Neutral Citation Number: [2020] EWCA Civ 377

Case No: B3/2019/1178

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
LEEDS DISTRICT REGISTRY
(HIS HONOUR JUDGE SAFFMAN)

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 14 January 2020

BEFORE:

LORD JUSTICE DAVIS
and
LORD JUSTICE HICKINBOTTOM

BETWEEN:

DMR (DONNA RAE)
(by her litigation friend, LEW)

Respondent/Claimant

- and -

IX & ORS

Applicant/Defendant

MR O'SULLIVAN QC (instructed by **Langleys**) appeared on behalf of the **Applicant**
MR SHELDON QC (instructed by **Irwin Mitchell**) appeared on behalf of the **Respondent**

JUDGMENT
(As Approved)

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(Official Shorthand Writers to the Court)

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1. LORD JUSTICE DAVIS: These are applications for an extension of time and for permission to appeal. The order sought to be appealed is a final consent order made in the Leeds District Registry of the High Court on 3 October 2018, the order being sealed on 9 October 2018. The notice of appeal itself was filed on 18 April 2019.

2. The background put very shortly is this. Ms Donna Rea, who was born on 9 May 1963, was riding on the pillion of a motor-bicycle driven by her then partner, the first defendant in the proceedings, on the night of 4 October 2012. The motorcycle collided with a dog which had got loose. Ms Rea sadly suffered catastrophic injuries as a result. Proceedings were in due course commenced against the first defendant and others on 7 September 2015. It transpired the first defendant had no valid insurance and the Motor Insurers' Bureau was named as second defendant in the proceedings. The third named defendant was a firm which had owned the dog in question.

3. Liability was disputed as between the first defendant and second defendant and the claimant. However, on 14 March 2017 a judgment was entered (as a result, so we were told this morning, of a deal made at the door of the court) against the first defendant for 75 per cent of the claimant's damages. No issue of contributory negligence had in fact arisen in the case: we were told that that figure in effect represented an appreciation of litigation risk. Thereafter very extensive reports on quantum were served. One such report served on behalf of the claimant in January 2018, was from a consultant neurosurgeon, Dr Bavikatte. His estimation of her life expectancy was placed between 16.53 years and 23.33 years, depending upon her subsequent ability to walk. No evidence on this particular issue of life expectancy was served by the defence, although in a counter-schedule the defence had averred that Ms Rea's life expectancy was 16 years and four months. It may also be noted that, throughout, the claim had been presented and the defence conducted on the footing of a lump sum basis of damages being sought.

4. Trial was scheduled for November 2018. There were protracted settlement discussions. At a meeting on 25 September 2018 the parties agreed full quantum in an amount of £8,649,581, of which 75 per cent was £6,487,185. The vast proportion of that figure related to future care and losses. Various substantial payments had in fact already been made in the interim or fell to be credited to the claimant, so the ultimate figure remaining to be paid was agreed to be £5,088,984. It was agreed that that amount would be paid as a lump sum by 4 pm on 17 October 2018.

5. There was an approval hearing on 3 October 2018 before Judge Saffman in the Leeds District Registry, approval of the High Court being necessary because the claimant was a patient. Both sides were represented by leading counsel. Judge Saffman approved the settlement on that date. The order to that effect was sealed on 9 October 2018. In the event, the claimant unexpectedly died in hospital on 13 October 2018. Subsequent documentation since obtained would tend to indicate that on 5 October 2018 she had contracted an illness which was said to be pneumonia arising from being in hospital. It is however to be noted that, even leaving aside the massive neurological damage which she had suffered, her health had not been at all good before October 2018, as the

defence knew. Indeed it had been reported prior to settlement that she had suffered a lack of cognitive functioning, had been in physical decline and had suffered a loss of a kidney and had had urinary tract problems. In a subsequent report dated 29 November 2018, Dr Tow, a consultant physician, stated that Ms Rea had picked up hospital pneumonia. Her traumatic brain injury was stated, however, to have been a major contributory factor to her susceptibility to infection.

6. The second defendant's solicitors were notified of Ms Rea's death on 16 October 2018, that is to say, on the day before payment was due. On 17 October 2018, and again before payment was due, the defence solicitors issued an application in the Registry of the High Court seeking a stay on the payment. They also sought disclosure of all the claimant's medical records up to the date of her death. It is clear (and understandable) that the defence solicitors had concerns that they had entered into the compromise under a misapprehension and indeed may have been concerned that there had possibly been a misrepresentation to them of the claimant's true medical condition.

7. There was then a further period of delay. Understandably, the claimant's solicitors could get no instructions pending the formal grant of letters of administration, Ms Rea having died intestate. At all events on 23 November 2018 the court ordered, in effect by way of a consent order, that there be a stay on the payment. Further, on 28 January 2019 and after representations had been made by counsel, Judge Saffman made in effect a further consent order, continuing the stay until 25 April 2019 and making various orders for disclosure of the relevant medical records relating to the death of Ms Rea. It was further directed that if any application to set aside the consent order was to be made, that was to be done by 25 April 2019 and was to be listed before Judge Saffman.

8. Thereafter medical records were disclosed in February and early March 2019. Having considered them, the defence team considered that there was no proper basis for alleging any kind of misrepresentation as to Ms Rea's condition. It was stated that the view was taken that the records as produced showed that the "terminal decline", as it was put, had started on 5 October 2018: that is to say, after the consent order had been made. In consequence the defence solicitors then issued a notice of appeal on 18 April 2019. This was well over five months after the consent order had been made in October 2018 and when time for appealing under the rules had expired.

9. There was just one ground of appeal put forward, which was this:

> "The death of Ms Rea on 13 October 2018, ten days after the order of Judge Saffman dated 3 October 2018, destroyed the basis on which he had made the order."

10. No formal application to rely on fresh evidence has even now been issued. It is clear, however, that the intent is at least to rely on the uncontroverted fact that Ms Rea died on 13 October 2018. It is possible, judging by what Mr O'Sullivan QC for the applicant has said to us this morning, that further other (perhaps limited) information will also be

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sought to be relied upon. But, as I have said, that is not currently the subject of any formal application notice seeking leave to adduce fresh evidence.

11. The first question, logically, is whether this proposed appeal should attract the necessary extension of time which the defendants must obtain if they are to be able to pursue this appeal. The claimant says that such extension of time should be refused. It is said that a delay of the present order, over five months, is significant and serious and it simply cannot be excused. Clearly in this regard this court must apply the principles laid down by the Court of Appeal in the case of *Denton v White* [2014] EWCA Civ 906, and the three stage process there enunciated must be applied.

12. I can accept that the delay in formally issuing the notice of appeal here was indeed significant and serious. However, in my opinion it would, in the circumstances of this particular case, be unduly technical and wholly unjust to preclude this appeal simply on grounds of lapse of time. This is a case, in fact, where the subsequent event sought to be relied upon, that is to say the death of Ms Rea, occurred within the period for appealing conferred by the rules. The defence issued a court application immediately it knew of the death of Ms Rea and before the payment was due to be paid under the order. It cannot possibly be said that the defence did nothing, either then or thereafter, during the five-month period that then elapsed. The claimant's advisers knew from the outset that the consent order was being formally challenged. Thereafter, as I see it, reasonable steps were taken to ascertain the truth about Ms Rea's untimely death. Indeed it is to be noted that, very fairly and properly, the claimant's solicitors consented to the various orders made in the interim giving directions in this regard.

13. Mr Sheldon QC, on behalf of the claimant before us today, submits that the defence had adopted the wrong procedure from the word go. He submits that in the light of the Court of Appeal decision in the case of *Roult v North West Strategic Health Authority* [2009] EWCA Civ 444 it never would have been appropriate to seek to apply to Judge Saffman to set aside the order. The only possible route available was by way of an appeal seeking to rely on fresh evidence. I am not entirely sure whether that is necessarily right. But in any event, even if that is so, and even if it be right that an appeal was the only proper procedural step to take, the truth of the matter is, as I have said, that a court challenge had been initiated. Moreover, matters had then proceeded by consent between the parties trying to establish the full position. Had a notice of appeal been issued within the time laid down in the rules, it is inevitable that it would immediately have had to be stayed, first so as to enable letters of administration to be obtained and then so as to enable the full facts to be investigated. In such circumstances, no prejudice whatsoever has been occasioned to the claimant and her legal team by the procedure adopted.

14. In those circumstances I regard the delay of five months in issuing the formal notice of appeal as entirely excusable; and in my view it would be wholly unjust not to grant the extension of time requested, in circumstances moreover where the appeal itself was lodged before the cut-off date of 25 April 2019 which Judge Saffman had himself approved. Furthermore, to grant the extension of time sought in this particular case can

involve no interference with general considerations of the good administration of justice.

15. I should add that there is no jurisdictional bar to a challenge being made to a final consent order: even if the court would be obviously slow to interfere with such an outcome. That is not, as is accepted, of itself a bar for the defence seeking to pursue the appeal.

16. The more fundamental point arising, however, is whether this case in any event is such as to merit the grant of permission to appeal. Mr O'Sullivan submits that it pre-eminently is a case worthy of attracting permission to appeal. Put shortly, he submits that the entire basis of the consent order has been falsified by the subsequent event of Ms Rea's death occurring so soon after the order had been made.

17. On behalf of the respondent claimant, Mr Sheldon forcefully argues that this is not an appropriate case to grant permission to appeal. He refers amongst other things to the provisions of rule 52.21. He says here that there was no procedural error of any kind. Furthermore, it cannot be said that the order at the time that it was made was "wrong". On the contrary, at the time it was made it was (and indeed, as Mr O'Sullivan agrees it was) a justified order. Mr Sheldon goes on to submit that what has since happened was always and foreseeably going to happen: that is to say, Ms Rea was always going to die. He submits that her life expectancy was a key part of the whole consent order and there could never have been certainty as to how long Ms Rea would live. He points out that had she lived for much longer than a further period of 22 years, there would have been no route of appeal available. Indeed, had she died perhaps, say, five or six years after the order had been made, there too no appeal could have lain, even though that would have constituted a substantial departure from Dr Bavikatte's best estimation.

18. Mr Sheldon submits that it is essential in such circumstances that principles as to the finality of litigation, in particular where final consent orders are made, should be respected. He draws attention amongst other things to a passage of the judgment of Hughes LJ in the *Roult* decision at paragraph 20, where Hughes LJ said this:

> "All serious personal injuries litigation involves an attempt to predict the future in order to quantify claims for future loss. The quantification of a care claim, as here, is perhaps the largest single example, but the same applies to the assessment of future career paths, lost future earnings and future expense of living, to name but three. What has happened in this case is not that there has been any event which destroys the basis of the order approving the settlement. The most that has happened is that in one (important) respect the prediction of the future has changed so far as the claimant's parents are concerned …"

19. Mr Sheldon would say: precisely so. He submits that the defence had made its choice by agreeing to the settlement as it did. Here they knew the uncertainties and risks that would attach to the making of a lump sum order. They did not (for doubtless good reason) even propose in their pleaded case a periodical payments order; and, having

agreed to a lump sum payment, the parties simply had to take either the consequence of Ms Rea dying much earlier than the doctor had predicted or, indeed, the consequence that she might die much later than the doctor had predicted. He submits that the consent order cannot be displaced simply because Ms Rea died much earlier than had been anticipated. As he said, where else can the dividing line be drawn? Would death six months after the order suffice? Would death twelve months after the order suffice? Where is the cutting off point, he asks rhetorically? The only way for certainty, he says, and for finality, he says, is by giving effect to the final consent order that was made. No doubt it was very unfortunate that Ms Rea should die so very swiftly after the order had been made; but that was an inherent risk of litigation and of compromise in this context.

20. I certainly see the force and logical consistency of this argument. It may well prove to be right. But, in my view, on consideration of the matter, this case does raise an important point which merits further and full argument before the Full Court. It is in fact to be noted that in paragraph 19 of his judgement in *Roult* Hughes LJ had contemplated there being at least some possibility of appeals lying by reason of supervening circumstances where a final consent order had been made. He said this:

> "The broader question of whether an order approving a settlement could ever be one in respect of which an appellate court would be justified in granting leave to appeal out of time if there had been either erroneous information given to the judge, or a supervening event had destroyed the basis on which he had made the order does not arise and accordingly we should not attempt to answer it in the abstract …"

21. In the present case, in so far as subsequent death is concerned, one could hardly get a more bright-line case on the facts: that is to say, when Ms Rea died so very, very shortly after the order had been made. Moreover, in some of the older authorities such as *Murphy* [1969], *Mulholland* [1971] and *McCann* [*1973*], there are statements which could be construed as indicating that a perhaps more flexible approach is indeed available to the court. In the *McCann* case, in fact, Lord Denning in effect directed himself by reference to whether it would be an affront to justice not to allow the subsequent event of a death to be brought into account as fresh evidence in deciding on what the correct outcome of the appeal should be. It is quite true that those cases were decided at a time when there was a different procedural regime and indeed where periodical payment orders were not available. Moreover, Mr Sheldon pointed to other potential distinguishing features relating to the case of *McCann*; although perhaps it is a little unfortunate that cases such as *Murphy* and *McCann* were not cited to or commented on by Hughes LJ in the *Roult* case.

22. Moreover, in the latest edition of the textbook *Foskett on Compromise*, the editors there seem to take the view that, in circumstances corresponding to the present case, the Court of Appeal may be entitled to interfere with a consent order which has been made. There is also further discussion in the textbook *McGregor on Damages*, 20th Edition at 40-046 and following, which perhaps is rather more equivocal on the point. Yet further, there are various authorities taken from Family Division cases (which, it may

be noted, purport to base themselves on what the civil law authorities have decided) which might suggest that in certain, albeit limited, circumstances there is indeed power in the court to set aside a final consent order in the cases of ancillary relief as a result of subsequent events, including death.

23. Given that this particular case does, as I have said, potentially provide a particularly bright-line factual scenario, it seems to me that it is appropriate, in an area where the law does not seem to be entirely clear and where all the authorities may need close analysis, that this matter should attract permission to appeal and be the subject of full debate before the Full Court. Accordingly, I would grant permission to appeal in this case.

24. I would however, in so saying, wish to add one other point for the avoidance of any doubt. In paragraph 20 of his judgment in *Roult*, Hughes LJ stated this:

> "I would moreover add that before any application for leave to appeal could be mounted on the basis of fresh evidence of a dramatic Barder-type event, the case must, as Lord Brandon held, be so clear that it is plain that such appeal would be certain or very likely to succeed."

25. I think there may be some room for debate as to whether that is indeed the necessary test for a case of this particular kind and whether this case should not simply be approached on the more orthodox approach set out in the Rules relating to leave to appeal – that is, simply to consider whether the appeal is realistically arguable. However, even if what Hughes LJ there says is to be taken as right, I in any event would take the view, given the current uncertainty as to the law, that there is some other compelling reason for permission to appeal to be granted. What I wish to make clear, for myself, is that in granting permission to appeal I most certainly should not be taken as having formed the view that this appeal is certain or very likely to succeed.

26. In those circumstances I would grant the extension of time sought and I would grant permission to appeal. Doubtless also it is accepted that the stay will continue in place in the meantime.

27. LORD JUSTICE HICKINBOTTOM: I agree.

Order: Extension of time granted; permission to appeal granted; costs in the appeal.

Permission to cite this judgment.

Note: By consent order made on 4 June 2020 the appeal was compromised on agreed terms.

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