



Neutral Citation Number: [2019] EWCA Civ 505

Case No: A3/2018/0227

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

William Trower QC (sitting as a Deputy High Court Judge)
HC-2016-003568

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 March 2019

Before:

LORD JUSTICE LONGMORE
LORD JUSTICE DAVID RICHARDS

and

LORD JUSTICE LEGGATT

Between:

HARBOUR CASTLE LIMITED
- and -
DAVID WILSON HOMES LIMITED

Appellant

Respondent

Bankim Thanki QC and James McClelland (instructed by K&L Gates LLP) for the
Appellant

Alan Gourgey QC and Tom Hickman (instructed by DLA Piper UK LLP) for the
Respondent

Hearing dates: 7 March 2019

Approved Judgment

Lord Justice David Richards :

1. This is an appeal against the order of William Trower QC, sitting as a Deputy High Court Judge, to strike out proceedings as an abuse of the process of the court.
2. Harbour Castle Limited (HCL) commenced proceedings in June 2009 (the first action) in which, after extensive amendments, it claimed damages of £27.5 million for the alleged breach of a covenant by the defendant (DWHL) to use all reasonable endeavours to obtain planning permission as soon as reasonably practical for two adjoining parcels of land (the property) owned by HCL. The covenant was contained in an option agreement dated 26 October 2004 whereby HCL granted to DWHL an option to purchase the property for £27.5 million. HCL's case was that if DWHL had used all reasonable endeavours, the requisite planning permission would have been obtained and either it would have exercised the option or, if it did not, HCL would have sold the property to a third party at that price. On either basis, it claimed £27.5 million as damages for breach of contract. In addition, HCL included two further claims, for approximately £1.69 million as a debt payable under an alleged oral agreement and for £16,800, as costs incurred by HCL in assisting DWHL in its efforts to obtain planning permission.
3. On 20 December 2012, the first action was struck out under the terms of an unless order for failure to provide security for the costs of DWHL in the sum of £201,000. On 21 September 2012, Burnett J had ordered security in a total amount of £1.3 million to be provided in four instalments, with the first due within 28 days. The first instalment of £201,000 was not provided and, on 15 November 2012, Master Marsh ordered that unless the first instalment was provided by 20 December 2012 the claim be struck out and DWHL's costs of the action be paid by HCL.
4. On 12 December 2016, just within the limitation period (or, at any rate, HCL's understanding of the relevant period), HCL issued its claim form in the present proceedings (the second action). The cause of action is the same as in the first action, as are the sums claimed by way of damages and debt, save that HCL has added a claim for consequential losses amounting to £186.4 million. HCL accepts that the addition of this claim does not alter the essential characteristic of the second action as a repetition of the first: see the judgment at [154]. The claim form was served on 12 April 2017, on the last day of the period of four months permitted for service under the Rules.
5. DWHL relied on eleven factors in support of its application to strike out the second action as an abuse of process but the principal ground was that it sought to revive a claim that had already been advanced in the first action which had been struck out pursuant to the unless order made by Master Marsh.
6. The burden of showing that the second action is an abuse lies on the party asserting it, in this case DWHL, and it must be clearly shown to be an abuse. Whether an action is an abuse is not a question of discretion, but an evaluative assessment to which there can be only one answer. These propositions are established by several decisions of this court, including *Stuart v Goldberg Linde* [2008] EWCA Civ 2, [2008] 1 WLR 823 and *Atkas v Adepta* [2010] EWCA Civ 1170, [2011] QB 894. If it is an abuse, the court has a discretion whether to strike it out, but, as Rix LJ said in *Atkas v Adepta* at [53], once satisfied that the second action is an abuse of process it is likely that the

court will strike it out, but it does not necessarily follow. The Judge had these principles well in mind, as appears from his judgment.

7. Because the assessment is fact-sensitive and involves taking account of and giving appropriate weight to all relevant factors, an appeal court will not interfere with the judge's assessment unless the judge has taken account of irrelevant factors, ignored relevant factors, applied a wrong principle, come to a decision that was not properly open to the judge or was, in the view of the appeal court, plainly wrong: see *Stuart v Goldberg Linde* per Sir Anthony Clarke MR at [81]-[82] and Sedley LJ at [76].
8. The inherent power to strike out proceedings as an abuse of process is one "which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people": *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 536 per Lord Diplock. Lord Diplock went on to observe that "the circumstances in which abuse of process can arise are very varied".
9. Where, as in the present case, the question is whether to strike out a second set of proceedings raising the same issues as in the first, the authorities establish that a proper basis for finding the second action to be an abuse will be shown if (but this is not intended to be an exhaustive list) the first action was struck out for a deliberate failure to comply with a peremptory order or for inordinate and inexcusable delay in its prosecution or for a wholesale disregard of the rules: see *Janov v Morris* [1981] 1 WLR 1389, *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426, *Securum Finance Ltd v Ashton* [2001] Ch 291, and *Aktas v Adepta*.
10. In the present case, the first action was struck out for failure to comply with a peremptory order for the provision of security for costs. Such an order will not normally be made if security cannot be provided and the order would stifle a legitimate claim. On that basis, one would expect HCL's second action to be regarded as an abuse of the process. HCL accepts that this would be so, were it not for the decision of the Supreme Court in *Goldtrail Travel Ltd v Onur Air Tasimacilik AS* [2017] UKSC 57, [2017] 1 WLR 3014 (*Goldtrail*). This decision made a significant change to the legal test for determining whether a claim would be stifled by an order for security. *Goldtrail* concerned an order for an appellant to pay a judgment sum into court as a condition for an appeal, but it is common ground that in this respect it applies equally to the provision of security for costs. It was decided after the first action had been struck out under the terms of Master Marsh's unless order.
11. Decisions of this court before *Goldtrail* established that where a corporate claimant or appellant could not itself provide security or make a payment into court, but its owners or controllers who stood to benefit from success in the action or appeal could reasonably be expected to do so, a claim or appeal was not to be taken as stifled by an order for security or payment into court. These decisions were overruled in *Goldtrail* and replaced by an approach that attributed greater significance to the separate legal personality of the corporate claimant or appellant. Lord Wilson, giving the majority judgment, stated at [18] that "[t]he question should never be: can the shareholder raise the money? The question should be: can the company raise the money?" At [23], Lord Wilson stated the relevant criterion as: "Has the appellant company established on the

balance of probabilities that no such funds would be made available to it, whether by its owner or by some other closely associated person, as would enable it to satisfy the requested condition?”

12. It is common ground now, and it was common ground at the time that Burnett J and Master Marsh made their respective orders, that at all material times from the start of the first action, HCL did not itself possess the funds to provide security. Equally, it was and remains common ground that its sole shareholder, Mr Phillip Jeans, at all material times personally had the resources to provide the security and had indeed funded HCL’s legal costs in the first action. Accordingly, neither at the time that the orders were made in 2012 nor when the first action was struck out, were the orders to be regarded, on the authorities as they then stood, as stifling HCL’s claim, irrespective of whether Mr Jeans would in fact have been prepared to fund the provision of security by HCL.
13. In considering now, in the light of *Goldtrail*, whether the second action is an abuse of process by virtue of the failure to comply with the peremptory order for security in the first action, it was submitted for HCL that if in fact it was not able in December 2012 to raise the requisite funds or other security from Mr Jeans, it would be wrong to conclude that there was a deliberate breach of Master Marsh’s order. If that fact could be established, it follows that, on the law as it now stands, Master Marsh’s order would have been discharged once it became clear that Mr Jeans was not prepared to back HCL with the necessary funds to provide security. It should be noted that it could not be said that either Burnett J’s order or Master Marsh’s order would not have been made, because at the time of those orders HCL and Mr Jeans believed that HCL’s bank would agree to ring-fence recoveries in the first action to enable HCL to repay loans by Mr Jeans to fund the litigation and that Mr Jeans would fund the provision of security. It was HCL’s case that this changed when, after Master Marsh’s order was made but before 20 December 2012, the bank refused to ring-fence any recoveries.
14. I accept that, if Mr Jeans ceased to be prepared to fund the provision of security as alleged, it could not in the light of *Goldtrail* be said that HCL’s failure to provide security by 20 December 2012 was a deliberate breach of Master Marsh’s order. If that is right, it is bound to have a very significant, and probably decisive, effect on whether the second action is an abuse of process.
15. The question is therefore whether in fact Mr Jeans would have provided the requisite funds, if requested to do so by HCL. Although it is for DWHL, as the party alleging abuse of process, to establish that the second action is an abuse, the burden of proof on this sub-issue falls on HCL. It is for HCL to show that it could not raise the funds from Mr Jeans. This is established by Lord Wilson’s formulation of the relevant criterion in his judgment at [23], quoted above. It could hardly be otherwise because DWHL would be in no position to prove this negative proposition.
16. In approaching the evidence, the Judge was mindful of what Lord Wilson said in *Goldtrail* at [24]:

“In cases, therefore, in which the respondent to the appeal suggests that the necessary funds would be made available to the company by, say, its owner, the court can expect to receive

an emphatic refutation of the suggestion both by the company and, perhaps in particular, by the owner. The court should therefore not take the refutation at face value. It should judge the probable availability of the funds by reference to the underlying realities of the company's financial position; and by reference to all aspects of its relationship with its owner, including, obviously, the extent to which he is directing (and has directed) its affairs and is supporting (and has supported) it in financial terms."

17. There was no dispute that Mr Jeans was the sole directing mind of HCL and had financed both HCL and the litigation up to December 2012 and continued to finance HCL after that time.

18. Evidence on the issue was put before the Judge in the form of witness statements of Mr Jeans and others. The Judge assessed the evidence and made findings of fact on it. He said at [128]:

"In the present case, there is no doubt that the breach of the order made by Master Marsh...was deliberate in the sense that HCL (through Mr Jeans as its directing mind) knew of its terms and made an informed choice not to comply with it."

19. This directly rejected the submission made on behalf of HCL, which the Judge recorded at [120]: "It is said that the fact that Mr Jeans chose not to fund HCL's claim by advancing the required security does not assist because it was Mr Jeans' choice (made in a personal capacity) which cannot be imputed to HCL".

20. At [133], the Judge said:

"...the evidence does not justify a conclusion that HCL did not have access to the means of providing the security ordered; it only justifies a conclusion that, for commercial reasons which it (together with GBGB and Mr Jeans) considered outweighed the consequences of the failure to provide security, *it* took a decision that it would not comply." (emphasis added)

21. At [135], the Judge said:

"I agree that there is in any event an air of unreality about HCL's submissions...In the light of the fact that Mr Jeans, as HCL's directing mind, says in his own evidence that he reluctantly accepted that he had to let the litigation go because he had decided "to focus on saving the business of both HCL and GBGB at that time", I do not accept that, even if a stifling argument had been made, the court would have concluded that HCL did not have access to sufficient funding to pursue the First Action if HCL's directing mind, acting in that capacity, had determined that pursuit of the First Action was the right thing to do."

22. Finally, at [137], the Judge said:

“As matters presently stand the evidence remains consistent with the fact that the decision Mr Jeans made was made both in his own right and in his capacity as the directing mind acting on behalf of HCL and the other entities (such as GBGB) to whose affairs it related.”

23. From these and other passages in the judgment, it is abundantly clear that the judge found, on the evidence before him, that the decision not to provide the security was taken by Mr Jeans in his capacity as the directing mind of HCL and that if, in that capacity, he had concluded that it was in the interests of HCL to proceed with the litigation, he would personally have provided the necessary funding. HCL therefore did have access to funding if it chose to seek it. At the very least, the Judge held that HCL had not discharged the burden of showing that HCL did not have access to the required funding. In my judgment, these conclusions were open to the Judge on the evidence.

24. The Judge was accordingly entitled to say, at [150], that HCL did not ensure that it used the opportunity provided by the first action to resolve its dispute with DWHL. Through Mr Jeans, it chose not to provide the security and so allowed the action to be struck out. It was a deliberate decision by HCL not to comply with the peremptory order for security. In my judgment, it was in those circumstances a clear abuse to commence new proceedings making the same claim. Going back to Lord Diplock’s words in *Hunter*, it would be manifestly unfair to DWHL to subject it to a second action, when HCL had chosen to abandon the first, and would bring the administration of justice into disrepute among right-thinking people. On any footing, it was a conclusion that was properly open to the Judge and it is not suggested that he took account of irrelevant factors or ignored relevant factors or applied wrong principles.

25. In my view, this is sufficient to dispose of this appeal. As I earlier mentioned, counsel for DWHL advanced a total of eleven factors in support of its application to strike out the second action. The Judge conscientiously dealt with each of them. He rejected some, and he was right to do so. There were others which he accepted and brought into the balance in favour of striking out the second action. It is unnecessary to go into these, but I am inclined to think that they added little to the conclusion that the second action was an abuse and should be struck out and that, if the Judge had found that HCL did not have access to funds from Mr Jeans in December 2012, they would not have justified a conclusion that the second action was an abuse.

26. For the reasons given in this judgment, I would dismiss the appeal.

Leggatt LJ:

27. I agree.

Longmore LJ:

I also agree.