

**RECENT DEVELOPMENTS IN THE LAW RELATING TO  
ABUSE OF PROCESS AND THE END OF THE RIGHT TO  
BE NON-SUITED: THE EFFECT OF *ARBUTHNOT  
LATHAM V TRAFALGAR HOLDINGS*<sup>1</sup> AND *GILHAM V  
BROWNING*<sup>2</sup>**

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*Arbuthnot* is a decision of the Court of Appeal framed largely in the context of the imminent changes to English civil procedure following Lord Woolf's reports (indeed, the judgment of the court is delivered by Lord Woolf sitting as Master of the Rolls). However, the case actually turns on well-established principles of equal application to practice in Northern Ireland.

The facts of *Arbuthnot* are, in summary, as follows. The plaintiff was a bank which had advanced funds to Trafalgar Holdings Ltd. The advance was secured by a guarantee given to the bank by Trafalgar's UK representative, a Mr Ashton, and his wife. The guarantee itself was supported by a mortgage in favour of the bank over the Ashtons' home.

In August 1989, the bank started proceedings against Trafalgar and the Ashtons for repayment of the advance. Trafalgar did not defend the action, but the Ashtons did. Pleadings closed in May 1990, and discovery was completed in June 1991. In August 1995, the limitation period applying to the bank's claim under the Ashtons' guarantee expired, and in May 1996, the Ashtons applied to have the bank's claim struck out on the grounds of delay. The bank opposed the application, explaining the delay by stating that the bank had inherited a huge portfolio of bad debt, and that since this particular debt was secured, it was accorded only a low level of priority in the bank's debt recovery programme. The judge at first instance found that the bank had been guilty of inordinate and inexcusable delay, but refused to strike the claim out, since the bank was still in time to commence a fresh action on foot of the mortgage given by the Ashtons to support their guarantee<sup>3</sup>. The Ashtons appealed.

The principles governing the issue of delay are set out in the well-known House of Lords decision in *Birkett v James*<sup>4</sup>. Lord Woolf summed these up in *Arbuthnot* as follows:-<sup>5</sup>

1. An action should only be dismissed for want of prosecution where:-
  - a. the plaintiff's default has been intentional and contumelious; or
  - b. where there has been inordinate and inexcusable delay giving rise to a substantial risk that a fair trial would not be possible, or to

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<sup>1</sup> [1998] 2 All ER 181.

<sup>2</sup> [1998] 2 All ER 68.

<sup>3</sup> In English law, mortgages, being contracts under seal, are "specialties" within the meaning of s.8 of the Limitation Act 1980. In the context of mortgage actions, the nearest equivalent to this provision in Northern Ireland is contained in arts.32-3 of the Limitation (NI) Order 1989.

<sup>4</sup> [1977] 2 All ER 801; [1978] AC 297.

<sup>5</sup> [1998] 2 All ER 181, at 187.

serious prejudice to the defendant.

2. Before the limitation period has expired, an action will not normally be dismissed for inordinate and inexcusable delay if fresh proceedings for the same cause of action could be initiated<sup>6</sup>.

The second branch of the principle in *Birkett v James* is, to a degree, simply the application of common sense. It is of no benefit to a defendant to have the first action struck out, only to be confronted with a second, identical action, with the inevitable further delay and expense which that would entail. However, this approach looks at the matter only from the perspective of the “complaining” defendant. The court is, nonetheless, entitled to look at the way an action has been conducted quite independently of whether or not a defendant has raised the question of prejudice. If the court finds that its process has been abused, then it has the power to take punitive action against the guilty party. Lord Woolf cited with approval<sup>7</sup> the following passage from the judgment of Parker LJ in *Culbert v Stephen Westwell & Co Ltd*<sup>8</sup>:-

“An action may also be struck out for...abuse of process of the court...[A] series of separate inordinate and inexcusable delays in complete disregard of the rules of court and with full awareness of the consequences can also properly be regarded as contumelious conduct, or, if not that, an abuse of the process of the court. Both this and the question of fair trial are matters in which the court itself is concerned and do not depend on the defendant raising the question of prejudice.”

However, Lord Woolf identified a further consideration, one directed very much towards his impending reforms. He said<sup>9</sup>:-

“In *Birkett v James* the consequence to other litigants and to the court of inordinate delay was not a consideration that was in issue. From now on it is going to be a consideration of increasing significance. Litigants and their legal advisers must therefore recognise that any delay which occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also on the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of civil justice. The existing rules do contain time limits which are designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed”.

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<sup>6</sup> Lord Woolf stated at p 189: “In *Birkett v James* no consideration was given to the situation where the only claim which had been relied on would be statute-barred if the action was dismissed, but there was another cause of action which would not be barred”. This is true, but this question was considered in Northern Ireland by Campbell J in *McCluskey v Colas (NI) Ltd* [1994] 4 BNIL 69, in which an action for slander (on which the limitation period had expired) was struck out on the grounds of inordinate and inexcusable delay, despite the existence of parallel claims in contract and negligence which were not statute-barred.

<sup>7</sup> At p 188.

<sup>8</sup> [1993] PIQR 54, at pp 55-6.

<sup>9</sup> At p 191f-g.

Delay may, therefore, amount to an abuse of the court's process which the court may punish *irrespective* of any prejudice (or lack of same) to any non-defaulting party in the action. And although this judgment is clearly framed with the reforms of next April in mind, it is a decision on the rules *in their current form*. Indeed, as Lord Woolf himself put it<sup>10</sup>:- "Most of the powers which the court requires for the purposes of case management are already contained in the existing rules". These rules are, of course, largely identical to the current Rules of the Supreme Court applicable in Northern Ireland.

Where the court strikes out an action on the grounds of abuse of the court's process, and the cause of action is not statute-barred, the defaulting plaintiff may, in theory at least, commence fresh proceedings forthwith on that same cause of action. In these circumstances, however, the principle in *Janov v Morris*<sup>11</sup> comes into play, which Lord Woolf restated as follows<sup>12</sup>:

"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".

This is not to say, of course, that delay is the only way in which the court's process may be abused. Returning to the facts in *Arbuthnot*, it was contended on behalf of Mr and Mrs Ashton that not only had the bank been guilty of inordinate and inexcusable delay, but that it had commenced litigation which, because of its mortgage security, it had no intention of bringing to a conclusion. That this is conduct which may amount to an abuse of the court's process was established by the House of Lords in *Grovit v Doctor*<sup>13</sup>. Many institutional lenders, faced with a large volume of bad debtors, habitually start a great many actions, and then pick which of them they wish to pursue. The remainder are "warehoused", to be progressed when - if - the lender chooses to do so. Lord Woolf condemns this practice<sup>14</sup> save in circumstances where it occurs either with the agreement of all the other parties to the action<sup>15</sup>, or under the direction of the court.

It is important to bear in mind that neither delay in the prosecution of a case, nor "warehousing" multiple actions without progressing them, are *automatically* abuses of the court's process. Delay may be justified in the context of settlement negotiations, and "warehousing" in circumstances where, for example, the decision of an appellate court is awaited on a particular point of relevance to the actions left in abeyance.

Conversely, however, conduct which is legitimate in itself may, by reason of the party's motive for pursuing it, amount to abuse of the court's process. In these circumstances, the court's task of deciding whether or

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<sup>10</sup> At p 191*d*.

<sup>11</sup> [1981] 3 All ER 780.

<sup>12</sup> [1998] 3 All ER 189 at 192*b*.

<sup>13</sup> [1997] 2 All ER 417 (HL).

<sup>14</sup> [1998] 3 All ER 189 at 192.

<sup>15</sup> Which may cover instances where "protective" proceedings are issued, as for instance in personal injury cases where liability is admitted, but quantum is disputed, and the plaintiff wishes to avoid his claim becoming statute-barred. *cf.* the practice in Admiralty proceedings of issuing several writs *in rem* in "sister ship" arrest cases.

not its process has been abused is less clear-cut. A striking illustration of this is *Gilham v Browning*<sup>16</sup>, another very recent decision of the English Court of Appeal. The facts grounding the original dispute between the parties were as follows. Mr Gilham and his wife operated a farm as a partnership. They agreed to sell the farm, together with various assets and goodwill to Mr and Mrs Browning. Mr Gilham took proceedings in the county court claiming just under £8,800 from the Brownings, being the balance of the purchase price. The Brownings defended, and counter-claimed £120,000 without giving details as to how this was made up.

This relatively straightforward case gave rise to a myriad of procedural twists and turns. To begin with, the Brownings required leave to defend. As a condition of obtaining leave, they were ordered to lodge the sum of £5,000 into court. A year later, directions for trial were given, including a timetable for the exchange of evidence (which has been standard practice in English civil litigation for several years, both in the High Court and the County Court). For the following three years, very little was done to progress the action. The court eventually set it down for trial and allocated a date in December 1996. The original plaintiff, Mr Gilham, died in August of that year and about six weeks after his death, the Brownings served a substantial expert's report, which contained the first detailed exposition of their counterclaim. They also served supplemental witness statements and indicated an intention to serve more. All of this was, of course, well outside the timetable originally laid down in 1993. In October 1996, Mrs Gilham was substituted as plaintiff (as her husband's executrix) and the court refused the Brownings leave to adduce in evidence the expert's report and the supplemental witness statements which they had served the previous month.

The Brownings then instructed new solicitors. They took the view<sup>17</sup> that if the Brownings discontinued their counterclaim and then issued fresh proceedings, this would enable them to introduce the fresh evidence that they had been barred from relying upon in the original proceedings. Accordingly, notice of discontinuance was served under Order 18, Rules 1 and 3 of the English County Court Rules<sup>18</sup>. The county court judge set aside the notice, holding that the collateral purpose behind its service rendered it an abuse of the court's process. The Brownings then elected to be non-suited on their counterclaim. The judge refused to non-suit, whereupon the Brownings offered no evidence on the counterclaim, which was dismissed. The Gilhams' own claim was settled by compromise. The Brownings appealed both the order setting aside the notice of discontinuance and the refusal to non-suit.

The appeal relating to the setting aside of the notice of discontinuance was grounded on the submission that - by contrast with the High Court<sup>19</sup> - a plaintiff in the English County Court can withdraw his claim and start again at any time before judgment or final order in the action. There is no judicial discretion, and no need for leave at any time. By contrast, discontinuance without leave in the High Court is expressly limited<sup>20</sup> to a period of 14 days after service of a defence or the service of the defendant's affidavit, where the proceedings are begun by originating

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<sup>16</sup> [1998] 2 All ER 68.

<sup>17</sup> [1998] 2 All ER 68 at 71j.

<sup>18</sup> The equivalent provision in Northern Ireland with regard to discontinuance is Order 21 Rule 1 of the County Court Rules (NI) 1981.

<sup>19</sup> See RSC Order 21 Rules 1-3.

<sup>20</sup> RSC Order 21 Rule 1.

summons. Thereafter<sup>21</sup> the plaintiff may disengage only with leave of the court, or the written consent of all other parties. The Brownings argued that:-

- a. The code of discontinuance operative in the county court is materially different from that of the High Court;
- b. The “materiality” of this difference is that it is expressly designed to allow a plaintiff to disengage if he considers that he will gain a collateral advantage from so doing;
- c. Consequently, serving a notice of discontinuance in order to obtain a collateral advantage is not an abuse of the court’s process - indeed, it is using the court’s process for the exact purpose for which it was designed.

May LJ dealt with the superficial attraction of this submission in relatively short order. He held, applying the decision of the House of Lords in *Castanho v Brown & Root (UK) Ltd*<sup>22</sup>, that the County Court has an inherent jurisdiction to prevent abuse of its process. He said<sup>23</sup>:-

“In my judgment...there is...no good reason for not applying the *Castanho* decision to notices of discontinuance in the county court. There is no express power in the High Court Rules to strike out a notice of discontinuance yet the jurisdiction exists.<sup>24</sup> The fact that there is no express discretion in county court Ord 18 does not help [the Brownings] since *Castanho v Brown & Root (UK) Ltd* applied to a non-discretionary part of the High Court Rules. I consider that the judge was correct to hold that he had jurisdiction to strike the notice out if it were an abuse. Whether in a particular case there is an abuse will be a question of fact and degree. It is a jurisdiction to be used with circumspection no doubt, but it is a jurisdiction which is available in the county court as in the High Court.”

Any decision of the Court of Appeal in England is treated here with the highest respect, and will be followed by the courts here, unless there is a good reason for not doing so<sup>25</sup>. It is submitted that, on this point, *Gilham* ought to be followed in this jurisdiction. The provision for discontinuance in CCR Order 18 is the same as that in CCR(NI) Order 21, save for the

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<sup>21</sup> RSC Order 21 Rules 2 and 3.

<sup>22</sup> [1980] 3 All ER 72.

<sup>23</sup> [1998] 2 All ER 68 at 76c-d.

<sup>24</sup> In *Castanho*, the plaintiff had served notice of discontinuance without leave in compliance with RSC Order 21 Rule 1 in an action for damages personal injury in which he had already obtained an admission of liability and interim payments. His motive for disengaging was to begin fresh proceedings in Texas, where it was thought that he might get a better result. Parker J struck out the notice of discontinuance at first instance, and granted an injunction restraining proceedings in the United States.

<sup>25</sup> For a striking example of a refusal by a Northern Ireland court to follow a decision on point from the English Court of Appeal, see *National and Provincial Building Society v Lynd* [1996] 9 BNIL 69 in which Girvan J declined - correctly, it is respectfully submitted - to follow the decision of the English Court of Appeal in *Cheltenham & Gloucester Building Society v Norgan* [1996] 1 All ER 449.

treatment of costs<sup>26</sup>, and it is clearly right that the County Courts in Northern Ireland should have powers to prevent abuse of their process in line with those now recognised as existing in England and Wales.

May LJ then turned to the appeal against the refusal of the County Court judge to non-suit the Brownings. Their counsel had contended that, in the County Court, a common law right survived whereby the plaintiff might elect to be non-suited at any time up to final order or judgment. Since this was an election which the plaintiff might make as of right, the court had no discretion to refuse to non-suit. If this was correct, then May LJ's decision on the propriety of the Brownings' notice of discontinuance would have been rendered nugatory: denied one exit route by a finding of abuse of process, the Brownings had only to choose to be non-suited in order to extricate themselves from the case. As the exercise of an unfettered common law right, rather than a rule of procedure, it could not, for that very reason, be impeached as an abuse of process.

In the course of submissions, counsel for the Brownings accepted that discontinuance under CCR Order 18 is, essentially, identical with the common law right of election to be non-suited. This caused the Court of Appeal to question whether or not the common law right to elect for non-suit had indeed survived the introduction of the discontinuance machinery into the county court rules. The editors of the *County Court Practice 1997* state in the notes to CCR Order 18 that it does survive, based on the decision of Wilmer LJ in *Clack v Arthur's Engineering Ltd*<sup>27</sup> in which he said<sup>28</sup>: "...At any time up to verdict, if the plaintiff elected to be non-suited he was entitled to it as of right and the court had no discretion to refuse..." This conclusion was reached on the basis of two pre-Judicature Act cases, namely *Robinson v Lawrence*<sup>29</sup> and *Outhwaite v Hudson*<sup>30</sup>. Yet in the High Court, the position was different, and was clarified at an early stage. The right of a High Court plaintiff to be non-suited was abolished by the 1883 Rules, and any doubt on the point was resolved conclusively by the House of Lords in *Fox v Star Newspaper Co Ltd*<sup>31</sup>. The Earl of Halsbury LC said this<sup>32</sup>:-

"Our whole system has now been changed, and I think that the reason why the word "nonsuit" itself is not now to be found in the rules is that it was determined that the power of a plaintiff at the common law to claim a nonsuit, or the plaintiff in equity to dismiss his bill at his own option, should no longer be permitted, and it is probable that the word "discontinuance" was supposed to apply to both forms of procedure both at common law and in equity. Accordingly, by Order XXVI., r.1, the only mode by which a plaintiff can submit to defeat is under that Order, unless he allows the proceedings to go on until the verdict is recorded against him. The word "discontinuance" no doubt had, under the former system, the more limited application, and the old system of nonsuit is manifestly no longer capable of being reconciled with the new procedure either in form or substance. The substance is that when it once comes into court,

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<sup>26</sup> Costs are required to be taxed in England, whilst in Northern Ireland, actual payment is required.

<sup>27</sup> [1959] 2 All ER 503.

<sup>28</sup> At page 507.

<sup>29</sup> (1852) 7 Exch 123.

<sup>30</sup> (1852) 7 Exch 380.

<sup>31</sup> [1900] AC 19.

<sup>32</sup> At page 20.

and when the plaintiff offers no support for his action, there must be a verdict for the defendant.”

Given that a broadly similar scheme of discontinuance had been introduced even earlier into the county court (starting with section 79 of the County Courts Act 1846, which contains provisions largely similar to those in the present CCR Order 21 Rule 2(1)), May LJ held that an unfettered right to be non-suited did not survive in the county court. He said this<sup>33</sup>:-

“...it is clear that the reasoning in *Fox v Star Newspaper Co Ltd* must also apply to the County Court Rules. In the High Court, discontinuance, fairly recently introduced when *Fox v Star Newspaper Co Ltd* was decided, had taken the place of nonsuit which had ceased to be available. In the county court there is discontinuance under Ord 18 up to judgment, and a discretionary power in the court to nonsuit when the evidence has been heard if the plaintiff fails to prove his claim. That covers the entire ground, and there is no room for a general right to be nonsuited, which in my judgment, on the authority of *Fox v Star Newspaper Co Ltd* did not survive the introduction of rules for discontinuance. Discontinuance was not addressed in *Clack's* case and the critical statement about nonsuiting was obiter<sup>34</sup>”

The anachronism of the unrestricted right to be non-suited has thus finally been banished from English law, more than 150 years after the process first began. What, then, of Northern Irish law on the point? The Supreme Court of Judicature (Ireland) Act 1877 abolished the right of non-suit in the superior courts, and discontinuance of proceedings in the High Court in Northern Ireland is now governed by Order 21 Rules 1-3 of the Rules of the Supreme Court (NI) 1980. These provisions mirror those contained in the English RSC Order 21 Rules 1-3, referred to earlier. The similarity between CCR Order 18 and CCR(NI) Order 21 has already been addressed. In the light of this, it is submitted that the unfettered right to elect to be non-suited in the County Courts of Northern Ireland has not survived the introduction of the machinery for discontinuance, for the same reasons as those given by May LJ for the demise of its English counterpart.

Nonetheless, there remains, it would seem, an important difference in English and Northern Irish practice with regard to the power of the *court* to compel a plaintiff to submit to a non-suit (or, in the terminology of Northern Irish practice, a “dismiss without prejudice”), arising from the decision in *Swift v Swift*.<sup>35</sup> This seems to be authority for the proposition that the power of a Northern Irish county court to compel a dismiss without prejudice ceases with the start of the trial or hearing whereas in England, the county court has the power, as we have seen, to order its equivalent - a non-suit - at any time prior to judgement or order. However, although the decision in *Swift v Swift* was unanimous, Crampton

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<sup>33</sup> [1998] 2 All ER 68 at page 81*b-d*.

<sup>34</sup> In *Clack's* case, the court was concerned whether or not the *court* had an unfettered discretion to non-suit, and if so in what circumstances. The question of the plaintiff's right to elect to be non-suited was not before the court, but Wilmer LJ made a finding on the point, as it had come up in the course of a review of the authorities relating generally to non-suited. There is no doubt that May LJ was quite correct in characterising the finding as obiter.

<sup>35</sup> (1852) ICLR 218.

J expressed doubts, and would clearly have been happier to hold that the matter was one for the discretion of the judge<sup>36</sup>. He acquiesced with the majority view “for conformity sake”<sup>37</sup>. The authority is old and clearly out of step with prevailing English practice, which has - rightly, it is submitted - broadened the discretion of the trial judge to order a non-suit at any stage prior to judgement or order if the interests of justice so require. It is submitted that the county courts in Northern Ireland should have the equivalent power to compel submission to a dismiss without prejudice, where the justice of the case so demands. For that reason - justifying the doubts expressed at the time by Crampton J - it is submitted that *Swift v Swift* should no longer be followed.<sup>38</sup>

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<sup>36</sup> *Ibid* at page 221.

<sup>37</sup> *Ibid* at page 221.

<sup>38</sup> The author is grateful to Barry Valentine BL for making available relevant extracts from his forthcoming work “Civil Proceedings: The County Court” (SLS Legal Publications (NI)) in connection with this article. The views expressed are entirely those of the author.