Target Holding Ltd v Brian David Oxborough [1999] ADR.L.R. 10/28

CA on appeal from Luton County Court (His Honour Judge Farnworth) before Kennedy LJ, Mummery LJ, Mantell LJ. 28th October 1999

LORD JUSTICE KENNEDY:

1. Lord Justice Mantell will give the first judgment.

LORD JUSTICE MANTELL:

2. This appeal concerns three consolidated possession actions which began life in July 1990 and which were eventually struck out by His Honour Judge Farnworth sitting in the Luton County Court on 23 February this year.

3. Each of these actions had been brought by a mortgage lender against householders who had borrowed money on the security of their homes in order to finance business ventures and had defaulted in making repayments. In addition to claiming possession the mortgagees sought to recover the arrears.

4. Whilst thus described the actions looked to be free from complexity, the defences put in by the householders included substantial counterclaims and raised issues which were anything but straightforward. Thankfully it is not necessary to analyse the content.

5. However, some reference to the course of events is unavoidable. I take the history from the judgment of His Honour Judge Farnworth. Following indications from all defendants in August 1990 that they intended to defend the claimant, Target Holdings Ltd, amended its particulars of claim. There was a directions hearing in November 1990 when the three sets of proceedings were consolidated and the defendants were ordered to file their defences within 28 days. There was a further order for discovery to take place by the exchange of lists no later than January 1991. The action was to be set down on filing a certificate of readiness signed by all parties. The defences and counterclaims were served in December 1990. The claimants served a reply and defence to counterclaim in February 1991, at the same time seeking further and better particulars of the defences. Those further and better difficulties were supplied in May 1991. This much was achieved with agreed extensions of time on both sides. There was greater difficulty over discovery. The defendants produced their documents five months late in June 1991 and the claimant was even slower. Full compliance did not take place until July 1993 with the service of a supplemental list. All this was against the background of a continuing correspondence which indicated as the judge found that there had been delay on both sides.

6. In the meantime in August 1991 the defendants raised the possibility of a settlement. A proposal was made which the claimant rejected before making counterproposals of its own. Thus started negotiations which continued with a number of interruptions until March 1998 when the claimant through its solicitors indicated that no progress towards a settlement having been made it would have to reinstate the possession proceedings. The response of the defendants' solicitors was to ask for time in which to take instructions. However on 23 March 1998 the claimant was informed of the defendant's intention to apply to strike out for want of prosecution and abuse of process.

7. That application, in the first instance, came on for hearing before Deputy District Judge Duchenne on 5 October 1998. He struck out the proceedings on both grounds. The claimant appealed to the County Court Judge. The judge held that there had been no intentional and contumelious default on the part of the claimant. As to want of prosecution he found that whereas there had been delay on both sides and that the delay for which the claimant was responsible was inordinate and inexcusable, nevertheless such delay on the claimant's part had not led to a substantial risk that it was not now possible to have a fair trial or that by reason of the delay the defendants would suffer serious prejudice. Hence this was not an action which fell to be struck out for want of prosecution. However, having reviewed recent authorities he did hold that the failure on the part of the claimant to progress the action with a proper sense of urgency constituted an abuse of process which required him to strike out the proceedings.

8. The present appeal lies against that order. The single Lord Justice who granted permission to appeal was conscious of this being a second bite at the cherry. Nevertheless, he took the view that the principle involved required to be considered by this court. I respectfully agree.

9. I have already referred to the fact that the learned judge had held that there was no intentional or contumelious default on the part of the claimant or that it would be appropriate to strike out for want of prosecution. He had also held that this was not a case in which the claimant had no intention of bringing the litigation to a conclusion as in **Grovit v Doctor** [1997] 2 All ER 417. There is no Respondent's Notice or cross appeal. What this court is left to consider, therefore, is the correctness or otherwise of his holding that the claimant's extreme tardiness in promoting its action is of itself a sufficient abuse to justify strike out. The judge began by setting out four propositions with which I would unreservedly agree:

10. "Firstly the claimant's claim is a straightforward one for possession of property subject to mortgages and recovery of mortgage moneys, where the limitation period does not expire until 2002. Secondly, the defendants' various defences, whilst at first sight quite complicated, all arise out of the Capital raising exercise that I have mentioned and the participants are clearly identified. Thirdly, assessment of the situation for the purposes of this appeal and the defendants' application must be as at March 1998, when the defendants' summons was issued. Fourthly, I consider that this is an action which reasonably conducted, should have been heard and determined within two to two and a half years at the most from the institution of proceedings, i.e. by the end of 1992. Mortgage possession proceedings themselves are straightforward. The defences and counterclaims arise from, as I have said, a short period of negotiations and decision making in 1989."

11. He then proceeded to deal with the alternative basis of the application before turning to the matter which is the subject of appeal. He reminded himself of three cases. The first in point of time is **Grovit v Doctor**, the second **Arbuthnot Latham Bank Ltd v Trafalgar Holdings** [1998] 1 WLR 1426 and the third **Choraria v Sethia** [1998] CLC 625. As to the first he recognised that this was not a case where litigation had been brought without any intention of bringing it to a conclusion, but took note of Lord Woolf's strictures with regard to delay. He then picked up the following extract from the judgment of Lord Woolf in **Arbuthnot Latham Bank Ltd v Trafalgar Holdings** at page 191: *"It is already recognised by Grovit v Doctor that to continue litigation with no intention to bring it to a conclusion can amount to an abuse of process. We think that the change in culture which is already taking place will enable courts to recognise for the future more readily than heretofore that a wholesale disregard of the rules is an abuse of process as suggested by Parker LJ in* ***Culbert v Stephen Westwell & Co Ltd*** *[1993] PIQR p.54.*

> *While an abuse of process can be within the first category identified in Birkett v James [1978] AC 297 it is also a separate ground for striking out or staying an action (see Grovit v Doctor at pp 642/643) which does not depend on the need to show prejudice to the defendant or that a fair trial is no longer possible. The more ready recognition that wholesale failure, as such, to comply with the rules justifies an action being struck out, as long as it is just to do so, will avoid much time and expense being incurred in investigating questions of prejudice, and allow the striking out of actions whether or not the limitation period has expired. The question whether a fresh action can be commenced will then be a matter for the discretion of the court when considering any application to strike out the action and any excuse given for the misconduct of the previous action ...*

The position is the same as it is under the first limb of Birkett v James. In exercising its discretion as to whether to strike out the second action, the court should start with the assumption that if a party has had one action struck out for abuse of process some special reason has to be identified to justify a second action being allowed to proceed."

12. The judge then cited from the judgment of Nourse LJ in **Choraria v Sethia** at page 630: *"The law, as it applies to this case, may therefore be stated thus although inordinate and inexcusable delay alone, however great, does not amount to an abuse of process, delay which involves complete, total or wholesale disregard, put it how you will, of the rules of court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground."*

13. And then, before moving to his final conclusion, the judge reminded himself of the total period of time which had elapsed and the well settled principle that a claimant who brings an action has the responsibility of driving it forward. He then identified the areas in which the claimant had failed in its duty to progress the action as follows:

1. A failure to ensure that the pleadings were in order at an early stage;
2. A failure to ensure that the process of discovery was completed expeditiously;
3. A failure to set down the action expeditiously or at all;
4. A failure to ensure that witness statements were prepared;
5. A failure to pursue the settlement proposals in a purposeful manner.

14. No one can fail to be aware of the change of climate in the court's attitude to the dilatory conduct of actions. There is, or so many litigants and prospective litigants must feel, a distinct nip in the air. Quite apart from the recently imposed regime, there is, undoubtedly, a greater readiness to strike out in cases of noncompliance with the rules. But it is necessary, I think, to remember that it has only been suggested that actions should be struck out "***as long as it is just to do so***" or "***it is fair to do so***"; see the passages previously cited. Also, in the words of Nourse LJ in **Choraria v Sethia**, any disregard of the rules must be "***complete, total or wholesale***" and "***with full awareness of the consequences***".

15. Here by far the greater part of the delay was taken up by protracted negotiations which did not involve any (let alone any "wholesale") disregard of the rules and without either side being alerted to the sea change which was about to come upon them. Both sides were equally responsible for the slowness with which those negotiations were conducted. It seems to me, as it did to the judge, that all the appellant can be condemned for is a failure to progress the action expeditiously for motives which seem respectable enough. Dress it up how one will, that amounts to no more than delay which, without more, it is conceded is insufficient to support an application for strike out. Add in the factor that time has not expired, not, of course conclusive in itself on an application to strike out for abuse of process, and it seems to me that there was no proper basis for the judge's decision.

Accordingly, I would allow this appeal and reinstate the action.

LORD JUSTICE MUMMERY: I agree.

LORD JUSTICE KENNEDY: I also agree.

ORDER: Appeal allowed with costs here and below Claimants within 14 days to obtain an appointment for directions at Bedford County Court. Order nisi under section 18 of the Legal Aid Act 1988 against the Legal Aid Board. Legal aid assessment of the Respondents' costs. (Order not part of approved judgment)

MR J BRISBY QC and MR R HILL (Instructed by Messrs Rosling King, London EC4A 3DL) appeared on behalf of the Appellant
MR N MERRIMEN QC and MR P EMERSON (Instructed by Messrs Anthony Collins, Birmingham B2 5PG) appeared on behalf of the Respondent