Neutral Citation Number: [2019] EWCA Civ 570

Case No: B2/2018/1346

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CANTERBURY
HHJ Simpkiss
Case A00CT526

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2019

Before :

LORD JUSTICE MALES
and
SIR TIMOTHY LLOYD

- -

Between :

PARHAM KHANDANPOUR	**Appellant**
- and -	
COLIN CHAMBERS	**Respondent**

- -
- -

Tina Kumar-Jacob (instructed by **Hallett & Co**) for the **Appellant**
Robert Denman (of **Holden & Co LLP**) for the **Respondent**

Hearing date : 26th March 2019

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Approved Judgment

Lord Justice Males :

1. This is an appeal from an order made by HHJ Simpkiss in the County Court at Canterbury by which he held that the appellant had failed to make a payment which was required to be made as a condition for setting aside a Default Costs Certificate and refused to grant relief from sanctions. The result was that the Default Costs Certificate stood. The appellant now accepts that the payment was not made on time, but appeals against the refusal of relief from sanctions.

Background

2. The appellant was the landlord and the respondent was the tenant of a property in Canterbury. On 28 July 2014 the respondent issued proceedings against the appellant claiming damages for unlawful eviction from the property and breach of the covenant of quiet enjoyment, together with an injunction requiring the appellant to readmit the respondent to the premises. The litigation was protracted, the result, according to the respondent, of the way in which the appellant chose to conduct it. Eventually, however, on 29 January 2016 the respondent obtained judgment for £6,874 following a fast track trial, together with an order for his costs to be assessed if not agreed. Permission to appeal was refused.

3. The appellant did not pay the judgment debt so the respondent took steps to enforce it, obtaining interim charging orders over three properties owned by the appellant who, according to his evidence, was a professional landlord owning some 70 properties.

4. The respondent also began the process for the assessment of his costs, but it appears that the appellant did not engage with that process. As a result, on 19 May 2016 the respondent obtained a Default Costs Certificate in the sum of £27,824.40, with payment to be made within 14 days. The appellant did not pay but applied to have the Certificate set aside. On 17 May 2017 DDJ Eyley made an order setting aside the Certificate subject to two conditions, namely that:

   (1) "the [appellant] pays a sum of £10,000 on account of costs to the [respondent] by 4 pm on 15 June 2017; and

   (2) by 4 pm on the same date the [appellant] do file and serve Points of Dispute to the Bill of costs herein."

5. At the same hearing the interim charging orders were made final on all three properties.

6. It is accepted that the appellant filed his Points of Dispute on time. It was apparent, therefore, that he sought to persist in his challenge to the Default Costs Certificate. In order to do that, he would need to comply with the payment condition.

7. The appellant's evidence, which the judge appears to have accepted, was that he had difficulty raising the money to pay the £10,000, but by 15 June 2017 he had arranged for two people, Mr Andy Bate and Ms Claudine Lear, to pay the money on his behalf. On that day the appellant himself was in hospital having emergency surgery on his hand having been the victim of a knife attack.

8. Mr Bate and Ms Lear gave instructions on 15 June 2017 to their respective banks for the payments to be made, with two payments each of £4,000 to come from Ms Lear and £2,000 from Mr Bate. One payment of £4,000 reached the respondent's solicitors' account before the 4 pm deadline, but the balance of £6,000 did not. However, it had arrived by 8.53 am on the following morning.

9. The respondent's solicitors recognised that the payment of £4,000 made on 15 June 2017 was intended to represent part payment of the £10,000 which the appellant was required to pay as a condition of setting aside the Default Costs Certificate. I have no doubt that they also understood the payment of £6,000 to be *intended* by the appellant to represent payment of the balance. Indeed, Mr Robert Denman for the respondent candidly accepted that he could not suggest otherwise.

10. However, the respondent's solicitors declined to treat the payment of £6,000 in this way. They wrote to the appellant on 16 June 2017, after receipt of the £6,000, as follows:

> "The only monies received in compliance with the Order dated 17 May 2017 was £4000.
>
> Other monies received, on 16 June 2017, have been apportioned (sc. appropriated) to the satisfaction of the Legal Aid charge and any balance towards the still outstanding Judgment Debt.
>
> Accordingly you have failed to comply with the Court Order dated 17 May 2017 ordering payment of £10,000 on account of costs by 4 pm on 15 June 2017.
>
> We are sending a copy of this letter to the Court for their attention."

11. The reference to the legal aid charge is somewhat confusing. While the legal aid fund would have a first charge on any recoveries made from the appellant, that gave rise to no independent obligation on the part of the appellant. He had an accrued obligation to pay the judgment debt and, if he wanted to challenge the Default Costs Certificate, he was required to make a payment on account of costs in accordance with the payment condition. Probably what the solicitors meant to say was that the money had been appropriated towards satisfaction of the judgment, but that as a result of the legal aid charge, it would actually be paid to the legal aid fund. However, it is unnecessary to pursue this further.

12. There followed further correspondence between the parties in which the appellant maintained that the respondent's solicitors had not been entitled to appropriate the money in this way, while the respondent's solicitors insisted that they had been. On 8 August 2017 an order was made by DDJ Ashley declaring that the appellant had failed to comply with the order of DDJ Eyley and that the Default Costs Certificate remained enforceable. That order was received by the appellant on 23 August 2017. On 19 September 2017 the appellant applied to set aside that order, contending that he had made the required payment by the deadline. Alternatively he applied for an extension of time for compliance or, in the further alternative, for relief from sanctions.

13. Those applications came before DDJ Vary who held that it was enough to satisfy the payment condition that the appellant had arranged to make payment and for instructions to have been given to the paying banks before the deadline. Accordingly he concluded that the appellant had complied with the payment condition and set aside the order made by DDJ Ashley. He did not rule on the applications for an extension of time or for relief from sanctions.

The judgment

14. The respondent appealed to the judge who held that the payment had not been made in time. Payment meant that the £10,000 should reach the respondent's solicitors' account before the deadline, which had not happened. This decision, which with respect was obviously correct and has not been challenged before us, meant that the appellant had failed to comply with the condition for setting aside the Default Costs Certificate. Accordingly the appellant needed relief from sanctions if the Certificate was to be set aside.

15. Before dealing with the application for relief from sanctions, the judge dealt with the question of appropriation, albeit recognising that this would not affect his decision that the appellant had not complied with the condition. He held that the respondent had been entitled to appropriate the payment of £6,000 in the way set out in the respondent's solicitors' letter of 16 June 2017.

16. The judge applied the principles set out in paras 21-059 and 21-060 of the 29th edition of *Chitty on Contracts* (now paras 21-061 and 21-062 of the 33rd edition) which were approved by Neuberger LJ in *Thomas v Ken Thomas Ltd* [2006] EWCA Civ 1504, [2007] Bus LR 429 at [19]:

> "**Rights to appropriate payments**. Where several separate debts are due from the debtor to the creditor, the debtor may, when making a payment, appropriate the money to a particular debt or debts, and if the creditor accepts the payment so appropriated, he must apply it in the manner directed by the debtor; if, however, the debtor makes no appropriation when making the payment, the creditor may do so.
>
> **Debtor's right to appropriate**. It is essential that an appropriation by the debtor should take the form of a communication, express or implied, to the creditor of the debtor's intention to appropriate the payment to a specified debt (or debts), so that the creditor may know that his rights of appropriation as a creditor cannot arise. It is not essential that the debtor should expressly specify at the time of payment, which debt or account he intended the payment to be applied to. His intention may be collected from other circumstances showing that he intended at the time of the payment to appropriate it to a specific debt or account. Thus, where at the date of the payment some of his debts are statute-barred and others are not, it will be inferred (in the absence of evidence to the contrary) that the debtor appropriated the payment to the debts that were not so barred."

17. The judge acknowledged that the timing of the payment and its amount supported the existence of an implied intention to appropriate the payment to fulfilment of the payment condition, but concluded that these factors were "nothing like enough; there has to be a communication" and that "there was no sufficient indication or no

sufficient circumstantial evidence from which any implied appropriation could be inferred". Accordingly, whatever the appellant had intended, he had failed to communicate that intention and thus had failed to appropriate the payment to compliance with the payment condition. Therefore the right to appropriate remained with the respondent as the creditor and the respondent had successfully appropriated the payment to the legal aid charge and the judgment debt.

18. This conclusion meant that compliance with the payment condition was not merely a few hours late, but that £6,000 of the £10,000 required to be paid on account of costs had not been paid at all.

19. The judge then addressed the application for relief from sanctions, applying the well-known *Denton* principles (*Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 906). On the basis of his findings so far, the application was hopeless: the appellant had failed to pay £6,000 out of the £10,000 which he had been required to pay; if the respondent was entitled to appropriate the payment as he had, it was not merely a delay of one day but a complete failure to pay, which on any view was a serious and significant failure; he had left payment to the last minute; there was no good reason for the continuance of the failure; and the failure had to be viewed against the background of failure to pay a long outstanding judgment debt. Accordingly the judge refused relief from sanctions.

20. He indicated, however, that if the only failure had been a delay in paying the £6,000 between 4 pm on 15 June 2017 and 8.53 am the following day, in other words if he was wrong about appropriation, he would have had little hesitation in granting relief from sanctions.

The appeal

21. The appellant now appeals on the issue of relief from sanctions with the permission of Lewison LJ who took the view that as DDJ Vary had not considered that issue at all, the ordinary first appeal test applied (*Handley v Lake Jackson* [2016] EWCA Civ 465).

22. Mrs Tina Kumar-Jacob for the appellant submits that the judge was wrong to conclude that the appellant had not impliedly appropriated his payments totalling £10,000 to the payment on account of costs required by the order dated 17 May 2017 and that he ought to have granted relief from sanctions.

23. For the respondent Mr Denman supports the judge's reasoning on the issue of appropriation and submits that in any event relief from sanctions should be refused in view of persistent defaults by the appellant in the history of the litigation, the absence of any good explanation as to why the appellant had left payment until the last minute, delay in making the application for relief, the appellant's failure to pay the judgment debt and his obstruction of attempts by the respondent to enforce the judgment.

Appropriation

24. I begin by considering the issue of appropriation, as that issue will determine the context for the application for relief from sanctions.

25. It is clear, as set out in the passage from *Chitty* quoted above, that a debtor's intention to appropriate a payment to a particular debt may be inferred from the circumstances known to both parties. Thus in *Parker v Guinness* (1910) 27 TLR 129 Lush J said at 131:

> "But if the inference to be drawn from the circumstances is that the payment was in fact appropriated by the debtor at the time of payment, the fact that he made no express statement at the time is immaterial. Now an appropriation by the debtor may be inferred from a variety of circumstances. Each case must, in my opinion, be considered on its own peculiar facts."

26. Mr Denman submitted that in *Parker v Guinness* there was only a single debt and that this made all the difference. I do not think that is the correct analysis of how the case was decided: there was an undisputed debt for a principal sum and a disputed claim for interest. In any event, however, Lush J's statement of principle set out above is of general application.

27. What matters is that in the light of all the circumstances, and viewing the matter objectively, there should be no doubt about the debtor's intention. As Greene LJ said in *Leeson v Leeson* [1936] 2 KB 156 at 162-3:

> "When it is said that there need not be an express appropriation of a payment, but that the appropriation can be inferred, that does not mean that appropriation of a payments can be inferred from some undisclosed intention in the mind of the debtor. It is to be inferred from the circumstances of the case as known to both parties."

28. In the present case it was obvious from the circumstances known to both parties that the payment of £4,000 made on 15 June 2017 was intended to be a part payment of the sum required to be paid that day as a condition of setting aside the Default Costs Certificate. That much is common ground. However, it was equally obvious that the payment of £6,000 received (at latest) by early on the following morning was intended as payment of the balance. Indeed the time of receipt was such that instructions must have been given on the previous day for the payment to be made. The total amount paid was the amount required to be paid. If the £6,000 was not intended to represent the balance, there would have been no point in paying the £4,000 on time the previous day. Moreover, the appellant had served Points of Dispute, which only made sense if he intended to fulfil the payment condition. By serving Points of Dispute the appellant effectively communicated to the respondent that he could expect to receive the £10,000 which had to be paid in order to fulfil the payment condition.

29. In these circumstances the respondent and his solicitors cannot have been (and were not in fact) in any possible doubt about what the payment was. The reason why Mr Denman accepted that the respondent's solicitors understood that the payment of £6,000 was intended by the appellant to represent payment of the balance required to be paid under the payment condition was indeed because it was obvious in all the circumstances.

30. It is evident that, by seeking to appropriate the payment as they did, the respondent's solicitors were taking advantage of what they regarded as a slip by the appellant. I do

not doubt that they believed that they were entitled to do so, and that they were frustrated by the long drawn out litigation and the appellant's failure to pay the judgment debt, but it remains the case that they knew that their purported appropriation was contrary to the appellant's obvious intention in making in payment.

31. In these circumstances I would hold that the payment of £6,000, albeit late, was impliedly appropriated by the appellant to fulfilment of the payment condition for setting aside the Default Costs Certificate. The application for relief from sanctions must therefore be approached on the basis that £4,000 out of the total of £10,000 was paid on time and that the balance was paid a few hours late.

32. In view of this conclusion it is unnecessary to consider a further argument advanced by Mrs Kumar-Jacob. This was to the effect that the principle of appropriation applies only to the situation where there are two or more debts outstanding and that the requirement to pay £10,000 was not a debt as the appellant was under no obligation to pay it. Rather, it was a condition which the appellant had to satisfy if he wished to set aside the Default Costs Certificate in order to be in a position to challenge the respondent's bill of costs. In such a situation I do not see why it should not be open to the paying party to appropriate a payment either to payment of the debt or to fulfilment of the condition as he chooses, or to the receiving party to do so if the paying party does not. However, that is a point which can be left for final determination to a case where it matters.

Relief from sanctions

33. As I have already said, the judge indicated that he would have had little hesitation in granting relief from sanctions if he had concluded that the only non-compliance was the delay overnight in making part of the payment required by the order of 17 May 2017.

34. I agree with the judge's view about that. I can therefore deal relatively briefly with the application of the *Denton* principles.

35. As to the seriousness of the breach, the delay was minor and had no effect at all on the conduct of the litigation or in any other way. It was a delay overnight of (at most) 17 hours.

36. Mr Denman submitted that the appellant's failure to pay on time was serious having regard to his previous conduct, including his failure to pay the judgment debt for a protracted period. However, while that is a factor which may be relevant at stage three, in considering the seriousness of the breach the court must focus on the breach itself. As the majority (Lord Dyson MR and Vos LJ) explained in *Denton*:

> "27. The assessment of the seriousness or significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past. At the first stage, the court should concentrate on an assessment of the seriousness and significance of the very breach in respect of which relief from sanctions is sought. We accept that the court may wish to take into account, as one of the relevant circumstances of the case, the defaulter's previous conduct in the litigation (for example, if the breach is the latest in a series of failures to comply with orders concerning, say, the service of witness

> statements). We consider that this is better done at the third stage (see [36] below) rather than as part of the assessment of seriousness or significance of the breach."

37. This approach was qualified in *British Gas Trading Ltd v Oak Cash & Carry Ltd* [2016] EWCA Civ 153, [2016] 1 WLR 4530. Where the breach consists of failure to comply with an unless order which was itself made as a result of a failure to comply with one or more previous orders, the assessment of seriousness should take account of the previous failure(s) as well as the failure to comply with the unless order itself.

38. As Jackson LJ explained:

> "38. An 'unless' order, however, does not stand on its own. The court usually only makes an 'unless' order against a party which is already in breach. The 'unless' order gives that party additional time for compliance with the original obligation and specifies an automatic sanction in default of compliance. It is not possible to look at an 'unless' order in isolation. A party who fails to comply with an 'unless' order is normally in breach of an original order as well as the 'unless' order.
>
> 39. In order to assess the seriousness and significance of a breach of an 'unless' order, it is necessary also to look at the underlying breach. The court must look at what X failed to do in the first place, when assessing X's failure to take advantage of the second chance which he was given."

39. The order made by DDJ Eyley was not an unless order of this kind. We do not have a transcript of any judgment, but even if the payment condition was imposed in the light of the appellant's long-standing failure to pay the judgment debt and a history of leaving things until the last minute, he was not in breach of any previous order as to costs. It was not, therefore, a case such as described by Jackson LJ where, having been in breach of previous orders for payment on account of costs, the appellant was now being given a final chance. At stage one, therefore, this was a minor breach, not one which was serious or significant.

40. It appears that instructions for payment had been given which ought to have enabled payment to be made on time, even if they had been left until the last minute. There was clear evidence that the appellant himself had been in hospital on the due date and was therefore unable to attend to the matter personally. That would suggest that relief from sanctions could well have been given as a result of applying stages one and two of the *Denton* principles, the seriousness and significance of the breach and the reason why it occurred, without needing to go on to stage three.

41. However, even if it was necessary to go on to consider all the circumstances of the case at stage three, and accepting that the application for relief was not made as promptly as it might have been, I would still be prepared to grant relief from sanctions. Even assuming that the appellant's conduct of the litigation was open to criticism and that he had sought to obstruct enforcement of the judgment, by the time with which we are concerned the respondent had obtained charging orders over the appellant's properties which would enable the judgment to be enforced, albeit with some further expense and delay. Further, refusal of relief from sanctions would mean that the Default Costs Certificate in the sum of £27,824.40 would stand unchallenged which, on the face of it, seems like a high figure having regard to the value of the

claim. It may be that this sum or something like it can be justified and that the costs were unnecessarily increased by the appellant's conduct of the litigation, but that is what the process of detailed assessment is intended to determine.

42. Ultimately, a sense of perspective is necessary. For the delay of a few hours which made no practical difference whatever, it would be disproportionate and unjust to deprive the appellant of an opportunity to challenge the Default Costs Certificate.

Disposal

43. I would therefore allow the appeal and set aside that part of the order of the judge which allowed the appeal from DDJ Vary and refused relief from sanctions. I would grant relief from sanctions and (for different reasons) would restore the order of DDJ Vary setting aside the order of DDJ Ashley. The result is that the Default Costs Certificate is set aside and the respondent's bill of costs must proceed to detailed assessment.

44. It is unfortunate that the issue of appropriation has complicated the conclusion of this litigation. If the respondent had accepted that the payment of £10,000 represented fulfilment of the condition for setting aside the Default Costs Certificate as it was obviously intended to do, albeit that it was a few hours late, the process of assessment would have been completed long ago.

Sir Timothy Lloyd :

45. I agree.