view that the cause of death would be the pre-existing illness or injury, rather than dehydration, begs the question. Not only may patients in pvs live for many years if provided with food and fluids but, as Lord Mustill recognised in *Bland*, the doctor's withdrawal of treatment is in law a cause of death, at any rate if it is unlawful.

It is regrettable that counsel for the Official Solicitor did not articulate and defend the principle of the inviolability of life, on which English law and Article 2 are historically based, a principle which has no truck with the incoherent distinction between intentional killing by an act and intentional killing by omission. Nor does he appear to have advanced the argument that tube-feeding is basic care rather than "medical treatment".

In short, an ideal opportunity to restore the law's moral and intellectual shape has been sadly missed.

JOHN KEOWN

SLOW PROGRESS IN STRIKING OUT DILATORY LITIGANTS: "NO SECOND BITE AT THE CHERRY"

FOR many years the problem of delay has plagued English civil proceedings. The main instrument used to counter it has been the power to strike out claims on the basis of "want of prosecution" (*Allen* v. *Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229, C.A.; *Birkett* v. *James* [1978] A.C. 297, H.L.). But, notoriously, this doctrine long ago lost its snap. Now the Court of Appeal in *Securum Finance Ltd.* v. *Ashton* [2000] 3 W.L.R. 1400 has sharpened the doctrine's bite, or at least lengthened its leash, by deciding that this power of dismissal extends to claims which are not yet statute barred.

The present case has twice proceeded to the Court of Appeal, on the first occasion as *Arbuthnot Latham Bank Ltd.* v. *Trafalgar Holdings Ltd.* [1998] 1 W.L.R. 1426. These are the main facts underlying both decisions. Arbuthnot lent money to Trafalgar. The Ashtons guaranteed the loan and, to support the guarantee, they provided a mortgage in favour of Arbuthnot over their Essex home. In the first action Arbuthnot sought repayment of the debt and made claims against the debtor and the guarantors. That action was struck out because of the claimant's excessive delay. Chadwick L.J. in the *Securum* case (at para. 51) confirmed that the basis of the striking out in the *Arbuthnot* case had been "limb 2" of the *Birkett* v. *James* rules, *viz.*:

https://doi.org/10.1017/S0008197301780610 Published online by Cambridge University Press

> that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers [which produces] ... a substantial risk that it is not possible to have a fair trial of the issues in the action or is likely to cause ... serious prejudice to the defendants ... ([1978] A.C. 297, 318, *per* Lord Diplock).

Next, Arbuthnot assigned the "bad debt" to Securum, which tried to rehabilitate it as a good debt by bringing the second action. The relief sought in these later proceedings differed in two respects from that claimed in the first: the assignee was now suing upon the guarantors' *covenant* to indemnify the creditor and, secondly, was enforcing its rights as mortgagee. Rather generously, both types of claim are subject to a 12-year period of limitation (for details, *Securum* case, paras. 10, 45).

The Ashtons applied to have the second claim struck out as an abuse of process. That challenge posed the issue, "whether it is an abuse of process to seek to litigate, in subsequent proceedings, issues which have been raised (but not adjudicated upon) in earlier proceedings which have themselves been struck out [for 'want of prosecution']" (para. 18). The striking out application failed at first instance because the judge followed *Birkett* v. *James* [1978] A.C. 297, 320, 322, H.L., which decided that an action cannot be struck out for want of prosecution if at the time of the striking out application the cause of action has not become statute barred. The House of Lords reasoned that a court could not prevent the claimant bringing fresh proceedings and that these would be secure from procedural challenge because the Limitation Act (now the 1980 Act) "permits" it to proceed. The court could strike out the second action only where the first action is dismissed for "abuse of process". But in 1978, in fact until Chadwick L.J. gave judgment in the *Securum* case, the assumption was that mere delay, even if lengthy and inexcusable, does not disclose "abuse".

In the *Securum* case Chadwick L.J. declared such leniency to be anachronistic in the light of the "Overriding Objective" in C.P.R., Part 1. He said (para. 34):

> ... The position, now, is that the court must address the application to strike out the second action with the overriding objective of the Civil Procedure Rules in mind—and must consider whether the claimant's wish to have "a second bite at the cherry" outweighs the need to allot its own limited resources to other cases.

The new position is this: when an action is struck out for want of prosecution, it is prima facie an abuse of process for the same claimant to bring a second action on the same facts, unless he can show "some special reason" to justify it. This is Chadwick L.J.'s

https://doi.org/10.1017/S0008197301780610 Published online by Cambridge University Press

innovation. The new institutional value-judgement is that a claimant who makes inefficient use of the public amenity of civil litigation is guilty of "abuse of process" (para. 52). In short, *Birkett* v. *James* has been overtaken in this respect by the strictures of the new procedural code.

However, abuse is here only presumed. On the facts of the *Securum* case the Court of Appeal declined to strike out the second claim. The court said that it would be unreasonable to require a creditor who has a triplet of rights—to repayment by the principal debtor, the benefit of a guarantee, and a mortgage supporting the guarantee—to fire the entire fusillade of remedies in the first action (para. 17).

What of the bigger picture? There are at least four sources of sanction against dilatory litigation:

(i) striking out for want of prosecution, the subject of this note;
(ii) striking out for "abuse of process" where the litigant has shown a "complete" ("total" or "wholesale") disregard for the procedural rules, especially those concerning the action's progress (the *Arbuthnot* case [1998] 1 W.L.R. 1426, C.A., noted P. Key (1999) 115 L.Q.R. 208);
(iii) striking out for "abuse of process" where the claimant's overriding desire is not to seek justice but instead to embarrass, vex or oppress his opponent (*Grovit* v. *Doctor* [1997] 1 W.L.R. 640, H.L.);
(iv) finally, the court can impose costs or other pecuniary sanctions instead of striking out (as explained by Lord Woolf M.R. in *Biguzzi* v. *Rank Leisure plc* [1999] 1 W.L.R. 1926, C.A.).

In category (i), which joins (ii) and (iii) in this respect, the second action can be barred as an "abuse of process" even when the claim is not yet statute barred. After 32 years this is clear progress, if a trifle slow.

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https://doi.org/10.1017/S0008197301780610 Published online by Cambridge University Press