Case No: B5/2012/1706/1759/1764

Neutral Citation Number: [2013] EWCA Civ 864

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BRENTFORD COUNTY COURT
His Honour Judge Powles QC
1BF00330

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 12th July 2013

Before :

LORD JUSTICE THORPE

LORD JUSTICE TOMLINSON
and
LORD JUSTICE BRIGGS

- -

Between :

DUNBAR ASSETS PLC	**Respondent**
- and -	
1. DORCAS HOLDINGS LIMITED	
2. HUGH BARRETT	
3. MELISSA ROSS	
4. PERSONS UNKNOWN	
5. JOE LAGNA	**Appellants**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Ian Wilson (instructed by **DLA Piper**) for the **Respondent**

Neil Mendoza (instructed by **Blackstones Solicitors**) for the

1st and 2nd Appellants

Michael Paget (instructed by **Saunders Law Limited**) for the **3rd Appellant**

Michael Paget (instructed by **Saunders Law Limited**) for the **5th Appellant**

- -

Judgment

Lord Justice Briggs :

1. This is the defendants' appeal against the order for possession of residential premises known as 1A Hartington Road, Chiswick ("the property") made by HHJ Powles QC in the Brentford County Court on 20th June 2012. The appeal is pursued not on the ground that the order for possession was necessarily wrong (CPR 52.11(3)(a)) but rather because it was unjust because of a serious procedural irregularity in the conduct of the hearing by the Judge (CPR 52.11(3)(b)).

2. The possession order was made at the end of a short hearing on the day listed for the multi-track trial of the claim for possession of the property, made by Dunbar Assets PLC against the first defendant Dorcas Holdings Limited (the legal owner of the property), the second defendant Hugh Barrett, the beneficial owner of the first defendant and its licensee as occupant of the property, and against the third defendant Melissa Ross, the second defendant's co-habitee and also a licensee occupant of the property. The claim was based upon a legal charge of the property by the first defendant to the claimant as a security for a series of successive loans.

3. The claim had, until then, been defended upon the basis of a denial of due execution of the legal charge, and by reference to an alleged oral agreement ("the trade-out agreement") pursuant to which it was said that the claimant had agreed not to demand repayment of the loans by the first defendant while it sought to "trade out of its existing debt" by the development of further properties with financial assistance from the claimant. Alternatively, the claimant was alleged to have become estopped from demanding repayment by reason of representations in broadly similar terms to those of the alleged trade-out agreement.

4. There is a full transcript of the proceedings before the Judge on 20th June, including his extempore judgment. It appears that it rapidly became common ground at the beginning of the hearing that there could not be the anticipated full trial of the claim. The Judge was burdened with two multi-track trials for hearing on the same day, and was required to hear and determine applications to amend their defences by the three existing defendants, as well as an application to be joined into the proceedings by Joe Lagna, who claimed to be a tenant of part of the property and sought, in substance, not to be evicted without the statutory two months' required notice. It had been specifically agreed between solicitors for the claimant and the first and second defendants that, if any amendment of their defence was allowed, there would have to be an adjournment of the trial. The Judge had ascertained from his pre-reading of Miss Anne Jeavons' trial skeleton argument for the claimant that she wished to submit that the existing pleadings (even if proved to the hilt) disclosed no answer to the claim for possession. Her skeleton argument in relation to the amendment applications submitted that the proposed amendments were, quite apart from being last minute, equally objectionable, for reasons which do not now matter.

5. The Judge's immediate concern, understandably in the light of the other multi-track claim awaiting trial in the wings, was to see if he could find what he

described as a "way through". He sought to ascertain from brief oral position statements from each counsel what they were seeking to achieve that day. He ascertained from Mr. Neil Mendoza for the first and second defendants that he did not accept that his pleading of the trade-out contract and estoppel worked, if at all, only as a counterclaim and not a defence (as Miss Jeavons had submitted), but he told Mr. Mendoza that he could elaborate on all that when he (the Judge) returned into Court after a pre-reading of the papers, including the newly lodged applications.

6. After about fifteen minutes' further pre-reading the Judge returned and heard each of the defendants' (and Mr. Lagna's) applications in turn. Part of the first and second defendants' requested amendments consisted of an amplification of the trade-out contract and estoppel claim. The Judge sought to cut short Mr. Mendoza's submissions about why he should have permission to amend by expressing the provisional view that those amendments related to what he called "the damages claim", and that the estoppel might be capable of being brought to an end by reasonable notice. Although Mr. Mendoza sought to respond, the Judge succeeded in terminating Mr. Mendoza's submissions about permission to amend during the following exchange:

> "The Judge: I am minded to let you make all those amendments-
>
> Mr. Mendoza: I am grateful.
>
> The Judge: But it is the consequences that follow from that that is really interesting.
>
> Mr. Mendoza: If you are minded to let me make the amendments, I do not need to address you.
>
> The Judge: Exactly.
>
> Mr. Mendoza: So I will stop."

7. The Judge then proceeded to hear submissions from counsel for the third defendant, and from Mr. Paget for Mr. Lagna. He ascertained from Mr. Paget that what his client actually wanted was to make sure that he got at least two further months in the property. Mr. Paget added that if his client's alleged tenancy pre-dated the legal charge he would be entitled to a slightly longer period, namely two months from the date of any possession order, together with the period necessary for the claimant to obtain possession against Mr. Lagna by a further order. Mr. Paget told this court that, in that event, Mr. Lagna might have expected to obtain about seven months in total.

8. Immediately after the end of the submissions on the defendants' various applications, the Judge proceeded to give an extempore judgment. He began by saying that:

> "The Court finds itself very much in case management mode rather than in decision-making mode."

He continued by refusing the first and second defendants' permission to amend, save only for the amplification of their case about the trade-out agreement and estoppel, which he had permitted during argument. He continued as follows:

> "What is the court therefore to do? There seems little enough reason to grant an adjournment to the third defendant for amendments that will be not be allowed, so I ought to get on with the trial. Plainly we cannot now do that. Miss Jeavons goes further. She says that we do not need to get on with the trial because the matters that are there by way of counterclaim complaining of things that the bank did not do from time to time will sound in money and the counterclaim can proceed at a later date, but that she is entitled to a possession order today.
>
> I agree with her. I see nothing in the estoppel point that has been raised. The matter is in a deed. There has been ample time for the parties to re-establish their positions once it became clear that the bank would not honour or comply with such representation as they had made. I do not see for one moment that there is a case that the estoppel was one that had a permanent effect such that the deed was rendered completely nugatory. I do not think that that is arguable.
>
> Miss Jeavons is entitled to her possession order. But I have, I hope, sufficient humility to recognise that I might be wrong, as Mr. Mendoza is clearly indicating from his facial expression.
>
> The solution is that I will grant a possession order, but I will also grant a stay of its execution for 21 days. If a Notice of Appeal is lodged within the 21 days, I will extend the stay until the matter can get before a High Court Judge to consider this ruling.
>
> As far as the fourth defendant is concerned, he will be made a party. The possession order in his case will be one of two months, but the stay will apply to him as well."

9. The Judge made it clear during submissions following judgment that he did not intend to close off the pursuit by the first and second defendants of the trade-out case as a counterclaim, notwithstanding Mr. Mendoza's continued protestation that his case was that it operated by way of defence.

10. All the defendants sought permission to appeal. Their main ground was that the Judge had, by moving straight to judgment for possession after dealing with the defendants' various applications, failed entirely to conduct a trial of that claim, treating the trade-out case as relevant only to a counterclaim for

damages and the estoppel case as unarguable, but without even hearing submissions in relation to either.

11. The defendants sought, but were refused, permission to appeal in relation to the Judge's refusal of permission to amend. They obtained permission to appeal in writing from Lewison LJ on their primary ground of procedural irregularity, and (orally) from Aikens LJ in relation to estoppel if, but only if, the appeal based on procedural irregularity failed.

12. Procedural irregularity there certainly was. Mr. Ian Wilson for the claimant did not seriously suggest otherwise. Mr. Mendoza and Mr. Paget (appearing on this occasion both for Mr. Lagna and the third defendant) submitted that the irregularity lay in the Judge failing, after dealing with the defendants' various applications, either to hold a trial or to adjourn it to some other date. If he wished to proceed to trial, they submitted that he should have required the claimant to prove its case, to call its witnesses for cross-examination and have permitted the defendants to do the same. In addition, Mr. Mendoza submitted that, in the light of the solicitors' agreement to that effect, the limited permission to amend which he had obtained meant that an adjournment of the trial was the only proper course of the Judge to take.

13. Those submissions all assume that, in the light of the outcome of the defendants' applications, there needed to be a trial. But the only claim before the court was the claimant's claim for possession of the Property. The Judge evidently considered that nothing in the defendants' pleadings amounted to anything which, even if proved in full, could amount to a defence to that claim. Furthermore, both the legal charge and the alleged debt for which it constituted security had by then been admitted so that, in the absence of a pleading which could amount to a defence, the claimant could obtain an order for possession without proving anything, but simply by relying on the defendants' admissions. The Judge evidently also regarded the first and second defendants' defence (amplified by the amendment which he had permitted) as giving rise to a potential counterclaim for damages, which nothing in his judgment or order was designed to prohibit.

14. In my judgment the real procedural irregularity lay in the Judge deciding that the claim for possession could be dealt with summarily without a trial, (either then or after an adjournment) without first inviting and hearing submissions on the question, squarely raised by the claimant's trial skeleton argument and in Miss Jeavons' opening submission, whether the defendants' pleadings, amended to the extent which the Judge permitted, disclosed any defence to that claim.

15. There is in my judgment nothing procedurally irregular about a trial judge entertaining at the beginning of a trial a submission that the defendants' pleadings disclose no defence to the claim, even if no formal application to strike out has been made by the claimant if, on his pre-reading of the papers, it appears to him that there is a properly arguable case for strike out which, if established, would save the parties substantial further time and expense. Before entertaining such an application, the Judge would have to be satisfied that the defendants had a fair opportunity to respond to it. Before deciding

such an application, it is an elementary and fundamental principle of fair procedure that he should first hear submissions on it from the defendants.

16. In *Markus Albert Frey v Labrouche* [2012] EWCA Civ 881 the first instance judge refused an application to strike out part of a claim. Having carried out a detailed pre-reading of the papers he declined to hear oral submissions in support of the application, taking the view that:

> "…an argument on these papers that the proceedings should be struck out as being an abuse is really beyond the reach of sustained argument."

Allowing an appeal on the ground of procedural irregularity, Lord Neuberger MR giving the leading judgment of the Court of Appeal said, at paragraph 22:

> "It is a fundamental feature of the English civil justice system, and indeed any civilised modern justice system, that a party should be allowed to bring his application to court, and make his case out to a judge."

Later, at paragraph 43, he continued:

> "However, even assuming that the decision in this case was a case management or procedural decision, it was simply unsustainable. It is fundamentally wrong for a judge to refuse to hear oral argument on behalf of a party whom the judge has decided to find against on reading the papers."

17. The present case is, in a sense, the converse of the *Labrouche* case, because here the Judge acceded to what was, in substance, a striking out application, but without first permitting the defendants to respond to it by oral submissions. But the principles to which Lord Neuberger referred seem to me to be equally applicable. Although there is no automatic right to a full trial of a case where it is alleged that the pleadings fail to disclose a triable issue, it is fundamentally unjust for a judge to conclude that a defence is defective in that sense without first inviting, hearing and considering argument from the defendants on that question.

18. As in the *Labrouche* case, the main submission of Mr. Wilson for the claimant was that the procedural irregularity to which I referred caused no injustice, within the meaning of CPR 52.11(3)(b), because the Judge's decision that there was indeed no defence to the claim for possession was plainly correct. Before considering the merits of that submission, it is convenient first to refer again to the *Labrouche* case, since it contains valuable guidance as to how a submission of that kind should be addressed on the hearing of an appeal based on procedural irregularity. At paragraph 35 Lord Neuberger MR noted that counsel for the respondent to the appeal:

> "argued that the Judge in any event reached the right conclusion, and therefore the appeal should be allowed,

> as a rehearing of the applications would be a self-evident waste of time."

Counsel's point had not been based upon the legal merits of the application, with which none of the advocates were ready to deal on appeal, nor did the Court of Appeal have time to address those matters. Nonetheless Lord Neuberger noted that:

> "given the desirability of this case being processed quickly (which the Judge rightly emphasised), it would have been an attractive course, but, as none of the parties were ready to argue the merits of the applications, it was not feasible."

19. Counsel for the respondent's submissions had in fact been based upon case management reasons why a partial strike out would have been of no utility. At paragraph 38 Lord Neuberger said:

> "However, I am unpersuaded that any of these arguments can properly justify shutting out the trustees from being permitted to exercise their right to have their arguments heard in support of their strike out applications. In the light of the importance of the principle that a party has a right to have his case heard, it would, in my opinion, require an overwhelming case before a refusal by a judge to strike out a claim without hearing any argument could be upheld by an appellate court without even that court hearing any argument on the substantive merits, and this is not an overwhelming case."

20. It struck me that the question whether the defendants' pleadings did disclose any real defence to the claim for possession could quite easily have been addressed on its merits by relatively short submissions in this court. It was an attractive course not so much because of any overriding need for speed (the property not being a wasting asset) but because it might if the claimant and the Judge were proved to have been correct save substantial further expenditure on the remission of the matter to the county court.

21. As amplified by the permitted amendment the trade-out pleading asserted an oral agreement that the claimant would permit (and fund) further developments by the first defendant designed to yield a sufficient profit to repay the debt, and refrain from demanding repayment of the existing debt in the meantime. The alternative estoppel case merely alleged that the claimant "was estopped from serving the said demand". The consequence of the alleged breach of the trade-out agreement was that the first defendant was deprived of an opportunity to repay the debt without recourse to the property, so that the loss occasioned by the breach was alleged to be liable to be credited to the first defendant against the outstanding loan. It was, in other words, a claim for unliquidated damages for breach of contract advanced by way of set-off against the admitted debt.

22. The difficulty with treating a claim of that kind as a defence to a claim for possession of property under a mortgage or charge is that it is well-established that the mortgagee's right to possession arises even before the ink is dry on the mortgage, is not (in the absence of expressed provision to the contrary) dependent on the prior service of a demand, and is not impugned by the assertion of a counterclaim or set-off for unliquidated damages exceeding the amount of the debt for which the mortgage stands as security: see *National Westminster Bank PLC v Skelton* [1993] 1All E R 242. By contrast, a defence of a liquidated set-off exceeding the mortgage debt may be an exception, but the point is undecided: see the *Skelton* case, at p.78.

23. Whereas the defendants' pleadings did indeed assert that the claimant was prohibited, by contract or by estoppel, from demanding repayment, there was no plea of an agreement or representation giving rise to any express inhibition upon seeking possession. It was common ground that nothing in the legal charge made the enforcement of the claimant's right to possession dependent upon the service of a prior demand.

24. I invited both Mr. Mendoza and Mr. Paget to assist by explaining what in their submission was the link between the pleaded inhibition upon demand, coupled with the assertion of an unliquidated set-off, and the otherwise bare denial of the claimant's entitlement to possession. I received nothing of substance from Mr. Mendoza by way of reply, beyond the bare assertion that the *Skelton* case was distinguishable, and the expression of a Micawberish hope that something might turn up during a full trial, and in particular during cross-examination, which could add more substance to the alleged estoppel than had thus far been pleaded.

25. Mr. Paget went a little further. He submitted that the effect of the alleged contractual (or by estoppel) inhibition on demanding repayment meant that the claimant could not without breach of contract seek repayment of its debt, and could not therefore comply with the requirement that a right to take possession of mortgaged property must be exercised in good faith and for the purpose of enforcing the security: see Megarry & Wade's Law of Real Property (8th Edition) at paragraph 25-025, and the cases cited in footnote 180.

26. While I cannot say that I found either of those submissions compelling, I have concluded that it would not be right to dismiss this appeal, based as it is on a fundamental denial of fair procedure to the defendants, upon the analysis that the judge was obviously right, so that the remission of the case would serve no useful purpose. I have two reasons for that conclusion.

27. The first is that I am not quite persuaded that the claimant's case, namely that there is no pleaded defence to its claim for possession sufficient to warrant a trial, has the quality described in the *Labrouche* case as being "overwhelming". Mr. Paget's qualifying principle may perhaps have some application in the present context, albeit far removed from the context from which it has emerged in the authorities.

28. Perhaps more importantly, it is not every case in which a conclusion that a judge's decision was right prevents a serious procedural irregularity from

amounting to an injustice. As the *Labrouche* case makes clear, the denial to a party of any opportunity to make submissions in support (or defence) of its case is a fundamental denial of procedural justice in its own right, regardless of the consequences. While there will be many cases in which, (as noted in the 2013 White Book Vol. 1 at page 1754), the absence of any adverse consequences flowing from a serious procedural irregularity will mean that an appeal based upon on it will fail, there is a residue of cases of grave procedural irregularity, and the present case is one of them, where the absence of consequences does not displace the injustice constituted by the inappropriate treatment of the complaining party.

29. I have some hesitation in relation to Mr Lagna. The time taken for this matter to reach this court means that he has already enjoyed considerably more time in occupation of the property than he went to the county court to obtain almost a year ago. He plainly has no answer to the claim for possession of his own. Nonetheless he is strictly entitled to attach himself to the other defendants' coat tails, if the order for possession is to be set aside against them on the ground that the claimant may not at this moment be entitled to enforce its security at all. Mr Wilson did not submit that his appeal should be dismissed if the other defendants succeeded.

30. For those reasons, I would allow the appeal, and remit the case to be transferred for trial to the Central London County Court, but with permission to the claimant to advance a claim for striking out, if so advised, in the meantime.

Lord Justice Tomlinson:

31. I agree.

Lord Justice Thorpe:

32. I agree.