Judgment 20/2009 **(i) Bank of Scotland PLC v Ferbrache et al (ii) Bank of Scotland PLC v Keys et al – Royal Court (Civil Action Files 1047/1066) – 8 April 2009**

Civil Procedure – strike-out applications – whether inordinate and inexcusable delay – key dates in each action reviewed – held that there had been inordinate and inexcusable delay by the Plaintiff – however the Defendants had failed to establish that the delay would prejudice the prospects of a fair trial – strike-out applications dismissed

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1047/1066

The 8th day of April before R J Collas Esquire, Deputy Bailiff, alone

Between	**BANK OF SCOTLAND PLC**	**Plaintiff**
	v	
	(1) MARY FERBRACHE	**Defendants**
	(2) ROGER DADD	
	(3) SADIE MORGAN	
	(4) JASON MORGAN	
And Between	**BANK OF SCOTLAND PLC**	**Plaintiff**
	v	
	(1) RICHARD KEYS	**Defendants**
	(2) RK & S ARCHITECTS LIMITED	
	(3) STILLWELL & CO LIMITED	

Whereas on 31st March the Deputy Bailiff considered applications by all the defendants in the Ferbrache action and the third defendant in the Keys action, Stillwell & Co Ltd to have the actions against them struck out for want of prosecution and heard thereon Advocates P Richardson, A M Ozanne and G S K Dawes counsel for the Bank the Ferbrache Defendants and Stillwell & Co Ltd respectively the Deputy Bailiff this day handed down judgment in the terms attached hereto and DISMISSED the said applications and directed that both actions be listed at the earliest possible date for directions to be given so that both matters may progress to trial without any further delays.

S M D ROSS
H M Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between	**BANK OF SCOTLAND PLC**	**Plaintiff**
	v	
	(1) MARY FERBRACHE	**Defendants**
	(2) ROGER DADD	
	(3) SADIE MORGAN	
	(4) JASON MORGAN	
And Between	**BANK OF SCOTLAND PLC**	**Plaintiff**
	v	
	(1) RICHARD KEYS	**Defendants**
	(2) RK & S ARCHITECTS LIMITED	
	(3) STILLWELL & CO LIMITED	

Date of hearing: 31st March 2009

Decision handed down: 14th April 2009

Before: Richard John Collas Esq., Deputy-Bailiff

Advocate for Bank:	**P Richardson**
Advocate for the "Ferbrache Defendants":	**A M Ozanne**
Advocate for Stillwell & Co Ltd:	**G S K Dawes**

Cases referred to:

Birkett v James [1978] AC 297
Ogier v Grand Havre Holdings Ltd, Royal Court 30 May 2006 (Judgment 24/2006)

1. All the defendants in the Ferbrache action and the third defendant in the Keys action, Stillwell & Co Ltd, who I will call simply "Stillwell", have applied to have the actions against them struck out. The argument has mainly focussed on the second limb of the well-known test in *Birkett v James [1978] AC 297* :

> *"(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"*

2. I need first to identify the relevant key dates in the chronology of each action. (I recognise that other dates may be relevant for other purposes and other applications). I have taken note of all the dates set out in the chronologies provided to me but the key dates appear to me to be as follows, beginning with the Keys action.

    1) Mr Keys' first valuation is dated 5 August 1996 but no claim is made against Stillwell in respect of that valuation. The second valuation, which is the subject of the claim is dated on or about 24 November 1999.

    2) The second advance by the Bank in respect of which they say they relied upon the second valuation was completed on or about 6 January 2000.

    3) The Bank does not plead the date when it alleges it became aware that the valuation was inaccurate. That date may be when it alleges it received a valuation on 15 July 2003. Or else it may be 4 June 2005 when they received a retrospective valuation.

    4) On 16 March 2004 the Bank sold Le Mont Saint for £2,000,000 and that must be the latest date by which it knew it would not recover all its lending.

    5) The Bank issued the Keys proceedings and tabled them in Court for the first time on 2 December 2005.

    6) After a number of adjournments, Stillwell paced the action against it *Inscrite* on 21 April 2006.

    7) Stillwell filed its defences on 19 January 2007.

    8) On 13 March 2007, I gave directions for discovery by mutual exchange of lists of documents by 10 April 2007, inspection by 24 April and any amended cause to be filed by 15 May.

    9) Stillwell served its list of documents on 19 April and the Bank served its list on 28 August 2007.

    10) On 3 October 2008, Stillwell brought an application to have the proceedings struck out.

3. In the Ferbrache action, it seems to me that the key dates are as follows.

    1) The defendants' first report on title was dated 22 November 1996, upon which the Bank claims to have relied before taking the first Bond, for £1,800,500, on 26 November 1996.

    2) The second report on title was dated 4 January 2000, on which the Bank says it relied in connection with the second Bond registered on 6 January 2000 for £398,496.

3) The Bank alleges that on 29 September 2003, it became aware of the existence of the right of way which it claims reduced the value of the property by 20%.

4) On 16 March 2004, the property was sold for £2million which the Bank knew was less than the amount then owing to the Bank.

5) The proceedings against the Ferbrache defendants, as I will call them, were tabled in Court and placed *Inscrite* on 13 January 2006.

6) On 13 March 2006, the Bank filed an amended Cause.

7) Defences were filed on 30 March 2006 including *Exceptions de Fonds* and *de Forme.*

8) On 5 December 2006 the Bank was ordered to file a response to the *Exceptions de Forme* within 14 days. The response was filed late, on 8 January 2007.

9) On 13 March 2007 I made orders concerning the adequacy of responses that had not been resolved between the parties and I made an order for discovery in the same terms as the order I made in the Keys action referred to above.

10) The Ferbrache defendants served their list of discoverable documents on 6 June and the Bank served its list on 28 August 2007.

11) The Ferbrache defendants issued their application for strike-out dated 4 November 2008.

4. The chronologies show that before March 2007 there were some delays in both matters even after allowance is made for the nature and complexity of the issues that needed to be addressed. However, I cannot say that such delays were inordinate and inexcusable, especially when I take into account the way that cases were generally prepared for trial prior to the introduction of the Royal Court Civil Rules 2007 and the case management powers then introduced.

5. I need to focus on the delays that occurred after March 2007.

    1) There was delay in complying with the orders for discovery. All parties were guilty of some delay but by far the longest delay was on the part of the Bank; four and a half months in each action.

    2) Thereafter, in the Keys proceedings the only activity prior to the issue of the strike-out application was that Ozannes wrote to the Bank's Advocates on 21 February 2008 requesting a document listed on its discovery list and followed that with a reminder and a request for another document on 4 June. Neither letter was answered.

3) In the Ferbrache action, the Bank's Advocates sent an email to A O Hall on 19 September 2007 suggesting a revised timetable; the proposal was accepted by reply of the same date. The new timetable was that the Bank would serve an amended Cause by 19 October; the Ferbrache defendants would file revised defences by 9 November; and there was liberty to apply for further directions on 2 days' notice.

4) On 4 October, the Bank inspected the Ferbrache defendants' documents and no further steps were taken by the Bank thereafter.

5) I also take note of Practice Direction No. 2 of 2008 entitled "Royal Court Civil Rules, 2007 – Transitional Provisions". Pursuant to paragraph 4 thereof the Bank should have listed Ferbrache proceedings for directions before the end of April 2008. The Keys action should also have been listed for directions. Advocate Richardson was unable to give any explanation as to why the Practice Direction had not been complied with.

6. I am persuaded that the delay in each action since the disclosure of the Bank's lists of discoverable documents on 28 August 2007 has been inordinate and, as no excuse has been put forward by the Bank, it is inexcusable. I could also say that the delay since 10 April 2007 (when the list should have been produced) is inordinate and inexcusable.

7. I next need to deal with the question of prejudice. I am greatly assisted by the earlier decisions of this Court in which a number of English authorities have been carefully considered and I respectfully adopt the following passage from the judgment of Hancox L-B in *Ogier v Grand Havre Holdings Ltd, Royal Court 30 May 2006* in which he said the following:

> *"61. I have carefully considered the authorities listed by Day D.B in Scanfield v. Carr. He placed considerable reliance on Shtun v. Zalejska [1996] 3 AER 411. I respectfully agree with him and I would adopt the principles enunciated by Neill L.J. at page 429 of the Report. They are:*
> *"How, then, should this second precondition [meaning the prejudicial effect of delay on the defendant] be approached? Each case will depend on its own facts and it is not helpful to lay down hard or fast rules. One can, however, indicate the factors to be taken into account in evaluating the defendant's case. These will include:*
>
> *(1) The issues in the case*
> *(2) The evidence which is or is likely to be available and how far this will be oral or documentary.*
> *(3) The time which has elapsed since the relevant events.*
> *(4) The degree of prejudice which was or is likely to have been suffered in the pre-writ period*
> *(5) The degree of prejudice which has been or is likely to have been caused by the inordinate and inexcusable delay."*

62. *To the foregoing I would add this extract from the passage set out at paragraph 36 above from Rath v. Lawrence, namely:*

> *"Is there a substantial risk that it is not possible to have a fair trial of the issues in the action."*

In answering this I accept that the final sentence of the quotation contains a dependent question, namely:

> *"For this purpose 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."*

63. *I further accept this proposition stated by Day D.B at page 9 of his Judgment:*

> *"The burden of establishing inordinate delay to the satisfaction of the court rests on a defendant. However, if that is so established, then the burden will generally be on the plaintiff to establish a reasonable excuse for the delay, because once inordinate delay has been established then in the majority of cases that will of itself establish that the delay was inexcusable".*

64. *The reverse side of this particular coin is, however, that once inordinate delay has been established, and the plaintiff has not demonstrated a reasonable excuse for the delay, the burden of establishing prejudice, and, by the same token, that a fair trial is impossible, shifts to the defendant. This is clear from the judgment of Waite L.J. in Rowe v. Glenister [1995] Times 7th August, who said that the onus of proving additional prejudice in the post-writ period lies on the defendant.*

65. *Further support is to be found in Department of Transport v. Chris Smaller Ltd [1989] AC 1197, in which, at page 1208, Lord Griffiths said:*

> *"I regard this [the submission that the burden is on the Plaintiff to negative prejudice] as a wholly impractical suggestion. It would put an unrealistic burden on the plaintiff. The plaintiff will not know the defendant's difficulties in meeting the case, such as the availability of witnesses and documents, nor will the plaintiff know of other collateral matters which will have prejudiced the defendant, such as the effect of delay on the defendant's business activities."*

66. *In my judgment these dicta must apply to the pre as well as to the post-writ period, in view of the statement by Lord Browne-Wilkinson in Roebuck v. Mungovin (supra) and, indeed, the earlier remarks of Lord Denning in Biss v. Lambeth Southwark & Lewisham Health Authority (supra), and this is consistent with the fifth guideline as to the principles to be observed in these cases stated, again by Neill L.J., in Trill v. Sacher [1993] 1 AER 961. This is as follows:*

> *"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" [I interpolate here 'To progress the case'] "with reasonable diligence. (see Birkett v.James). Accordingly a court is likely to look strictly at any subsequent delay which is in excess of the period allowed by the rules of court for taking the relevant step, and may regard (it) as inordinate even though a similar lapse of time might have been treated less strictly had the action been started earlier."*

> *67. Accordingly, it is, in my opinion clear, on all the authorities, that delay after the issue of the writ, or of the tabling of the Cause in Guernsey, can be added to the pre-writ delay and if it appears to the Court on a strike out application that the aggregate of those delays is inordinate and inexcusable, and no reasonable excuse has been shown, it will then look to see if the defendant has established that substantial prejudice has been occasioned to him. Moreover, in Electricity Supply Nominees Ltd. v. Longstaff & Shaw Ltd [1986] Constitutional Law Journal page 183, shows that the Court will pay close attention to each separate period of delay that has occurred."*

8. What prejudice do the parties allege? Advocate Mrs Lewis said the following in her affidavit sworn on 29 September 2008 on behalf of Stillwell:

> *"17. The Third Defendant is severely prejudiced in the preparation of a defence to the allegations of negligence made against it, especially noting that much of the information required to defend the specific allegations directed at the Third Defendant are not within the knowledge of the Third Defendant. That knowledge lies with the First Defendant who prepared the three valuation documents the subject of these proceedings.*

> *18. Given that over 13 months have expired since the Plaintiff's last communication or positive move to progress the claim, it would appear that the Plaintiff does not wish to progress the claim as against either the third Defendant or the other two named defendants."*

9. In his submissions, Advocate Dawes made much of the failure of the Bank to progress the Keys action against Mr Keys, the first defendant and, to a lesser extent, the second defendant (it is apparently a dormant company waiting to be struck off the Register of Companies). It is not clear whether Mr Keys was acting as an employee and director of Stillwell or of the second defendant when he prepared the November 1999 valuation. Advocate Dawes disclosed in argument, but not by affidavit, that Mr Keys left Stillwell in difficult circumstances and may not be co-operative towards the company which is why Stillwell has been waiting for the Bank to progress its action against him personally and has not taken steps to obtain evidence from him (as I understand the position). It appears from the Court file that although 'B' service was obtained on Mr Keys on 2 December 2005, he has never entered an appearance in person or through counsel save that on the first few occasions the matter was in Court, Ozannes may have applied for one or more adjournments on his behalf while they waited for clarification as to who they were instructed to represent.

10. The capacity in which Mr Keys was acting, or to be more precise, in the name of which company he produced his report, is an important issue in the Keys action and the question of what information was available to him is also important, especially in relation to the right of way. His first valuation was prepared more than 12 years ago and the second more than 9 years ago. It is more than likely that his recollection of matters that are not recorded in the available documents will be fading. However, Stillwell has not persuaded me that anything has happened during the period from August 2007 or even April 2007 that could be said to have caused a fair trial to be no longer possible. Stillwell has apparently sat back waiting for the Bank to engage Mr Keys fully in these proceedings. In my view, if it was that concerned to preserve his memory of the events, Stillwell could have contacted him much earlier to request him to provide a statement or explanation of what happened. The Bank gave notice of its claim to all the defendants in the Keys action in a letter dated 14 November 2005 that particularised the complaint in some detail.

11. Advocate Dawes also argued that with the passage of time it will be more difficult for expert witnesses to give evidence as to comparable prices in the property at the relevant time. I do not accept that argument, the prices at which properties are conveyed are recorded in the Greffe and, in my experience, estate agents in the Island keep their own records that will include the prices at which property owning companies have been sold by way of share transfer. Also, the Bank apparently has already obtained a retrospective valuation.

12. Regarding the Ferbrache defendants, Advocate Ozanne also argues that the passage of time will have had a deleterious effect on the memories of their witnesses that gives rise to a substantial risk that a fair trial will not now be possible. It seems to me to be likely that much of the evidence will be recorded in correspondence and other documents in the relevant file maintained by the defendants. Also, they were put on notice of a claim in a detailed letter dated 30 August 2005. I am not persuaded by them that their memories have faded during the periods of delay to such an extent as to prejudice the prospects of a fair trial such that the proceedings must now be struck out.

13. Most of the Ferbrache defendants have now retired from practice and it must be most annoying to have an action such as this hanging over them but that does not, in my opinion, justify a strike-out and indeed Advocate Ozanne did not argue that it should do so.

14. In my judgement, neither of the applications for strike-out on the grounds of want of prosecution have been made out.

15. In my view, I do not need to decide whether the actions are *perimés* because even if they are, I would have discretion to restore each of the actions to the *Rôle.* In deciding whether to exercise that discretion I would take account of the same facts and grounds and I would reach the same conclusion that the actions should be allowed to continue.

16. In this judgment I have not addressed the question of whether either or both of the actions are now prescribed by the passage of time, or whether fresh actions would be

prescribed if the Bank had to re-issue fresh proceedings. It seems to me that if fresh proceedings were issued, the prescription arguments would be different from any arguments that would be run on the present proceedings. But, the parties seem to accept that there would not be a clear-cut prescription defence; at minimum there would be a (possibly novel) argument that the Bank was *empeché d'agir* until 15 July 2003 or later.

17. However, in reaching my decision I have taken account of the fact that the events complained about happened a number of years ago and it is incumbent on the Bank to progress the actions to trial without delay.

18. I have concluded that the applications by the Ferbrache defendants and by Stillwell to have the proceedings struck-out must fail but I direct that both actions must be listed at the earliest possible date for directions to be given so that both matters may progress to trial without any further delays.