Case No. B1/2000/0005

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ILFORD COUNTY COURT
(HIS HONOUR JUDGE McDOWALL)

Royal Courts of Justice
Strand London WC2

Thursday, 8th June 2000

B e f o re:

LORD JUSTICE PETER GIBSON LORD JUSTICE MAY

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MICHAEL VINOS Claimant/Appellant
- v -
MARKS & SPENCER PLC Defendant/Respondent

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(Computer Aided Transcript of the Palantype Notes of Smith Bernal Reporting Limited, 180 Fleet Street, London EC4A 2HD
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MR OLIVER PEIRSON (Instructed by Cornish & Co, Lex House, 1-7 Hainault Street, Ilford, Essex IG2 4EL) appeared on behalf of the Appellant

MR TIMOTHY M LORD (Instructed by Beachcroft Wansboroughs, 100 Fetter Lane, London, EC4A 1BN) appeared on behalf of the Respondent

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J U D G M E NT (As Approved by the Court)

1. LORD JUSTICE PETER GIBSON: May LJ will give the first judgment.

2. LORD JUSTICE MAY: This is an appeal from a decision and orders of His Honour Judge McDowall in the Ilford County Court on the 8th December 1999. The judge then dismissed the claimant's appeal from the decisions of District Judge Thomas made on 17th November 1999.

3. The appellant, Mr Vinos, was employed by Marks and Spencer Plc, the defendants, as an Operations Supervisor at their premises in High Street, Kensington. On 28th May 1996, he was unloading pallets from the store's goods lift. As he wheeled a pallet out of the goods lift it toppled over and the pallet and the stock on it fell on to him causing him injury. He consulted solicitors on 6th June 1996 and they wrote on his behalf on 20th June 1996 to the defendants notifying a prospective claim for personal injury. The defendants passed the matter to their insurers. On 24th December 1996, the insurers wrote to Mr Vinos' solicitors saying that, without admitting liability, they were willing to compensate him in full for his injuries. They asked for medical evidence to be provided when it was available.

4. Mr Vinos had been quite badly injured in the accident. He suffered injury to his left knee, straining to his back and had bruising to the front of his chest. The back and chest injuries resolved themselves quite quickly, but he continued to have trouble with his left knee. A consultant orthopaedic surgeon diagnosed him as suffering a degenerative tear in the posterior horn of the medial meniscus with fluid within the joint. He continued to have pain and discomfort and limited movement in the knee. He had various treatment and had a course of physiotherapy, but unfortunately by the early summer of 1999 the prognosis was that his injury and symptoms were permanent.

5. There were co-operative negotiations between Mr Vinos' solicitors and the defendants' insurers and the defendants made interim payments to him amounting to £5,000. However, in May 1999, the negotiations were not concluded and the three year statutory limitation period for bringing proceedings was about to expire. So on 20th May 1999, about a week before the expiry of the limitation period, Mr Vinos' solicitors issued a claim form on his behalf in the Ilford County Court. The claim form gave brief details only of the claim. The value of the claim was stated to be in excess of £250,000. The claim form said that particulars of claim were to follow. These were prepared. The copy which this court has bears the date of 15th July 1999. A schedule of special damages was then prepared. The court's copy of this has the date of 17th September 1999.

6. Mr Vinos' solicitors did not serve the claim form on the defendants when it was issued. They wrote to the defendants' insurers telling them that proceedings had been issued. The insurers apparently had some problems finding their papers. It was agreed that the solicitors would serve the proceedings on the defendants directly. But they did not do so until they posted a letter enclosing the claim form, the particulars of claim and the schedule of special damages on 27th September 1999.

This resulted under Civil Procedure Rules, rule 6.7 in deemed service being effected on 29th September 1999. It is accepted on behalf of Mr Vinos that this was nine days after the expiry of the four month period after the date of issue within which Civil Procedure Rules, rule 7.5 stipulates that the claim form had to be served. The solicitors have no explanation for this failure other than that it was an oversight. By this stage, of course, the statutory limitation period had run out.

7. On 21st October 1999 Mr Vinos applied for an extension of time for serving the claim form and for an order remedying the error which his solicitors had made. On the same day, the defendants applied for service of the claim form to be set aside and for costs on the ground that the claim form was not served within the four month period. The district judge dismissed Mr Vinos' application for an extension of time and acceded to the defendants' applications. His Honour Judge McDowall dismissed Mr Vinos' appeal against the district judge's decision, made costs orders which by agreement were not to be enforced unless Mr Vinos recovered compensation from the Solicitors' Indemnity Fund, and ordered repayment of the interim payment of £5,000. He also gave permission to appeal to this court, notwithstanding that the appeal would be a second appeal, which the terms of the then current Court of Appeal Practice Direction discouraged, where both the district judge and the judge had reached the same conclusion.

8. Rule 7.5 of the Civil Procedure Rules provides, subject to exceptions which do not apply in this case, that a claim form must be served within 4 months after the date of issue. It is accepted that the claim form was not served within that four months. Rule 7.6(1) provides that the claimant may apply for an order extending the period within which the claim form may be served. Rule 7.6(2) provides as a general rule that an application to extend the time for service must be made within the period for serving the claim form specified by rule 7.5 or within the period for service specified in an order extending the initial period. So the general rule is that an application for an extension has to be made before the stipulated period for service has run out. In the present case the application was made after the stipulated period had run out.

9. Rule 7.6(3) provides:

> "If the claimant applies for an order to extend the time for service of the claim form after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if–
>
> (a)the court has been unable to serve the claim form; or
>
> (b)the claimant has taken all reasonable steps to serve the claim form but has been unable to do so; and,
>
> (c)in either case, the claimant has acted promptly in making the application."

10. In the present case, the judge held that Mr Vinos had acted promptly in making the application, but the court had not been unable to serve the claim form – it had not been asked to do so – and Mr Vinos by his solicitors had not taken all reasonable steps to serve the claim form but been unable to do so – the solicitors had simply made an error and had allowed the time to run out.

So rule 7.6(3) not only did not empower the court to extend the time but, by virtue of the words "only if", positively precluded the court from doing so. This was the essence of the district judge's and the judge's reasoning. The judge held that the court had no discretion to consider whether to extend time. He noted that rule 3.1(2)(a) empowers the court to extend time for compliance with any rule even if an application for extension is made after the time for compliance has expired. But that power is expressed to apply "except where these rules provide otherwise" and rule 7.6(3) does provide otherwise in that it prescribes the only circumstances in which the court is able to extend the period for serving the claim form if the application is made after the period for service has expired.

11. The judge said this on the subject of discretion on page 3 at letter F of his transcribed judgment:

> "It is accepted by the defence that if the court had a discretion the court would only realistically exercise it in favour of the claimant, because it is not suggested for a moment that any prejudice has arisen or that any other considerations would apply to say that any kind of injustice would be done to the defendant."

12. And on page five of the transcript, reading from letter B, having discussed the meaning of rule 7.6, the judge said this:

> "In this matter I find myself distinctly unhappy as to the correct approach. The instinct that one has is to say 'No harm is done, let the action proceed' so that the appropriate person, that is the defendant's insurers, can meet the claimant's apparently justified claim for compensation. But on the other hand it does seem to me that where the rules have specifically provided for failure to serve a claim form within a set time and provided two, and only two, circumstances under which extensions can be given, that it would be wrong to ignore those.
>
> It seems to me, therefore, that I am persuaded that a rigid interpretation is called for,and that accordingly the District Judge was right in the decision which he made.
>
> I wish to repeat, for the avoidance of any doubt at all, that it is not merely a matter of the defendant's concession, that I would make it clear that if and insofar as I was persuaded that I did have a discretion, it seems to me overwhelmingly a case where I would have exercised it in favour of the claimant.
>
> I think that if I had been exercising such a discretion it would have been my concern to make sure that the appropriate person bore the costs of this unfortunate hiccup in the progress of the claimant's case - in other words I would have needed a lot of persuading not to make the solicitors pay the entire costs of what was their fault. But as it is, it seems to me that the order which I must make is to refuse this appeal.
>
> I record again, as a side observation, that I am comforted to this extent in terms of overall justice: that it is quite plain that the claimant, Mr Vinos, is going to receive 'an appropriate level of compensation', and that the only live question in one sense was whether it was going to be recovered from the defendant's insurers or from the solicitor's indemnity fund."

13. The unease which the judge expressed in the earlier part of this last passage from his judgment no doubt influenced him in giving permission to appeal even though the appeal would be a second appeal. Although it is of largely historic interest only, now that there is a new structure for

appeals to be found in Civil Procedure Rules, rule 52 and its Practice Direction which came into force on 2nd May 2000, I am inclined to think that the judge was right to do so, even though, as will appear, I consider that his decision was correct and that this appeal should be dismissed. (Under Section 55 of the Access to Justice Act 1999 and rule 52.13, for second appeals permission may now, subject to transitional provisions, only be given by the Court of Appeal.)

14. Mr Vinos' essential case on this appeal is that the overriding objective of the Civil Procedure Rules, rule 1.2 and rule 3.10 give the court a discretion to extend the time for serving the claim form and that the judge was wrong to decide otherwise. The overriding objective of the rules is to enable the court to deal with cases justly. By rule 1.2, the court is obliged to give effect to the overriding objective when it exercises any power given to it by the rules or when it interprets any rule. Rule 3.10 provides that:

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction-
>
> (a)the error does not invalidate any step taken in the proceedings unless the court so orders; and
>
> (b)the court may make an order to remedy the error."

15. Mr Peirson on behalf of Mr Vinos accepts that the application to extend time could not be made under rule 7.6(3) nor under rule 3.1(2)(a). But he submits that the judge was wrong to hold, as he did, that rule 3.10 did not give the court a discretion, which the judge would clearly have exercised in Mr Vinos' favour if he had decided that there was a discretion.

16. Mr Peirson submits that rule 3.10 contains a general power to rectify matters where there has been an error of procedure. Not serving the claim form within the period prescribed by rule 7.5 was an error of procedure. The judge was wrong to hold that rule 7.6(3) positively prevented him from extending time. The power conferred by Rule 3.10 is not restricted to provisions in other rules, as is rule 3.1(2) by its introductory words "except where these rules provide otherwise". The only restriction on the power in rule 3.10 is that to be derived from the overriding objective. Alternatively, Mr Peirson submits that rule 1.2 obliges the court to give effect to the overriding objective when it interprets the rules, and any conflict or ambiguity between rules 3.10 and 7.6(3) should be resolved by a liberal interpretation of rule 3.10, which achieves the overriding objective. The discretion which, it is submitted, rule 3.10 gives is a general discretion whose ambit is not limited to the considerations to be found in rule 7.6(3). To the extent that Coleman J decided otherwise in Amerada Hess v Rome and others, an unreported decision given on 19th January 2000, he was, it is submitted, wrong.

17. Mr Lord, on behalf of the respondents, made written submissions and Mr Peirson made oral submissions by reference to what they submit the position would have been under the former Rules of the Supreme Court. In my judgment, these submissions are not in point. The Civil Procedure Rules are a new procedural code, and the question for this court in this case concerns the

interpretation and application of the relevant provisions of the new procedural code as they stand untrammelled by the weight of authority that accumulated under the former rules. The court is not in the first instance concerned with the exercise of a discretion. Decisions about the exercise of the court's discretion to strike out cases for delay are not in point. There is, in my judgment, no basis for supposing that rule 7.6 in particular was intended to replicate, or for that matter not to replicate, the provisions of former rules as they had been interpreted.

18. Mr Lord emphasises that the words "only if" in rule 7.6 expressly limit the circumstances in which the court has power to extend time, when the application is made after the period has run out, to circumstances which do not apply in this case. He submits that rule 3 is concerned with case management decisions and that rule 3.10 does not come into play until proceedings are properly started by service of the claim form; that the power under rule 3.10 cannot extend to enable the court to do what rule 7.6 specifically provides it may not do; that rule 3.10 cannot extend to enable the court to extend a time period when the part of rule 3 which specifically provides for extending time periods – rule 3.1(2) – does not apply because of the words "except where these rules provide otherwise"; that an interpretation of rule 3.10 wide enough to make rule 7.6(3) nugatory would also render ineffective many, if not all, of the other requirements of the rules expressed in mandatory terms; that interpretation of the rules to give effect to the overriding objective should not result in the court making exclusively discretionary decisions unregulated by any structure; and that a main element of the overriding objective is that civil litigation should be conducted without delay. If necessary, Mr Lord seeks to withdraw the concession made before the judge that, if there were a discretion, it would be bound to be exercised in Mr Vinos' favour.

19. In my judgment, the judge's conclusions were correct essentially for the reasons which he gave, which I express in my own words as follows.

20. The meaning of rule 7.6(3) is plain. The court has power to extend the time for serving the claim form after the period for its service has run out "only if" the stipulated conditions are fulfilled. That means that the court does not have power to do so otherwise. The discretionary power in the rules to extend time periods – rule 3.1(2)(a) - does not apply because of the introductory words. The general words of Rule 3.10 cannot extend to enable the court to do what rule 7.6(3) specifically forbids, nor to extend time when the specific provision of the rules which enables extensions of time specifically does not extend to making this extension of time. What Mr Vinos in substance needs is an extension of time – calling it correcting an error does not change its substance. Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored. It would be erroneous to say that, because Mr Vinos' case is a deserving case, the rules must be interpreted to accommodate his particular case. The first question for this court is, not whether Mr Vinos should have a discretionary extension of time, but whether there is power under the Civil Procedure Rules to extend the period for service of a claim form if the application is made after the period has run

out and the conditions of rule 7.6(3) do not apply. The merits of Mr Vinos' particular case are not relevant to that question. Rule 3.10 concerns correcting errors which the parties have made, but it does not by itself contribute to the interpretation of other explicit rules. If you then look up from the wording of the rules and at a broader horizon, one of the main aims of the Civil Procedure Rules and their overriding objective is that civil litigation should be undertaken and pursued with proper expedition. Criticism of Mr Vinos' solicitors in this case may be muted and limited to one error capable of being represented as small; but there are statutory limitation periods for bringing proceedings. It is unsatisfactory with a personal injury claim to allow almost three years to elapse and to start proceedings at the very last moment. If you do, it is in my judgment generally in accordance with the overriding objective that you should be required to progress the proceedings speedily and within time limits. Four months is in most cases more than adequate for serving a claim form. There is nothing unjust in a system which says that, if you leave issuing proceedings to the last moment and then do not comply with this particular time requirement and do not satisfy the conditions in rule 7.6(3), your claim is lost and a new claim will be statute barred. You have had three years and four months to get things in order. Sensible negotiations are to be encouraged, but protracted negotiations generally are not. In the present case, there may have been an acknowledged position between the parties that the defendants' insurers would pay compensation; but it is not suggested that they acted in any way which disabled the defendants in law or equity from relying on the statutory limitation provisions and on the Civil Procedure Rules as properly interpreted.

21. In Amerada Hess v Rome and Others, Coleman J had to consider in complicated circumstances whether 40 writs had been effectively served on defendants who were Lloyds' underwriters. He concluded that none of them had been effectively served. All the relevant events took place before the Civil Procedure Rules came into force, but applications on behalf of the claimants to recover the position were made after they came into force. These included both applications under the former Rules of the Supreme Court and under Civil Procedure Rules, rule3.10. Counsel presented the applications on the basis of the provisions of the former Rules of the Supreme Court and I read Coleman J's decision to be under those provisions. He made extensive reference to authorities decided under the former rules; but he also considered what the position would be under the Civil Procedure Rules and specifically considered rule 7.6 and rule 3.10. Of these he said at page 32 of the transcript:

> "In a case where the claimant has effected service ineffectively prior to expiration of the period for validity for service under CPR 7.5 and, after that period, applies to remedy that 'error of procedure' under Part 3.10, there is no reason why the court should not exercise its discretion to grant what is in substance and in effect an extension of time for service by reference to the considerations identified in CPR 7.6(3) and every reason why it should. The overriding objective in CPR 1.1 does not, in my judgment, lead to any different approach. For there to be different or wider discretionary considerations in relation to granting what is in substance the same relief under CPR 3.10 from those under CPR 7.6 would be open to those very objections in principle which have persuaded me that the decision in Boocock should not be followed."

22. Having decided that the applications failed under the Rules of the Supreme Court, Coleman J then said on page 34:

> "If one approaches the problem by way of CPR 7.6(3), the difficulties confronting AH are no less insuperable. They have to establish that they took all reasonable steps to serve the claim form but were unable to do so and that they acted promptly in making the application. They are unable to establish either. They did not take any steps to effect service, reasonable or otherwise, between 2nd February and 26th March. Nor did they act promptly in making an application. They ought to have applied at the very latest on 22nd March, but failed to do so."

23. I am not sure that Coleman J's interpretation of rules 7.6 and 3.10 and their relationship is entirely clear. In the first passage to which I have referred he is, I think, clearly saying that, in cases to which rule 7.6(3) applies, there is a discretion under rule 3.10 to grant what in substance is an extension of time, but the exercise of the discretion is limited to the considerations in rule 7.6(3). In the second passage, he may have been saying that, if the conditions in rule 7.6(3) are not fulfilled, there is no discretion and the application fails. There may be little or no practical difference between the two interpretations. But, in my judgment, for the reasons which I have given, the second is correct. On the simple facts of the present case, the conditions in rule 7.6(3) were not fulfilled and the court has no discretion. It is not therefore necessary to consider Mr Peirson's submission that, if there were a discretion, Coleman J's analysis of its ambit was erroneous.

24. For these reasons, I would dismiss this appeal.

25. LORD JUSTICE PETER GIBSON: The question raised by this appeal is a question of construction of the Civil Procedure Rules. Does the court have the power to extend time for service of a claim form if the claimant only applies after the period provided for in rule 7.6(2) has expired and the conditions in rule 7.6(3) are inapplicable?

26. The construction of the Civil Procedure Rules, like the construction of any legislation, primary or delegated, requires the application of ordinary canons of construction, though the Civil Procedure Rules, unlike their predecessors, spell out in Part 1 the overriding objective of the new procedural code. The court must seek to give effect to that objective when it exercises any power given to it by the rules or interprets any rule. But the use in rule 1.1(2) of the word "seek" acknowledges that the court can only do what is possible. The language of the rule to be interpreted may be so clear and jussive that the court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case, though in that context it should not be forgotten that the principal mischiefs which the Civil Procedure Rules were intended to counter were excessive costs and delays. Justice to the defendant and to the interests of other litigants may require that a claimant who ignores time limits prescribed by the rules forfeits the right to have his claim tried.

27. A principle of construction is that general words do not derogate from specific words. Where there is an unqualified specific provision, a general provision is not to be taken to override that

specific provision. Rule 7.6 is a specific sub-code dealing with the extension of time in all cases where the time limits in rule 7.5 have not been or are likely not to be met. The sub-code sets out in some detail what the claimant must do if he wants an extension of time and the circumstances in which the court may exercise the discretion conferred on it to extend the time: rule 7.6(3). That the circumstances specified in sub-paragraphs (a), (b) and (c) of rule 7.6(3) are the sole relevant conditions for the discretion to be exercisable seems to me to be made crystal clear by the words "only if". It is plain that the general power in paragraph 3.1(2)(a) to extend time cannot override rule 7.6. Nor, in my judgment, could the general power in rule 3.10 to remedy a failure to comply with a rule be pressed into service to perform the like function of, in effect, extending time. Even though rule 3.10 differs from rule 3.1(2) in not having wording to the effect of "except where the rules provide otherwise", that is too slight an indication to make rule 3.10 override the unambiguous and restrictive conditions of rule 7.6(3).

28. I reach that conclusion on the wording of the Civil Procedure Rules alone. Like my Lord, I have not found helpful reference to the Rules of the Supreme Court, couched as they were in different and less strong language, nor the cases decided thereunder. For these as well as the reasons given by my Lord, I also would dismiss this appeal.

Order: Appeal dismissed with costs.