffs? It is unlikely that the plaintiffs will be able to produce direct evidence of such a conspiracy. They will presumably ask the court to infer it from the circumstances, and in particular from the fact that they were dismissed from what they had been led to believe would be secure, profitable and interesting employment so soon after being engaged. In order for the plaintiffs to succeed, it will be necessary for the court to find that Mr. Stanbury, of his own volition or persuaded by Mr. and Mrs. Sacher, offered the plaintiffs employment when, in truth, he knew perfectly well that he did not intend to retain them as employees of his company. In other words, it must be shown that the entire offer of employment was a sham. This is the essence of the plaintiffs' case.

Although after the passage of so many years the memories of all the witnesses, whether for the plaintiffs or the defendants, will undoubtedly be less clear than they would have been nearer the time about the detail of particular events or conversations, it is in my view unlikely in the extreme that any of the defendants will not remember whether they did enter into a fraudulent agreement. In particular, I find it inconceivable that Mr. Stanbury will not have a clear recollection of the truth or falsity of the plaintiffs' allegation. In the end, therefore, I have concluded that the judge's evaluation of this issue was correct.

As I have said, the plaintiffs on 3 June 1991, pursuant to the order of the Deputy Judge, served on the defendants their accountants' report, and later served particulars of their claim for damages based upon that report. The plaintiffs claim loss of earnings from 30 November 1982 to 30 November 1987 in the sum of £83,060, and loss of the share value in Christopher Trill Ltd in the sum of £792,000, together with interest on both sums.

These claims are both based on the opinion expressed in the accountants' report, that if the defendants had not fraudulently persuaded the plaintiffs to dispose of their shares in Christopher Trill Ltd, that company would have traded successfully and profitably and would have expanded its turnover and profits year by year, to the benefit of both plaintiffs. The accountants' report contains for each of the five years ending 30 November 1987 projected balance sheets, profit and loss accounts and cash flow projections for Christopher Trill Ltd.

Mr. Pollock submits that, as a result of the delay, it will be difficult, if not impossible, for the defendants to counter this evidence properly. Doing so will involve a consideration of the trading conditions for such companies at the relevant time which will now be extremely difficult to make. Moreover, it may prove impossible to check some of the assumptions in the accountants' report.

I do not accept this submission. Whilst consideration of the plaintiffs' accountant's report may well involve a considerable amount of detailed work, the majority of the assumptions in it must be based upon documentary material — documents in the action or other published material — which will be equally available to accountants instructed by the defendants. Moreover, it is for the plaintiffs to prove the case they seek to make. If some of the assumptions in the accountant's report cannot be checked, it must follow that they cannot be justified. If anybody will suffer prejudice in this situation, it will be the plaintiffs.

Although I think that the delays in the conduct of this litigation are deserving of very considerable censure, I cannot find that there is a substantial risk that a fair trial of the central issue will not be possible, nor that the defendants have been prejudiced in relation to that issue by this delay.

For this reason, despite the view I have formed about the other issues, I would dismiss this appeal.

LORD JUSTICE NEILL:

I agree that this appeal should be dismissed for the reasons given by Glidewell LJ. As, however, we had the benefit of detailed arguments as to the practice to be followed on an application to strike out for want of prosecution, I have decided to add a short judgment of my own.

The power of the court to dismiss an action for want of prosecution is not based on any statute or any rule of court but on the inherent jurisdiction of the court to control its own procedures.

It was in 1967, following the decision of the Court of Appeal in Fitzpatrick v. Batger & Co. Ltd [1967] 1 WLR 706, 710 , that this power began to be exercised with any frequency. Since then countless cases involving delay have been decided. Many

of these cases have been reported. For the purpose of formulating the relevant principles, however, it is sufficient to refer to only a few authorities.

In December 1967 three cases which had been dismissed for want of prosecution came before the Court of Appeal. In judgments which were delivered in January 1968 the court laid down the principles to be applied. The leading case was Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 2 QB 229 . At page 259 Diplock LJ set out the principles as follows:

> "What then are the principles which the court should apply in exercising its discretion to dismiss an action for want of prosecution upon a defendant's application? The application is not usually made until the period of limitation for the plaintiff's cause of action has expired. It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue. It is for the defendant to satisfy the court that one or other of these two conditions is fulfilled. Disobedience to a peremptory order of the court would be sufficient to satisfy the first condition. Whether the second alternative condition is satisfied will depend upon the circumstances of the particular case; but the length of the delay may of itself suffice to satisfy this condition if the relevant issues would depend upon the recollection of witnesses of events which happened long ago.
>
> Since the power to dismiss an action for want of prosecution is only exercisable upon the application of the defendant, his previous conduct in the action is always relevant. So far as he himself has been responsible for any unnecessary delay, he obviously cannot rely upon it. But also, if after the plaintiff has been guilty of unreasonable delay the defendant so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay, he cannot obtain dismissal of the action unless the plaintiff has thereafter been guilty of further unreasonable delay. For the reasons already mentioned, however, mere non-activity on the part of the defendant where no procedural step on his part is called for by the Rules of Court is not to be regarded as conduct capable of inducing the plaintiff reasonably to believe that the defendant intends to exercise his right to proceed to trial. But it must be remembered that the evils of delay are cumulative, and even where there is active conduct by the defendant which would debar him from obtaining dismissal of the action for excessive delay by the plaintiff anterior to that conduct, the anterior delay will not be irrelevant if the plaintiff is subsequently guilty of further unreasonable delay. The question will then be whether as a result of the whole of the unnecessary delay on the part of the plaintiff since the issue of the writ, there is a substantial risk that a fair trial of the issues in the litigation will not be possible."

Ten years later the principles laid down in Allen v. Sir Alfred McAlpine & Sons Ltd (supra) were approved by the House of Lords in Birkett v. James [1978] AC 297. At page 318F Lord Diplock sets out the circumstances in which the power should be exercised in these terms:

> "The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."

In Birkett v. James (supra) the House of Lords considered three further questions which had not arisen for decision in Allen v. Sir Alfred McAlpine & Sons Ltd (supra):

- 1. Whether an action should be struck out on the ground of delay before the expiration of the limitation period.
- 2. Where the plaintiff has delayed bringing an action, whether the defendant has to show that he has suffered prejudice additional to that caused by the tardy commencement of proceedings.
- 4. Whether it is relevant that the plaintiff may have an alternative remedy against his solicitor.

In addition the House of Lords gave guidance as to how in an interlocutory matter an appellate court should approach the decision of the court of first instance.

On the first of these questions it is sufficient to refer to a passage in the speech of Lord Diplock at p. 320:

> "There may be exceptional cases … where the plaintiff's conduct in the previous proceedings has induced the defendant to do something which will create more difficulties for him in presenting his case at the trial than he would have had if the previous proceedings had never been started. In such a case it may well be that the court, in the exercise of its inherent jurisdiction, should stay the second proceedings on the ground that, taken as a whole, the plaintiff's conduct amounts to an abuse of the process of the court. But, such exceptional cases apart, where all that the plaintiff has done has been to let the previous action go to sleep, the court in my opinion would have no power to prevent him starting a fresh action within the limitation period and proceeding with it with all proper diligence notwithstanding that his previous action had been dismissed for want of prosecution.
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> If this be so, it follows that to dismiss an action for want of prosecution before the limitation period has expired does not, save in the exceptional kind of case to which I have referred, benefit the defendant or improve his chances of obtaining a fair trial; it has the opposite tendency."

On the second question I can again take a short passage from the speech of Lord Diplock. He said at page 323:

> "To justify dismissal of an action for want of prosecution some prejudice to the defendant additional to that inevitably flowing from the plaintiff's tardiness in issuing his writ must be shown to have resulted from his subsequent delay (beyond the period allowed by rules of court) in proceeding promptly with the successive steps in the action. The additional prejudice need not be great compared with that which may have been already caused by the time elapsed before the writ was issued; but it must be more than minimal; and the delay in taking a step in the action if it is to qualify as inordinate as well as prejudicial must exceed the period allowed by rules of court for taking that step."

On the third question Lord Diplock, Lord Edmund-Davies and Lord Russell of Killowen expressed the opinion that the fact that the plaintiff may or may not have an alternative remedy against his solicitor is not a relevant consideration in considering whether to dismiss an action for want of prosecution.

In the light of some of the arguments which were addressed to this court, I should refer also to an earlier passage in the speech of Lord Diplock at p. 317:

> "It is only very exceptionally that an appeal upon an interlocutory order is allowed to come before this House. These are matters best left to the decisions of the masters and, on appeal, the judges of the High Court whose daily experience and concern is with the trial of civil actions. They are decisions which involve balancing against one another a variety of relevant considerations upon which opinions of individual judges may reasonably differ as to their relative weight in a particular case. That is why they are said to involve the exercise by the judge of his 'discretion' . That, and the consequent delay and expense which appeals in interlocutory matters would involve, is also why no appeal to the Court of Appeal from his decision is available except with the judge's leave or that of the Court of Appeal. Where leave is granted, an appellate court ought not to substitute its own 'discretion' for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which he had decided the matter. They should regard their function as primarily a reviewing function and should reverse his decision only in cases either (1) where they are satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to take into account; or (2) … in order to promote consistency in the exercise of their discretion by the judges as a whole where there appear, in closely comparable circumstances, to be two conflicting schools of judicial opinion as to the relative weight to be given to particular considerations."

Finally I should refer to the decision of the Court of Appeal in Rath v. C.S. Lawrence & Partners [1991] 1 WLR 399 . In that case the causes of action accrued in January 1983 and the limitation period expired in January 1989. The writ was issued on 22 May 1984 and reasonable progress was made until about the end of that year. There then followed, however, a delay by the plaintiffs in proceeding with the action which extended to a period in excess of four years. In March 1989 the defendants took out summonses to dismiss the action for want of prosecution. The question which arose for decision was whether the defendants could rely on the long period of delay which, except for the few weeks between January and March 1989, had taken place exclusively during the limitation period. The Court of Appeal held unanimously that the defendants were entitled to rely on this delay. At page 411 Slade LJ said:

> "The late issue of a writ is one thing; by itself it cannot be regarded as culpable. The casual and dilatory conduct of proceedings in breach of the rules, after a writ has been issued, is another thing. If a person who claims to have a cause of action chooses to take advantage of the process of the court by issuing a writ at whatever time during a limitation period, he has, in the words of Lord Diplock, 'a corresponding right to continue to prosecute it to trial and judgment so long as he does so with reasonable diligence' … In my judgment, therefore,, the full period of inordinate and inexcusable delay in the plaintiff's conduct of their action running between about October 1984 and February 1989 falls to be taken into account for the purpose of applying the principle of Birkett v. James ."

From these and the other relevant authorities, I would extract the following principles and guidelines for use on an application to strike out for want of prosecution where it is not suggested that the plaintiff has been guilty of intentional and contumelious default.

- 1. The basic rule is that an action may be struck out where the court is satisfied:

• (a) "that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers" , and
• (b) "that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party" . (Birkett at p. 318F).

• 2. The general burden of proof on an application to strike out for want of prosecution is on the defendant.
• 3. "Inordinate" delay cannot be precisely defined. "What is or is not inordinate delay must depend on the facts of each particular case" . (Allen at p. 268F). It is clear, however,

• (a) that for delay to be inordinate it must exceed, and probably by a substantial margin, the times prescribed by the rules of court for the taking of steps in the action; and
• (b) that delay in issuing the writ cannot be classified as "inordinate" provided the writ is issued within the relevant period of limitation.

• 4. Delay which is inordinate is prima facie inexcusable (Allen at p.268F). It is for the plaintiff to make out a credible excuse. For example, difficulties with regard to obtaining legal aid may provide such an excuse.
• 5. Where a plaintiff delays issuing proceedings until towards the end of the period of limitation he is then under an obligation to proceed with the case with reasonable diligence (Birkett at p. 323D). Accordingly, a court is likely to look strictly at any subsequent delay which is in excess of the period allowed by rules of court for taking the relevant step, and may regard such subsequent delay as inordinate even though a similar lapse of time might have been treated less strictly had the action been started earlier.
• 6. A defendant cannot rely on a period of delay for which he has himself been responsible.
• 7. A defendant cannot rely on a period of delay if at the end of the period he "so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay" (Allen at p. 260B). It has been said that this rule is based on waiver or acquiescence, but the better view appears to be that the defendant is estopped: (see County & District Properties Ltd v. Lyell (1977) [1991] 1 WLR 683, 690F).
• 8. Save in exceptional cases an action will not be struck out for want of prosecution before the expiry of the relevant limitation period (Birkett at 321D). It is not altogether clear how this rule is best explained. It may be that before the limitation period has expired the delay cannot properly be regarded as "inordinate" (cf Birkett at 321D). Alternatively, it may be that, though the delay is both inordinate and inexcusable, the court would not in the ordinary case exercise its discretion to strike the action out if a fresh writ could be issued at once. To do so would only delay the trial.
• 9. Once the limitation period has expired the court is entitled to take account of all the earlier periods of inexcusable delay since the issue of the writ. These periods can include

• (a) periods of delay occurring before the expiry of the limitation period which at an earlier stage could not be treated as "inordinate" (see 8 above).
• (b) Periods of delay on which at an earlier stage the defendant could not rely because he was estopped from doing so by inducing the plaintiff to incur further costs in the reasonable belief that the action was going to proceed to trial, but which have been revived by subsequent inordinate and inexcusable delay. This proposition seems to follow from Diplock LJ's proviso in Allen at 260C "unless the plaintiff has thereafter been guilty of further unreasonable delay" . It is also supported by a later passage in his judgment in Allen at 260D where he said:
•"But it must be remembered that the evils of delay are cumulative, and even where there is active conduct by the defendant which would debar him from obtaining dismissal of the action for excessive delay by the plaintiff anterior to that conduct, the anterior delay will not be irrelevant if the plaintiff is subsequently guilty of further unreasonable delay."

• 10. A defendant cannot rely on any prejudice caused to him by the late issue of a writ. Thus such prejudice is not due to delay which can be characterised as inordinate or inexcusable. Some additional prejudice after the issue of the writ must

be shown. The additional prejudice "need not be great compared with that which may have been already caused by the time elapsed before the writ was issued" , but it "must be more than minimal and the delay in taking a step in the action if it is to qualify as inordinate as well as prejudicial must exceed the period allowed by rules of court for taking that step" . (Birkett at 328G).

• 11. Prejudice to the defendant may take different forms. In many cases the lapse of time will impair the memory of witnesses. In other cases witnesses may die or move away and become untraceable.

• 12 The prejudicial effect of delay may depend in large measure on the nature of the issues in the case. Thus the evidence of an eye-witness or of a witness who will testify to the words used when an oral representation was made is likely to be much more seriously impaired by the lapse of time than the evidence of someone who can rely on contemporary documents. A defendant may also suffer some prejudice from prolonged delay in an action which involves imputations against his reputation, though this factor by itself is unlikely to provide a ground for striking out.

• 13. When considering the question of prejudice and, if it is raised, the question whether there is a substantial risk that it will not be possible to have a fair trial of the issues in the action, the court will look at all the circumstances. It will look at the periods of inordinate and inexcusable delay for which the plaintiff or his advisers are responsible and will then seek to answer the questions: has this delay caused or is it likely to cause serious prejudice, or is there a substantial risk that because of this delay it is not possible to have a fair trial of the issues in the action?

As Slade LJ stressed in Rath (supra) at p. 410:

"… a causal link must be proved between the delay and the inability to have a fair trial or other prejudice, as the case may be."

• 14 An appellate court should regard its function as primarily a reviewing function and should recognise that the decision below involved a balancing of a variety of different considerations upon which the opinions of individual judges may reasonably differ as to their relative weight. Accordingly, unless intervention is necessary or desirable in order to achieve consistency where there appear to be conflicting schools of judicial opinion, the appellate court should only interfere where the judge has erred in principle (Birkett at p. 317).

I return to the facts of the present case. The writ against the first three defendants was issued as long ago as 26 September 1983. At that point, in the words of Farquharson LJ in Rath at p. 406 , the plaintiffs "set the treadmill of litigation in motion" and thereafter became bound to observe the rules of the court. This is not a case where the plaintiffs can place any reliance on the principle that delay in the issue of the writ cannot constitute inordinate delay provided it is issued within the limitation period.

Glidewell LJ has identified the three relevant periods of delay:

• (a) 3 September 1984 to 20th May 1985.
• (b) 15 April 1986 to 24 April 1987.
• (c) 25 February 1989 to 12 June 1990.

The period of limitation expired in July 1989 so the first two periods of delay occurred before the date of expiry. The third period spanned that date. I am satisfied, applying the principles I have set out above, that the defendants can rely on all three periods. They amount in aggregate to about three years. The earlier periods of delay were revived by the last period.

One comes therefore to the questions of estoppel and prejudice. I have had the advantage of reading in draft the judgment of Glidewell LJ on the issue of estoppel. I agree with his analysis of the matter and do not wish to add anything.

I also agree with Glidewell LJ's conclusion on the more difficult question of prejudice. Furthermore, though I consider that the judge went wrong when dealing with the issue of delay, I attach some importance to the reasons which he gave for not striking the action out. I agree with him that the case at trial will not depend upon the witnesses' recollection of fine points of detail. The central issue is stark and clear: did these defendants conspire together to defraud or damage the plaintiffs? Or, to put the matter even more simply, was the offer of employment by Mr. Stanbury a dishonest trick?

The delay is serious and deplorable, but in the end I have reached the same conclusion as my Lord and the judge. I am not persuaded that by reason of the delay there is a substantial risk that a fair trial will not be possible or that the defendants have been seriously prejudiced in relation to the trial of the central issue of conspiracy.

I too would dismiss the appeal.

(Appeal dismissed. The order below is not to be disturbed. As between the parties to the appeal no order for costs. The respondents' costs to be taxed under the Legal Aid Act. The costs of the respondents to be paid by their solicitors on the basis that provided notice is given within 28 days they will be entitled to make representations as to why no order should be made.)

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