Case No: 9212392

IN THE COURT OF APPEAL
CIVIL DIVISION

Royal Courts of Justice
The Strand
London WC2

Date: Thursday 30th January 1997

B E F O R E:

LORD JUSTICE AULD

SIR BRIAN NEILL

B E T W E N:

	(1) JOHN BRIAN HOPKINSON (2) RICHARD BESSELL HARE (3) TIMOTHY PETER WREFORD HARE (4) BIRMINGHAM MID-SHIRES BUILDING SOCIETY	Appellants
	- and –	
	JOHN DAVID TUPPER	Respondent

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(Official Shorthand Writers to the Court)

MR A NICOL (Instructed by Messrs Pinset Curtis, Royex House, Aldermanbury Square, London) appeared on behalf of the Appellants.
MR J WATT-PRINGLE (Instructed by Messrs Wright Hassal & Co., 9 Clarendon Place, Leamington Spa) appeared on behalf of the Respondent.

JUDGMENT (As Approved)

LORD JUSTICE AULD: This is an appeal by the Plaintiffs from an order of His Honour Judge Graham made on 19th May 1995 in which he ordered that their claim be struck out for want of prosecution. The Defendant resists the appeal and relies upon the Judge's reasoning and additional and alternative grounds now set out in an Amended Respondent's Notice.

In the action the Plaintiffs claim the balance of principal, £21,169, and contractual interest, £11,574, alleged to have been due under a legal charge of 31st December 1981 to secure borrowings of £60,000 by the Defendant from the fourth Plaintiff, a building society. The first three Plaintiffs are or were solicitors. They sue as assignees of the debt due to the fourth Plaintiff under a deed of assignment of 29th September 1989.

The claim arose out of the Defendant's failure to make payments due under the charge to the fourth Plaintiff in the Autumn of 1984. He surrendered the property and the fourth Plaintiff sold it in August 1985 for less than the principal and interest outstanding under the mortgage, leaving a balance outstanding, then, of £21,169.

The Plaintiffs claim that the debt became due under the charge in October 1984 when the Defendant began to default on the payments. However, it was not until early 1989 that they took action to recover the outstanding balance of principal and interest. On 22nd March 1989, before entering into the deed of assignment, the first three Plaintiffs, presumably claiming as equitable assignees, issued a generally endorsed writ claiming the outstanding money. They did not serve it until 6th March 1990 or a Statement of Claim until 5th April 1990.

On 1st August 1990 the Defendant served a defence challenging the Plaintiffs' make-up of the claim as between principal and interest, the calculation of the claim and the validity of the assignment to the first three Plaintiffs. He also alleged acquiescence and/or waiver and/or estoppel in

relation to the mon-payment. Shortly after that, on 20th September 1990, the fourth Plaintiff was added as a party to the action.

There followed a period of just under 16 months before, on 23rd January 1992, the action was transferred to the Shoreditch County Court. A further 6 months or so elapsed before, on 6th August 1992, the Plaintiffs served amended particulars of claim, the amendments going to the issue of the validity of the assignment. Over a year then passed, until 1st September 1993, when the Plaintiffs applied for a list of documents from the Defendant. The Defendant's response to that application just over a month later, on 11th October 1993, was to apply to strike out the proceedings under CCR Order 17, r 11 for failure to request a hearing date within the specified period or under the Court's inherent jurisdiction for want of prosecution.

On 8th November 1993 the Plaintiffs, as an insurance, issued fresh and identical proceedings in the Shoreditch County Court. I say the Plaintiffs; the first, third and fourth Plaintiffs are the same, but there is a substituted second Plaintiff.

In September 1994 a District Judge dismissed the Defendant's applications. On 19th May 1995, on the Defendant's appeal from that dismissal, Judge Graham dismissed the action for want of prosecution under the Court's inherent jurisdiction but rejected the Defendant's contention that it should be struck out for failure to comply with CCR Order 17, rule 11.

As to want of prosecution the Judge found that there had been inordinate and inexcusable delay in the prosecution of the action and that the delay had prejudiced the Defendant. He struck out the claim notwithstanding his view that at least part of it, namely the £21,169 due since October 1984, was not statute-barred because he regarded it as principal secured by a charge to which Section 20(1) of the Limitation Act 1980 applied, a 12 years' limitation period. I say notwithstanding

his view that part of the claim was not statute-barred, because the court will only exceptionally strike out a claim where a plaintiff can start a fresh action claiming the same relief. See Birkett v. James [1978] AC 297. However, he found that the Defendant had an arguable case that the part of claim relating to interest since August 1985, £11,574, was statute-barred, as it was outside the 6 years' limitation period provided by Section 20(5) of the Act for arrears of interest payable in respect of any sum so secured. He held, in reliance on Barclays Bank v. Miller [1990] 1 WLR 343, CA, that authority entitled him, in the exercise of his discretion, to strike out the action for want of prosecution. In that case this Court held that, in a case of inordinate, culpable and prejudicial delay where it is seriously arguable that the cause of action would be time-barred if fresh proceedings were issued, the better course may be to dismiss the action for want of prosecution and leave the question of limitation for determination in those fresh proceedings if issued.

On this appeal the Plaintiffs accept that they have been guilty of inordinate and inexcusable delay - of about two years from mid 1991 to mid 1993 - but maintain that it has not created a substantial risk of serious prejudice to the Defendant. They maintain that, in any event, it is not seriously arguable that all or most of the claim is statute-barred, that, therefore, Barclays Bank and Miller is not in point and that there is no good purpose in dismissing their claim for want of prosecution.

The Defendant does not seek to resurrect the Order 17, rule 11 argument. He relies on the Judge's finding of inordinate and culpable delay and of the consequential prejudice and on his ruling that at least part of the claim was statute-barred. He goes further and, by the amendment to his Respondent's Notice, maintains that the Judge should have found that the whole of the claim is statute-barred, thus removing any inhibition that the Judge might or should have felt in exercising his discretion to strike out the claim for want of prosecution.

I shall deal first with the question whether it is seriously arguable that all or part of

claim was statute-barred so as to deal with the Plaintiffs' argument that, prejudice or no, dismissal of their claim for want of prosecution was inappropriate.

As to the £21,169, the Plaintiffs' case is - and the Judge's finding was - that, by reference to clause 4(d) of the charge of 31st December 1981 and a general presumption of law, repayments were applied first towards interest with the consequence that the claimed sum was principal secured by a charge to which, by Section 20(1) of the 1980 Act, a 12 year limitation period applied. If the Plaintiffs are right about that the 12 year period ran from the default in the Autumn of 1984 and the claim was therefore not statute-barred at the time of the Judge's order.

As to the interest claimed on that sum after the fourth Plaintiff's sale of the property in 1985, the Plaintiffs say that it is claimed pursuant to the Defendant's covenants under seal in the charge, and that therefore it too is subject to a 12 year limitation period, this time under Section 8 of the 1980 Act, which contains that general time limit for actions on a specialty. The Plaintiffs also rely on this provision in respect of the principal sum of £21,169, if, contrary to their main contention, it is not protected by the 12 year period by Section 20(1).

The Defendant maintains, however, that the whole of the Plaintiffs' claim arises out of a simple contract - in the case of the first three Plaintiffs that assigned to them - and in the case of all the Plaintiffs unsecured since the sale of the property in 1985, long before the commencement of the action, and that, therefore, a 6 year period applies under Section 5 of the 1980 Act.

Mr. Timothy Dutton, on the Defendant's behalf, pointed out that at the time of the issue of the proceedings the Plaintiffs had not yet served notice of the assignment pursuant to Section 136 of the Law of Property Act 1925. He submitted that it is arguable that they were equitable assignees of the debt before action and that at that date they had a simple contract debt, not secured by a charge. He

also referred to clause 1 of the deed of assignment which recited the assignment of

> "the debt of ... £21,169 ... and all interest due and to become due under the terms of the mortgage and the benefit of the covenant for repayment contained in the mortgage".

He maintained, in reliance on National Westminster Bank v. Kitch [1996] 1 WLR 1316, CA, that a claim based on a simple contract debt does not cease to be so simply because it is also secured by a charge, a fortiori where it is no longer so secured. See also Barnes v. Glenton [1899] 1 Q.B. 885, CA, per A.L.Smith LJ at 887-9.

Mr. Dutton argued alternatively - and as the Judge found - that a limitation period of 6 years is applicable to the interest part of the claim by virtue of Section 20(5), of the 1980 Act as "interest payable in respect of any sum of money secured by a mortgage or other charge".

As to the Plaintiffs' argument that the whole of their claim, that is for interest as well as principal, was an action upon a specialty under Section of the 1980 Act, Mr Dutton argued that Section 8 had to be read subject to the special provisions in Section 5 for actions founded on simple contract and in Section 20 for recovery of sums secured by a mortgage or the proceeds of the sale of land.

The task of the Court on this part of the appeal is not to resolve those issues, but to consider whether it is seriously arguable that all or a significant part of the claim would be statute-barred in the fresh proceedings issued in November 1993. In my judgment, it is seriously arguable that where a mortgagee has re-possessed and has sold the security and is seeking to recover the shortfall, his claim is in simple contract whatever the nature of the instrument under which the debt was initially secured. There is a distinction drawn by Denning LJ in Barclays Bank Ltd. v. Beck [1952] 2 Q.B. 47, CA at 54 between debts created by a simple contract outside a deed and that created by or under a mortgage deed. However, the Court was not there concerned with limitation or the effect thereon of a mortgage security having been realised before action. It seems to me, for the

reason advanced by the Defendant, at least arguable that neither Section 20(1) nor (5) governs the matter and that the whole claim was one in simple contract to which the 6 years' limitation period applies. The claim, whether that of the fourth Plaintiff under the original agreement or of the first three Plaintiffs under the assignment, and whether for principal or interest, was not for or in respect of a sum "secured by a mortgage or other charge" as prescribed in those provisions. The property the subject of the mortgage had been sold long before the action was commenced and, in any event, before the post August 1985 interest figure of £11,574 accrued.

In my judgment too, it is seriously arguable that the matter is not subject to a 12 years' limitation period under the general rule in Section 8 of the 1980 Act for actions on a specialty. Section 8(1), as Section 8(2) and the editors' gloss in 24 Hals. Stats, 4td ed., p.655 make plain, is a general provision which is subject to other provisions of the Act prescribing shorter periods of limitation:

> "Subsection (1) above shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act."

But for the fourth plaintiff's sale as mortgagee in possession of the secured property its entitlement to claim would have been governed by Section 20 and would not normally have been characterised as an action on a specialty. See 28 Hals. Laws, 4th ed., para. 676. Its inability now to rely on Section 20(1) as to the principal, independently of its assignment of the debt, cannot have the effect of rendering the claim subject to the general 12 year rule for specialties in Section 8; it is in essence a claim in simple contract, as is that of the other Plaintiffs under the assignment.

It follows that, in my judgment, the Judge should have found, for reasons other than Section 20(5) that the Defendant had a seriously arguable case that all or much of the claim in the fresh proceedings was statute-barred. In the circumstances, and notwithstanding the warning of Mr Andrew Nicol, on behalf of the Plaintiffs, of the inevitability of their proceeding with the fresh action, I would,

in my discretion, take the same course as the Court took in Barclays Bank PLC v. Miller. The proper forum for complex arguments on the issue such as those addressed to this Court is in those proceedings, not in this action where they are academic. Accordingly, if I am satisfied that the Judge was otherwise entitled to dismiss the action for want of prosecution, I would uphold his decision and leave the issue of limitation to be determined in those proceedings.

I turn now to the other grounds of appeal going to the issue of prejudice.

The first is that the Judge wrongly gave too much weight to the period of delay before the issue of the writ and between its issue and its service - both within the limitation period - as periods of inordinate and culpable delay, and in so doing misapplied dicta of this Court in Rath v. Lawrence & Partners [1991] 1 WLR, 399, CA. I need not take long with this complaint. In my view, it is without merit. It is true that the Judge referred to pre-writ and post-writ delay, but he did so in considering the overall delay and after correctly summarising the ratio in Rath. At page 8B-D of the transcript of his judgment, he observed that it took nearly 5 years from the sale of the property in August 1985 to the service of the statement of claim in April 1990 and then a further 3½ years until the application to strike out. His view was that individually and "certainly cumulatively" the periods constituted inordinate and culpable delay. Though he could have expressed his conclusion with greater care, his meaning was plain.

The second ground challenges the Judge's findings as to prejudice, which are at pages T8E-9E of the transcript of his judgment. They are, first, the fading memories of the Defendant and his wife, both of whom were essential witnesses for the defence, and also of Mr. Large, their solicitor, who would be required to give evidence of his dealings on behalf of the Defendant with the fourth Plaintiff in 1985 to 1986. In the case of the Defendant's wife there was also the fact of her failing health. Second, the Judge had regard to the inability of the Defendant, by reason of lapse of time, to sue

the fourth Plaintiff's surveyor for alleged negligent over-valuation of the property which, he claimed, induced him between 1981 and 1983 to undertake too high a mortgage borrowing. This is how the Judge put it:

> " The final question is whether such delay has been prejudicial to a fair trial. In her affidavit, Miss Sarah Lewis, the Defendant's solicitor, states that the Defendant proposes to call two witnesses apart from himself to give evidence. They are his wife, Mrs. Tupper, and Mr. Large, who was his solicitor during the relevant period. They will testify about events which occurred ten years ago. Mrs. Tupper is now 75 years old and according to the medical report before me suffers from multiple chronic ailments which have appeared or deteriorated since 1986 when she would have been fit to give evidence. Now a court appearance would give rise to stress and would not be wise. Her evidence is necessary to support the Defendant's allegation of estoppel as she is to give evidence about conversations with employees of the Building Society. Even if she is not too poorly to attend court her recollection might well be adversely affected by her medical condition and age. As for Mr. Large, although he will have his file to refresh his memory any independent recollection of events will probably have vanished over a decade. More important is the Defendant's testimony. In 1984 he had major surgery for a brain tumour and although there was no evidence of mental impairment, memories fade during the passage of such a period of time.
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> There is the further point, namely that the Defendant had considered with his solicitors in 1986 a possible action against the Society's surveyor for negligent over-valuation of the property which induced him to accept such substantial loans. He did not pursue the matter because the Society did not inform him of any shortfall from the sale or make a claim until the limitation period for the action against the surveyor had almost expired. It is not for me to determine this issue save to say that it is prima facie arguable.
>
> My conclusion therefore is that the Defendant has suffered prejudice as a result of the delay and it is in the interests of justice that the claim be struck out."

Mr. Nicol submitted that there was no evidence that the Defendant's memory had suffered. He said that, from an affidavit which he swore in June 1994 for the hearing before the District Judge, he appeared then to have a clear recollection of the material events going to the issues of acquiescence etc.. There is no evidence that the development of his brain tumour in 1984 - after successful treatment for which he returned to work - has affected his memory. In addition, he had provided his solicitors with a witness statement to which he could turn to refresh his memory.

As to the Defendant's wife, Mr. Nicol said that her intended evidence would go mainly to a telephone conversation with an unidentified employee of the fourth Plaintiff in the Autumn of 1985. She had provided a witness statement about it. It is not evidence that the Plaintiffs can rebut, and if she is now too infirm to attend Court the evidence can be admitted in writing under the Civil Evidence Act.

As to Mr. Large, Mr. Nicol submitted that he is in no worse position now than he was many years ago, a typical solicitor handling many hundreds of files and unlikely to have any independent recollection of their contents. He would always have had to depend on the file in this case, containing no doubt contemporaneous notes to refresh his memory.

Mr. Dutton, in reply, relied on the fact that the Defendant, his wife and Mr. Large, would have to give evidence of material events and conversation going to the issues of acquiescence, waiver and estoppel between 1985 and 1990, i.e. starting with a period over 10 years ago.

As to the Defendant, he is now aged 63 and in 1984, shortly before the events to be examined, suffered from a brain tumour. As to the Defendant's wife, Mr. Dutton said that her evidence would have gone, not only to a single conversation, but to the effect of it on her and the Defendant. He stressed the importance of oral and properly tested evidence on such matters. He said that she is now aged 76 and that there was medical evidence before the Judge that her health had deteriorated since 1986. A report prepared in November 1994 shows that over the 6 year period from 1986 to 1992 she suffered from a number of chronic illnesses, some of which were controlled with treatment, some of which had got worse. Since 1992 her condition has stabilised, but already age and its concomitant, a greater tendency to fatigue, are taking its toll. As to Mr. Large, Mr. Dutton pointed out that he too would be at a disadvantage in giving evidence of events over 10 years ago.

As to the lost potential for an action by the Defendant against the surveyor for negligent advice in 1981, Mr. Nicol has suggested that even if he could have relied on an alternative period under Section 14A of the Limitation Act 1980, his right of action was already statute-barred before the issue of these proceedings and therefore before there was any culpable inordinate delay. Mr Dutton suggested that he would still have had a right of action against the surveyor in respect of some of his borrowings up to about 1989 but that the Plaintiffs' delay curtailed his opportunity properly to consider it. The evidence showed that the Defendant considered with his solicitors in 1986, 3 years before the issue of these proceedings in 1989, the possibility of such action but did nothing about it. The Judge did not make a finding on this issue save to say that he regarded the claim of prejudice to the Defendant as "prima facie arguable". To what extent he relied upon it in reaching his decision is not clear; I do not consider that he could, or should, have much placed any significant reliance upon it.

More important is the Judge's conclusion that the action should be struck out because the dimming of memories, coupled in the Defendant's wife's case with her medical deterioration and increasing infirmity over the period of delay, has prejudiced the Defendant. On such an issue, essentially one of judgment on the facts and not susceptible to fine analysis one way of the other, this Court should be slow to interfere.

As the Court has now made plain in Shtun v. Zalesjska [1996] 1 WLR 1270, it is not essential for a finding of prejudice in such a case that there should be evidence of the particular respects in which potential witnesses' recollections have been impaired or as to any particular part of the delay to which such impairment is attributable. The circumstances of a case, in particular the issues and the length of delay itself, may entitle a court to infer that memories are likely to have become so dim as seriously to prejudice the case of a party and make continuation of the proceedings unfair. This seems to me just such a case - one where the main issues in play are over ten years old and where all the defence witnesses, for one reason or another, are obviously going to be hard put to it to recollect with confidence and precision conversations, impressions and their effects on such troublesome issues as acquiescence, waiver and estoppel. I can see no basis for interfering with the Judge's finding that the Plaintiffs' inordinate and culpable delay has caused prejudice to the Defendant.

Accordingly, I would dismiss the appeal.

SIR BRIAN NEILL: I agree.

LORD JUSTICE AULD: For the reasons given in the draft judgment, copies of which have been provided to the parties, this appeal is dismissed

MR WATT-PRINGLE: My Lords, I am very greatful. I appear today for the defendant/respondent.

Unfortunately, Mr Dutton is unable to appear and he apologises for that. My Lords, on behalf of the respondent I apply for costs of this appeal and also for legal aid taxation of this cost.

LORD JUSTICE AULD: What do you say about the first of those applications?

MR NICOL: In the normal course of event I could not possibly stand in the way of that, there having been a resounding success for the respondent. My Lords, this is not a normal case. As your Lordships indicated in your Lordships' judgment. There are proceedings in the Shoreditch County Court where by and large the matters canvassed in your Lordships' judgment will fall to be decided. My current instructions are that those proceedings will proceed. In those circumstances, my Lords, what I would ask for is a stay of the taxation of costs in these proceedings pending the outcome of the substantive proceedings in the Shoreditch County Court. My Lords, I ask that for two reasons in these unusual circumstances. Firstly, if there is a determination of the costs and the inevitable payment from my client to my learned friend's client-----

LORD JUSTICE AULD: Forgive me for interrupting. I understood the application to be an application for, and taxation of, Mr Tupper's legal aid costs. Is that right?

MR NICOL: Indeed. That is all we are asking for and costs.

MR WATT-PRINGLE: It is the cost of the appeal that I was dealing with. I apologise to your Lordships -- of course I could not stand in the way of the taxation of Mr Tupper's legal aid costs-----

LORD JUSTICE AULD: -- or at least you want an order to stay at the moment?

MR WATT-PRINGLE: That is right my Lords. I was going to urge it upon your Lordships for two reasons. Firstly, if costs are paid out and subsequently my clients are successful in the substantive proceedings, they will have paid out costs with little chance of recovery from a legally aided client. Secondly, my Lords, it will make the matter of taxation of the action of the second matter very much more difficult if that has already been dealt with. Your Lordships will be aware that all the witness statements, discovery and so on, on the second action, are identical to the pleadings and discovery, witness statements that have formed part of this appeal. So to tax them will make any adjudication for which costs are owed from one party to the other will fetter the discretion of the district judge in the second proceedings because that district judge will be at a loss to know how to apportion costs which by themselves amount to little more than photocopying.

LORD JUSTICE AULD: Yes. You are not opposing the order of costs in principle, simply asking for a stay of the taxation. Is that right?

MR WATT-PRINGLE: My Lords, what I am seeking is this: that all the costs of both actions be dealt with at the end of the second action and that the determination of which costs are ordered from which party be made at that time.

LORD JUSTICE AULD: What about the principle of the costs of this appeal regardless of when they are taxed?

MR WATT-PRINGLE: My Lords, the principle of costs of this appeal would normally be the case that the costs of the appeal would be paid by my clients because we have lost. However, if it is the case that if in the substantive hearing in the second action my clients are successful, what I ask is that all the costs of both the appeal and the second action are dealt with together.

LORD JUSTICE AULD: That is the principle of awarding costs as well as taxation. Is there anything you would like to say about that, Mr Nicol?

MR NICOL: Yes, my Lords. The appellants in this matter have lost on a substantive issue and that is the action which has been struck off. Their attempts to upset that on appeal, with all the arguments which were advanced before your Lordships, failed. In my submission the normal costs order should be made in those circumstances. If it so happens that they do indeed proceed with the second proceedings and ultimately they are successful, well then it is just their happy coincidence for the parties that those second proceedings will have been rather cheaper than proceedings usually are because many of the documents and so on will be able to be used from the present proceedings. The fact of the matter is still that in these proceedings from their inception to date, the appellants have advanced a case which ultimately has failed and they should pay the usual cost consequences of that. So I would ask that the costs are made in favour of the respondent in the normal way.

So far as the stay on the taxation is concerned, in my submission, my Lords, that is not something which ought to be ordered in this case because it is a discrete taxation, and the taxation in the second proceedings will be a very straightforward matter. The respondent here is likely to be legally aided in the second proceedings in any event and therefore the usual costs order will be made, if he fails in those proceedings, not to be enforced without the leave of the court.

LORD JUSTICE AULD: The appeal is dismissed with costs. The court does not make any order staying taxation of the costs and there will be legal aid taxation for the respondent.

MR NICOL: I am very grateful.