**Family Mosaic Home Ownership Ltd v Peer Real Estate Ltd**

[2016] EWHC 257 (Ch)

Chancery Division

Birss J

16 February 2016

Trowers & Hamlins for the Claimant

Hogan Lovells for the Defendant

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BIRSS

1. This is an application to transfer an action into the Shorter Trials Scheme. The parties both agree that the case should be transferred and the application was brought to be dealt with on paper. Ordinarily no judgment would be needed in order to make an order of this kind but there are a number of points which bear some consideration particularly since, as far as one can tell, this is the first time such an application has been made. The first issue is whether the court has jurisdiction to transfer a pending case in the scheme at all, second whether the case falls within the class of cases which the scheme is for, third whether it is an appropriate case to transfer in any event, and the fourth concerns the procedure to be followed on transfer.

2. The Shorter Trial Scheme (STS) is a pilot scheme set up by Practice Direction 51N along with the Flexible Trials Scheme (FTS). Paragraphs 1.1-1.5 of the PD 51N apply to both schemes, paragraphs 2.1-2.60 apply to the STS and paragraphs 3.1-3.9 apply to the FTS. These pilot schemes came into force on 1st October 2015.

3. The schemes are available in all the courts in the Rolls Building. The courts in which the schemes are available are the Chancery Division (including the Companies Court and the Patents Court), the Commercial Court (including the Admiralty Court), the Financial List, the Technology and Construction Court, and the London Mercantile Court.

4. The exception is the Intellectual Property Enterprise Court (IPEC). Paragraph 2.3(d) PD 51N provides that cases in the IPEC will not normally be suitable for the STS. That is simply because the IPEC already operates a similar procedure.

5. The impetus for the two schemes came from the consultation which led to the new Financial List. Respondents to the consultation expressed a wish for shorter and earlier trials, at a reasonable and proportionate cost. It was appreciated that the schemes had a wider potential applicability than just the Financial List and so the pilot schemes extend to all the courts mentioned above.

6. The Shorter Trial Scheme is intended to involve tight control of the litigation process by the court, in order to resolve the dispute on a commercial timescale. The case will be managed by a docketed judge with a trial date fixed for not more than 8 months after the CMC and with judgment six weeks thereafter. The maximum length of trial will be four days, including reading time. Costs budgeting will not be applicable; instead costs will be assessed summarily.

7. This procedure takes its inspiration from a similar scheme working in Australia and from the success of the IPEC in demonstrating what can be achieved when the court exercises greater control over procedure. For the last five years the IPEC has been handling disputes which would ordinarily have required a trial lasting a week or even longer and dealing with them at trial in a day or two. The cases are ready for trial within six months of the CMC. This scheme makes a similar procedure available for all business cases.

8. The initiative as a whole also seeks to foster a change in litigation culture: a recognition that comprehensive disclosure and a full, oral trial is often unnecessary for justice to be achieved. That in turn should improve access to justice by producing significant savings in the time and cost of litigation.

9. The pilots will run for two years from 1st October 2015. That does not mean that the trial has to be completed within the two year period, it means that the schemes will be open to all cases commenced in or transferred into the schemes during two year period.

*Can an existing case be transferred into the Shorter Trial Scheme?*

10. Cases can be started in the STS by issuing them in the relevant court and marking the claim form appropriately (PD51N paragraphs 2.8-2.9). The transfer of cases to or from the STS is dealt with in paragraphs PD51N paragraphs 2.10- 2.15.

11. Paragraphs 2.10 – 2.11 deal with the situation in which a case has been started in the STS but the defendant wishes to apply to transfer it out. Of course if the case is inappropriate for the STS then it should be transferred out at the earliest opportunity. Therefore the paragraph provides that such an application should be made promptly and normally before the first CMC. If it is transferred out of the scheme then the case will proceed as any other case would in the court in which it was issued.

12. Paragraphs 2.12-2.14 deal with transfer into the STS and paragraph 2.15 applies to transfers both in and out. They provide as follows:

2.12 An application to transfer a case into the Shorter Trials Scheme must be heard by a judge. If a judge orders a case to be transferred into the Shorter Trials Scheme, he may give case management directions.

2.13 An application by any party for an order transferring proceedings into the Shorter Trials Scheme should be made promptly and normally not later than the first CMC.

2.14 The court may, of its own initiative, suggest that a case be transferred into the Shorter Trials Scheme.

2.15 In deciding whether to transfer a case into or out of the Shorter Trials Scheme, without prejudice to the generality of the overriding objective, the court will have regard to the type of case the Scheme is for, the suitability of the case to be a part of the Scheme and the wishes of the parties.

13. It has been pointed out that none of these paragraphs state in terms that the court can transfer an existing case into the STS. They could be said to presuppose that such an order can be made. The likely place for a provision relating to transfer would be Part 30 of the CPR. Rule 30.1 provides that amongst other things Part 30 deals with transfers of proceedings within the High Court but nowhere in Part 30 is there a provision dealing with a transfer of this kind. The closest rules are r30.2, which deals with transfers between the RCJ and district registries (and vice versa) and r30.5, which deals with transfers in and out of specialist lists. Neither the STS nor FTS are specialist lists, not least because they are intended to be available within existing specialist lists such as the Patents Court and the Financial List. So nothing in Part 30 applies in terms to the transfer sought on this application.

14. Nevertheless, in my judgment the court does have power to transfer an existing case into the STS and to transfer a case out of the scheme if it is within it. That is for the following two distinct reasons:

15. First, I bear in mind the overriding objective to deal with cases justly and at proportionate cost (CPR r1.19(1)) and the court’s power (CPR r3.1(2) (m)) to take any step or make any order (other than as set out in the list from 3.1(2) (a)–(ll)) for the purpose of managing the case and furthering the overriding objective.

16. The overriding objective expressly includes, as far as practicable: saving expense, dealing with cases in ways which are proportionate and allotting to a case an appropriate share of the court’s resources (CPR r1.19(1)). Having an appropriate case conducted in the STS is likely to reduce the cost to the parties and at the same time free up the court’s resources to make them available to other litigants. Experience in the IPEC mentioned above bears that out. Accordingly since transferring a proper case into the scheme is likely to save expense, deal with case in a proportionate way and allot to it an appropriate share of the court’s resources, r3.1(2) (m) provides an express basis on which the court could make the necessary order in this case. This reasoning also applies equally to a transfer out in a proper case.

17. Second, construing PD51N itself as whole, the schemes which are provided for are clearly intended work in such a way that cases could be transferred in and out of them, as appropriate. The legislative intent, that such an order should be made in a proper case, is clear. It is implicit in these provisions that an order transferring a case into or out of the schemes can be made, if appropriate.

18. Paragraph 1.3 of PD51N provides that:

For the purposes of the pilot where the provisions of this Practice Direction conflict with other provisions of the rules or other practice Directions, this Practice Direction shall take precedence.

19. Therefore to the extent that it could be said that the power derives implicitly from PD51N itself, the fact that such a power is absent from Part 30 is not determinative since PD51N takes precedence.

20. So an existing case can be transferred into or out of the STS. The order for transfer does not affect the court or division in which the case was begun, so as a case which was commenced in the Chancery Division, this case would remain in that division after transfer.

21. The STS involves the case being managed and tried by judges and so the application to transfer has to be made to a judge (para. 2.12). That limitation is of most significance in the Chancery Division because cases are generally managed by Chancery Masters. However if a case before a Chancery Master does appear to be suitable for the STS, the Master can on his or her own initiative suggest that the case be transferred to the STS (PD 51N paragraph 2.14) and, if appropriate, this could be accommodated readily by an application coming to a judge on paper.

22. Although the STS has some specific rules about the Particulars of Claim (para 2.21 – 2.23) and Defence (para 2.30-32), when a case is transferred into the STS, it may or may not be necessary to require the parties to amend any existing Statements of Case. Experience of transferring cases into the IPEC, and its predecessor the Patents County Court, showed that such a step was often not necessary. It could well be disproportionate to require a further round of pleadings or amendments simply because the case should be transferred.

*Does this case fall within the class of cases appropriate for the Shorter Trials Scheme?*

23. PD51N paragraphs 2.2-2.3 provide:

2.2 The Shorter Trials Scheme is for all cases in the Admiralty and Commercial Court, the London Mercantile Court, the Technology and Construction Court, and the Patents Court and for business cases in the Chancery Division.

2.3 The Shorter Trials Scheme will not normally be suitable for –

(a) cases including an allegation of fraud or dishonesty;

(b) cases which are likely to require extensive disclosure and/or reliance upon extensive witness or expert evidence;

(c) cases involving multiple issues and multiple parties, save for Part 20 counterclaims for revocation of an intellectual property right;

(d) cases in the Intellectual Property Enterprise Court;

(e) public procurement cases.

24. Therefore in the Chancery Division the STS is for business cases. That is not intended to reduce the ambit of the scheme as compared to the other courts mentioned in paragraph 2.2. The actions in these other courts are all business cases of one sort or another. The term “business” as used in paragraph 2.2. is a broad one and I will not attempt a definition. The term will cover a wide range of the sort of cases which are heard in the Chancery Division. The contrast is between business cases in the widest sense and purely private, non-commercial matters such as family property and family trusts.

25. This case illustrates the wide scope of the term. It is a claim for specific performance of a contract by which the claimant contends the defendant agreed to sell a property in London. The property is Units A-C, 47-49 Pomeroy St, SE14 and the price was £2.75 million. The claimant is a registered provider of social housing and a registered society. The defendant is the owner of the freehold. I infer that the claimant intended to use the property as part of its undertaking as a provider of social housing. The contract contained a condition precedent about planning permission. The claimant’s case is that the defendant waived the condition precedent and/or encouraged the claimant to believe that the claimant would be entitled to purchase the property notwithstanding planning permission would not be obtained by the long stop date. Detrimental reliance and unconscionability is pleaded and the claimant relies on estoppel. The defendant’s Defence is the contract was terminated in accordance with its terms before it took effect as a contract to sell. It denies waiver and estoppel and counterclaims for a declaration that the contract has lawfully terminated.

26. This is obviously a commercial property dispute, and as such falls well within the ambit of the STS. The fact that the claimant is a registered provider of social housing does not mean this case falls outside the scheme.

27. Clearly the exclusions in sub-paragraphs (d) and (e) of paragraph 2.3 do not apply but I will say a word about the other three. Considering para 2.3(a), the parties have confirmed that the case involves no allegation of fraud or dishonesty. Estoppel and unconscionability is relied on but that is no reason not the deal with the case in the STS. Considering para 2.3(b), the parties have confirmed that neither extensive ldisclosure nor extensive witness or expert evidence will be needed. The case involves a relatively self-contained question of whether the defendant agreed to waive the condition precedent or is estopped. A large part of the relevant documents have already been produced annexed to the pleadings. That is not to say that some disclosure and oral evidence may well be appropriate but that can be addressed at the CMC. Considering para 2.3(c), there is not the sort of multiplicity of issue or parties which would make a case unsuitable for the STS. There is a counterclaim but it is a simple claim for a declaration arising from the same points which are already in issue. The parties’ current estimate is that the length of the trial is likely to be less than four days. Of course within the STS (para 2.53), the trial timetable will be controlled so that the case is tried in that period.

*Is this is an appropriate case to transfer?*

28. Even though the application is by consent, given that transfer into the STS is capable of having an impact on other court users, it is necessary for the court to turn its mind, albeit briefly, to the question of whether the transfer is in accordance with the overriding objective, particularly having regard to the administration of justice generally.

29. As far as I am aware if it is transferred into the STS this would be the second case in the Rolls Building to be in the scheme. That will have no significant impact on the overall administration of the court lists. I am satisfied that it is an appropriate case for transfer.

30. In future in simple cases there may well be no need to give reasoned judgments every time a case is transferred. It was appropriate to do so in this case given the novelty of the issues arising.

*The procedure to be followed after transfer*

31. PD 51N para 2.5 provides that all STS claims will be allocated to a “designated” judge at the time of the first CMC or earlier if necessary. The term “designated” simply refers to the fact that cases in the STS are docketed so that, so far as possible all the case management and the trial are dealt with by the same judge. Any judge of the relevant court may be allocated to deal with a case in the STS. The term “designated” does not mean that only certain judges are designated to hear cases in the STS.

32. The parties have agreed to take steps to fix a CMC on the earliest available date after 29th March 2016. The CMC will be arranged to be heard by the judge allocated to the case.

33. Other agreed directions at this stage are for a Reply and Defence to Counterclaim and exchange of lists of issues, in order to facilitate the management of the case at the CMC. There is no need for any further directions at this stage since they can be given at the CMC. It is also clear that there is no need to require the parties to amend the existing Particulars of Claim or Defence having regard to the fact that the case will now proceed in the STS.

34. An unusual aspect of the CMC in the STS is that at the CMC the court will fix the trial date and date for the pre-trial review (paragraph 2.38(e) and (f)). To facilitate that I will include a direction that the parties liaise with Chancery Listing in advance of the CMC to see if dates can be found and provisionally agreed for the court’s approval at the CMC.

*Conclusion*

35. I am satisfied that the court has power to transfer this case to the Shorter Trial Scheme and that it is an appropriate case to be transferred. Under the scheme this dispute will come on to trial faster and at a lower cost that might otherwise have been the case.