Neutral Citation Number: [2021] EWCA Civ 1124

Case No: A3 2020 1630

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MR JUSTICE FANCOURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2021

Before :

LORD JUSTICE NEWEY
LORD JUSTICE ARNOLD
and
SIR CHRISTOPHER FLOYD

- -

Between :

COLIN GEORGE WATTS	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

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- -

Mr Watts in person
Oberon Kwok (instructed by **Solicitors for HM Revenue and Customs**) for the **Respondents**

Remote hearing date: 13 July 2021

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Approved Judgment

"Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30am July 27th, 2021."

Sir Christopher Floyd:

1. The issue in this appeal is whether the judge should have granted an extension of time to enable the appellant, Mr Watts, to comply with an unless order. The appeal has important consequences for Mr Watts, because the judge's refusal to extend time resulted in the striking out of his intended appeal to the High Court from a bankruptcy order which had been made against him.

2. At the conclusion of Mr Watts' submissions, we decided that the appeal should be dismissed without calling upon Mr Oberon Kwok for the respondents. We informed the parties that we would put our reasons for that decision in writing. These are my reasons for joining in the decision to dismiss the appeal.

The facts

3. On 15 November 2017, the respondents (HMRC) served a statutory demand on Mr Watts in the sum of £10,865.03 in respect of unpaid taxes, interest and penalties. The statutory demand was not complied with, and so, on 11 December 2017, HMRC presented a bankruptcy petition in the County Court at Central London (CCCL). On 28 December 2017, Mr Watts applied to set the statutory demand aside, but that application was dismissed by Deputy District Judge McKenzie on 4 April 2018. In consequence, on 20 September 2018, District Judge Alan Johns QC sitting in the CCCL made a bankruptcy order against Mr Watts.

4. In the face of the bankruptcy order, Mr Watts launched a twin offensive. First, on 10 December 2018, he commenced an action against HMRC in the Queen's Bench Division ("the QB action"). Secondly, on 12 December 2018, he applied to set the bankruptcy order aside. HMRC responded on 14 December 2018 by applying to strike out the QB action. On 14 January 2019, Master Eastman transferred the QB action to the CCCL (Chancery List). On 12 April 2019, HHJ Monty QC, sitting in the CCCL, ordered HMRC's strike-out application and Mr Watts' set-aside application to be heard together by HHJ Johns QC (as DJ Johns QC had by then become).

5. The two applications were in due course heard by HHJ Johns QC on 15 August 2019. Mr Watts' application to set aside the bankruptcy order was dismissed. HMRC's application to strike out the QB action succeeded.

6. On 10 February 2020, Mr Watts opened a third front. On that day he issued an appellant's notice in the High Court seeking permission to appeal the bankruptcy order made by DJ Johns QC on 20 September 2018 (and possibly the order of 15 August 2019). On 17 March 2020, Fancourt J made an order (on Mr Watts' application dated 12 March 2020) extending the time for filing an appeal bundle, including a transcript of the judgment appealed, to 17 April 2020. Further applications to extend the time were made on 14 April 2020, 13 May 2020, and 17 June 2020. Against this background of successive applications for extensions of time, on 23 June 2020, Fancourt J made an order that unless the bundle and transcript were filed by 17 July 2020, the intended appeal would be struck out without further order ("the unless order").

7. The unless order contained a recital to the effect that the applicant had provided neither a proper explanation of the steps taken to obtain a transcript, nor a reason why

a transcript had not been obtained, and that there was an obvious inference that the appellant was not taking all reasonable steps to obtain a transcript and provide an appeal bundle in accordance with the court's direction. Paragraph 1 of the operative part of the order provided that unless the appeal bundle and transcript were filed no later than 17 July 2020, the intended appeal should be struck out as from midday on the second working day after 17 July 2020. 18 and 19 July 2020 falling at the weekend, it followed that, unless the bundle and transcript were filed in time, or time was further extended, the intended appeal would stand struck out at midday on 21 July 2020. Paragraph 2 consisted of a "Note to the Appellant" which explained that:

> "If through no fault of your own you are unable to comply by 17 July 2020, and you wish to apply for a further extension, you **must** apply to the court (making a formal application on form N244) **before** 17 July 2020, supported by full evidence explaining why it has not been possible since 19 March 2020 to obtain a transcript and file an appeal bundle, and your application will be listed before a judge for you to explain why you have not complied with this Order." (emphasis in original)

8. On about 16 July 2020 Mr Watts did make an application for a further extension of time for filing the transcript and appeal bundle. Whatever its precise date, it is common ground that the application was made before the expiry of the time limit provided for in the unless order. The reasons given on his form N244 refer to the following:

   i) A request for the transcript had been made on 11 February 2020;

   ii) An email had been received dated 14 March 2020 from a Mr Shah, a District Judges' Clerk at CCCL, which referred to Mr Watts' Form EX 107 (request for transcription);

   iii) A further email of 7 May 2020 had been sent by Mr Watts to a judge's clerk at CCCL (Mr Blackbourn) requesting details of the person to contact concerning the transcript, and there had been no reply to that email at the date of the application; and

   iv) A general reference to delays caused by the coronavirus pandemic.

9. On 31 July 2020, Fancourt J dismissed the application for the extension of time, and confirmed that the appeal was struck out, because it appeared that "the application dated 16 July 2020 is not supported by evidence explaining why it has been impossible to obtain a transcript and file an appeal bundle". The order was made on the papers, but contained a provision that any party could apply to set it aside within 7 days of the service of the order upon them.

10. Mr Watts made an application dated 21 August 2020 to set aside Fancourt J's order striking out the appeal. His application repeated the points made in favour of an extension of time in his application of 16 July. The application to set aside was dismissed by order of Fancourt J on 4 September 2020. The reasons given in the order were that the application for an extension of time had not been supported by full evidence explaining why it had not been possible since 19 March 2020 to obtain a

transcript and file an appeal bundle; that the application did not provide any evidence showing that it had been impossible since 19 March 2020 to obtain the transcript and file the bundle; that although the coronavirus pandemic had made things difficult and caused some delays, transcripts had been produced and obtained by litigants throughout the period in question; that a non-response to a single email of enquiry did not begin to establish that it was impossible from 19 March 2020 to obtain a transcript and file a bundle; and that no attempt had apparently been made subsequent to the making of the unless order on 23 June 2020 to obtain the transcript. There was, thus, no good reason for setting aside the order of 31 July refusing the extension of time and confirming that the appeal was struck out. The reasons given in the order also referred to the fact that the intended appeal was against a bankruptcy order made on 20 September 2018 and the appellant's notice was not issued until 10 February 2020.

11. Nugee LJ granted Mr Watts permission to appeal "limited to the question whether the explanations provided in the application of 16.7.20 should have been sufficient to prevent the unless order taking effect".

12. Mr Watts has placed before the court two appeal bundles containing much material which was not before Fancourt J, and has applied to us for permission to rely on it. We agreed during the hearing to allow the parties to refer to that further material for the purposes of enabling us to decide whether it should be taken into account.

13. On the central question of what efforts Mr Watts made to obtain a transcript of the judgment of DJ Johns QC, the further material appears to show the following:

    i) When Mr Watts filed his appeal on 10 February 2020 a *pro forma* letter was given to him at the public counter of the High Court Appeals Office. The letter pointed out that he must "as soon as possible and in any event within 7 days of today's date, apply for an approved transcript of the lower court's judgment unless you have made an application for a transcript at public expense." It then went on to explain that the appeal bundle needed to be filed by 16 March 2020, and was to include the relevant appeal documents and the transcript of the judgment of the lower court. The letter also explained the procedure for obtaining any necessary extension of time, as well as a warning that the appeal risked being struck out if the requisite documents were not filed or an extension obtained.

    ii) In an email to Mr Blackbourn on the following day Mr Watts attached pdfs of completed Forms EX 105 and EX 107 (request for transcript at public expense and request for transcription respectively) as well as a Form EX 160 (remission of fees). Finally he attached a copy of a posting receipt for an earlier request for a transcript. The receipt is dated 19 August 2019.

    iii) The email of 14 March 2020 which Mr Watts received from Mr Shah (referred to above) is produced. This appears to confirm that the request for transcription had been emailed to the court by Mr Blackbourn. Quite what this meant is a little obscure. As I have mentioned, Mr Blackbourn was a clerk at the CCCL, which was the lower court. The email says nothing about the application for a transcript at public expense.

iv) A letter dated 21 March 2020 from the NHS states that Mr Watts had been identified as a person who was at risk of severe illness from COVID-19, and advising him to stay at home. There is more material relating to the general effects of the pandemic on the legal system in Mr Watts' second bundle, but there is no need for me to dwell on that, as none of it is specific to this case.

v) The email of 7 May 2020 to Mr Blackbourn (referred to above) is produced. This attached the email from Mr Shah dated 14.03.20. The email to Mr Blackbourn asks "Is [there] someone at London CC who I could email, in reference to Mr Shah email request of 14.03.20. I am on my second Chancery Court extension of time ORDER I can only hope that the Court understands such backlog delays".

vi) A further email chain between Mr Watts and Ms Pierce of Chancery Judges (High Court) Listing shows that Mr Watts wrote to her on 14 May 2020 to explain that he had not received a transcript despite his efforts to date. He said that he had not yet received an answer from Mr Blackbourn as to whom to contact in this regard. Ms Pierce replied 20 minutes later explaining that the lower court was CCCL and asking whether the request for the transcript had been sent to them. She explained that she (like other staff) was working remotely, but that she would notify him of the person to contact when she went to the office the next day. Mr Watts replied shortly after, saying that it would be very helpful to be put in touch with the transcript team. Ms Pierce was good to her word, and replied on 15 May 2020, saying that she had asked a colleague in her department for a contact email address for the transcription service which she gave. Mr Watts did not apparently respond to this email until 20 August 2020 (after his intended appeal had been struck out). His reply complained about the fact that his appeal had been struck out, and requested the return of the appeal bundle (which he had filed, albeit minus the transcript).

14. Mr Watts who is representing himself in these proceedings, submitted that his appeal should be allowed. He had made efforts, reasonable in the circumstances, to obtain the transcript. He had made one unsuccessful attempt to obtain the transcript even before he filed his appeal. Then, as soon as he filed the appeal, he had applied for the transcript by emailing the relevant documents to the lower court. He stressed the difficulties under which both he and the court were operating during the COVID-19 pandemic, meaning that he could not personally attend the lower court to chase the transcript. He said that he had not wanted to make a nuisance of himself, or appear to bully the lower court by sending hundreds of emails. He complained that the CCCL was simply not responding to his requests. In the light of those matters, the court should have adopted a more lenient approach to his application for an extension of time.

15. Mr Watts also made another point concerned with the transfer of the QB Action to the CCCL. He submitted, as I understood him, that this had been misinterpreted by the court and that it was intended to transfer the action to the Chancery Division of the High Court. He submitted that the need for an appeal to the High Court had thus been made necessary by the court itself.

16. The first, and ultimately insuperable obstacle faced by Mr Watts is that his appeal is against the exercise of a case management discretion, namely the discretion either to grant or refuse an extension of time. It is now well established that this court is in the highest degree reluctant to interfere in first instance decisions of that character. The court will only do so where the judge has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision which is plainly wrong in the sense of being outside the generous ambit of discretion where reasonable decision-makers may disagree: see for a recent re-statement of that approach: *Broughton v Kop Football (Cayman) Limited and others* [2012] EWCA Civ 1743 at [51], per Lewison LJ. Strict rules against appellate intervention in case management decisions are necessary, otherwise the progress of actions towards trial would be the subject of repeated interruptions caused by appeals.

17. Fancourt J's decision to refuse an extension of time was arrived at against a background of successive applications for extensions of time from 16 March 2020. The unless order of 23 June 2020 had set out in the clearest possible terms what it was necessary for Mr Watts to explain if he required a further extension of time. The reasons for the extension which Mr Watts had provided were perfunctory in the extreme, but each of them was considered and dealt with by the judge in a manner which it is not possible to criticise. Particularly telling was the absence of evidence of any efforts on the part of Mr Watts to obtain the transcript between the date of the unless order and the date of the judge's decision, despite the clear warning in the unless order of the need to provide a full explanation. Mr Watts' submissions, courteously presented as they were, do not begin to establish that Fancourt J's judgment is flawed in any of the ways I have identified in the previous paragraph. I can see no principled basis on which this court would be entitled to interfere with the judge's decision on the materials before him.

18. The point made by Mr Watts as to the transfer of the QB action is based on a misconception. Master Eastman's order did not transfer the case to the Chancery Division of the High Court, but to the CCCL (Chancery List). In any event, this complaint is the subject of ground 1 of Mr Watts' grounds of appeal, and permission for that ground has been refused.

19. I turn, therefore, to the further material which Mr Watts seeks to put before the court. There is, of course, a difficulty in criticising a judge for not having regard to matters which were never placed before him (as to which see *Broughton* (cited above) at [52]). That is particularly the case here, where the question is not whether Mr Watts is able to provide a full explanation of the delay to this court, but whether the judge was justified in concluding that he had not given a full explanation for the delay to him. To the extent that the further material does provide further explanation, it serves to underscore the inadequacy of the explanation given to the judge. I will proceed, nevertheless to consider whether the further material could have assisted Mr Watts if it had been placed before Fancourt J.

20. I agree that the material shows that Mr Watts did apply to the CCCL on 27 February with the necessary materials to request a transcript, and I am prepared to assume in his favour that he did not receive a response. I have no doubt that the judge was aware of this, and approached the application on that basis. He was, however, right to concentrate on the period from 16 March 2020, when Mr Watts' time for filing the transcript had run out, and to ask himself what if any further efforts Mr Watts had

made since that time. The same applies to the email from Mr Shah of 14 March 2020 which, taken at its highest, shows that the court was still progressing his application made just two weeks before. What is striking, however, is the sparsity of material showing efforts on the part of Mr Watts to obtain the transcript thereafter.

21. I accept that the further material demonstrates that Mr Watts did make a request on 7 May 2020 to Mr Blackbourn for assistance as to whom to contact to chase the transcript, and I am, again, prepared to assume in Mr Watts' favour that he did not receive an immediate response. As the judge observed, however, one unanswered request does not explain why it was not possible to obtain the transcript over a period of several months from 16 March 2020. The subsequent email correspondence with Ms Pierce later in May shows that it was not correct to say that Mr Watts was not provided with an address to contact. At the date of Mr Watts' applications to extend time on 17 June and 16 July 2020 Mr Watts had been told by Ms Pierce how to contact the transcription service for CCCL. Mr Watts told us that he had tried "clicking" on this email address but had not encountered success. He has not, even now, produced any documentary evidence that he tried to contact this transcription service, and I infer that he did not do so. In this respect the further material makes the position worse, not better, for Mr Watts.

22. The further material does not show any effort on the part of Mr Watts to obtain the transcript between 15 May and the date of the unless order on 23 June, a period of nearly 6 weeks. On any view, the receipt by him of the unless order should then have alerted Mr Watts to the urgency of the situation. There is nothing to suggest, however, that he drew anyone's attention to the fact that he was under an unless order, or that he made any further effort to obtain the transcript between the date of the unless order and the date of his application to extend time on 16 July 2020, a further period of three weeks. Mr Watts' explanation, that he did not wish to make a nuisance of himself by repetitive emails is not an acceptable one in circumstances where there is no evidence of a single email to anyone over this long period. Mr Watts needed to be pro-active in seeking the transcript, and he could not reasonably have been criticised for being persistent.

23. As to the effects of the pandemic, the judge was right to take notice of the fact that, although the pandemic had caused some difficulties, it had not prevented the production of transcripts altogether. The further material does not indicate that the judge was wrong to approach matters on that basis.

24. I conclude, therefore, that even if the further material had been placed before Fancourt J it would have been insufficient to justify him in granting a further extension of time.

25. It was for those reasons that I joined in the decision to dismiss the appeal.

Lord Justice Arnold:

26. I agree.

Lord Justice Newey:

27. I also agree.