Neutral Citation Number: [2023] EWCA Civ 664

Case No: CA-2022-001069

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
Charles Bagot QC sitting as a Deputy High Court Judge
[2022] EWHC 2465 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 June 2023

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE ARNOLD
and
LORD JUSTICE STUART-SMITH

- -

Between :

ELO TRUSTEES LIMITED	**Claimant/ Appellant**
- and -	
(1) BONHAMS 1793 LIMITED	**Defendants/ Respondents**
(2) HNW LENDING LIMITED	

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Anton van Dellen (instructed by direct access) for the **Appellant**
The **First Respondent** did not appear and was not represented
Daniel Brayley (instructed by **Shoosmiths**) for the **Second Respondent**

Hearing date : 7 June 2023

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Approved Judgment

Lord Justice Arnold:

Introduction

1. The Claimant ("ETL") appealed from an order of Charles Bagot QC sitting as a Deputy High Court Judge dated 29 July 2022 dismissing two applications by ETL dated 2 May 2022 and 22 May 2022 for the reasons given in the judge's judgment dated 25 July 2022 [2022] EWHC 2465 (QB). ETL's first application was for relief from sanctions imposed by an order of Foxton J dated 13 April 2022 ("the Foxton Order"). ETL's second application was to set aside an order of McGowan J dated 5 May 2022 ("the McGowan Order"). It was common ground that the second application stood or fell with the first, and therefore the sole question for the court was whether ETL should be granted relief from sanctions. The judge held that ETL's failures to comply with the Foxton Order were serious and significant, that there was no good reason for those failures and that considering all the circumstances of the case it was not appropriate to exercise the court's discretion in favour of ETL. Permission to appeal was granted by Coulson LJ. After hearing counsel for ETL, the Court dismissed the appeal. My reasons for concurring in that disposition of the appeal are set out below.

Events prior to the Foxton Order

2. In 2016 Mr XXXX Elo (XXXX being Mr Elo's first name) entered into certain loan agreements with the Second Defendant ("HNW"). Disputes arose which were settled by a settlement agreement in 2019. In September 2020 HNW commenced proceedings against Mr Elo for non-payment of sums due under the settlement agreement. On 23 October 2020 HNW obtained judgment in default. On 5 November 2020 a writ of control was issued on the application of either Marston Legal Services Ltd or Marston (Holdings) Ltd (both names appear in the papers) ("Marston") to seize goods, chattels and other property of Mr Elo to satisfy the default judgment. Various assets were taken into possession by Marston pursuant to that writ of control including eight unique or rare cars ("the Cars").

3. On 16 November 2020 Mr Elo applied to have the default judgment set aside. On 15 December 2020 Mr Elo applied for a stay of execution of the writ of control.

4. At some point prior to 15 March 2021 HNW arranged for the Cars to be auctioned for sale by the First Defendant ("Bonhams"). On 15 March 2021 ETL filed an application for an order staying execution of the default judgment and for an order for the Cars to be returned to ETL. ETL is a company of which Mr Elo is the director and the owner of an 80% shareholding. Both Mr Elo and ETL contended that the Cars belonged to ETL and not to Mr Elo personally. For reasons that have not been explained, ETL's application was not issued or listed for hearing.

5. On 9 June 2021 District Judge Worthington sitting in the County Court at Central London dismissed Mr Elo's application to set aside the default judgment and directed that ETL's application be transferred to the High Court.

6. On 17 June 2021 Master Gidden adjourned Mr Elo's application for a stay pending the outcome of Mr Elo's intended application for permission to appeal the decision on the set aside application. Master Gidden further ordered that, in the event that an

application for permission to appeal was either not made or was unsuccessful, HNW was entitled to proceed to execution of the writ of control without further order.

7. Mr Elo's application for permission to appeal the decision on the set aside application was refused on paper by HHJ Monty QC on 15 September 2021. The application was renewed orally before HHJ Gerald on 21 January 2022, but was again dismissed. Accordingly, pursuant to the order of Master Gidden, HNW was entitled to proceed to execute the writ of control.

8. On 7 April 2022 ETL learned that Bonhams had again listed the Cars for auction. On 11 April 2022 ETL applied to the High Court without notice and without a hearing for an injunction against Bonhams to restrain the auctioning and sale of the Cars. The application was considered on paper by Saini J on the same day and refused on the ground that there was no justification for the application having been made without notice. Saini J directed that ETL could renew its application at a hearing on notice or, if necessary, on informal notice to Bonhams. ETL duly renewed its application at a hearing before Foxton J on 13 April 2022 on informal notice to Bonhams. ETL and Bonhams were both represented by counsel at the hearing.

The Foxton Order

9. By paragraph 1 of his order Foxton J granted an injunction restraining Bonhams from offering for sale or selling the Cars until a return date to be fixed on the first open date after 25 May 2022. The Foxton Order also contained directions, which were agreed between the parties, as follows:

> "2. Unless [ETL] by 12 noon on 14 April 2002 issues a claim form against [HNW] and [Bonhams] seeking by way of relief a determination of the ownership of the Cars, the injunction made pursuant to paragraph 1 of this Order shall be discharged.
>
> 3. [ETL] shall serve any claim form issued pursuant to paragraph 2 of this Order on the defendants to that claim as soon as reasonably practicable and in any event by 4pm on 20 April 2022.
>
> …
>
> 5. [ETL] shall file and serve evidence in support of its application for the continuation of this Order by 4pm 27 April 2022.
>
> …
>
> 8. If [ETL] fails to (i) issue a claim form in accordance with paragraph 2 of this Order; and/or (ii) serve the claim form in accordance with paragraph 3 of this Order; and/or (iii) file and serve evidence on [Bonhams] in accordance with paragraph 5 of this Order, [ETL] shall be debarred from relying on evidence of title to contradict that put forth by [Bonhams], [HNW], or [Marston].
>
> 9. If [ETL] is debarred pursuant to paragraph 8 of this Order:

> (i) [Bonhams], [HNW], and [Marston] shall each be entitled to a declaration against [ETL] that [Mr Elo] was at all material times and continues to be the person with title to the Cars and consequent upon that declaration they shall be entitled to dispose of them of them in execution.
>
> (ii) Any claim issued by [ETL] pursuant to paragraph 2 of this Order shall be struck out without further order of the Court.
>
> ..."

Events after the Foxton Order

10. In considering the events which transpired following the Foxton Order, it is relevant to note that ETL was professionally represented throughout, as were Bonhams and HNW.

11. On 14 April 2022 ETL submitted a draft Claim Form to the High Court for issue. The Court did not issue the Claim Form for several days, but ETL did not chase the Court. On 19 April 2022 the Court queried the fact that the statements of truth on the Claim Form and accompanying Particulars of Claim were in the name of (and signed by) Mr Elo: it interpreted XXXX as seeking anonymity and indicated that an application for anonymity had to be made. In addition, it noted that the fee stated in the Claim Form was incorrect, although the correct fee had in fact been paid. ETL explained the position regarding Mr Elo's name and corrected the error regarding the fee, and the Claim Form was issued later the same day. Thus the Claim Form was issued out of time.

12. ETL emailed the Claim Form to Bonhams and HNW on 19 April 2022, but ETL had failed to obtain prior consent to service by email and thus this did not constitute service. ETL served the Claim Form on Bonhams by first class post on 20 April 2022, resulting in deemed service on 22 April 2022, and on HNW by first class post on 19 April 2022, resulting in deemed service on 21 April 2022. Thus the Claim Form was served on both Defendants out of time.

13. On 25 April 2022 Bonhams wrote to ETL noting that it was in breach of the Foxton Order and asking whether an application for relief from sanctions would be made. ETL did not immediately respond to this letter.

14. On 27 April 2022 ETL emailed its evidence to Bonhams and HNW. Again, ETL had not obtained prior consent to service by email and therefore this did not constitute service. Bonhams replied pointing out that, as the claim had already been struck out, there were no extant proceedings in which to serve evidence. Again, ETL was asked to confirm whether, and if so when, it intended to apply for relief from sanctions. On the same day ETL responded that it did intend to apply for relief and that Bonhams would be invited to sign a consent order. In the meantime ETL served its evidence on Bonhams by first class post on 27 April 2022, resulting in deemed service on 29 April 2022. Thus it was served on Bonhams out of time. The judge found that it was not served on HNW at all.

15. On 2 May 2022 ETL filed an application notice seeking relief from the sanctions imposed by the Foxton Order, but did not at that stage give notice of the application to either Defendant. On 4 May 2022 Bonhams, which was unaware of the application for relief, applied for an order confirming that the sanctions envisaged by the Foxton Order applied. McGowan J duly made the McGowan Order on paper on 5 May 2022.

16. On 22 May 2022 ETL filed an application to set aside the McGowan Order.

17. ETL did not receive a sealed copy of the first application notice from the Court until 16 June 2022, not having chased in the intervening period since 2 May 2022. ETL then served both application notices on the Defendants.

Applicable principles

18. It was common ground both before the judge and before this Court that the principles applicable to ETL's application for relief from sanctions were the well-known principles laid down in *Denton v T.H. White Ltd* [2014] EWCA Civ 9806, [2014] 1 WLR 795. The court should consider the application in three stages. The first is to assess the seriousness and significance of the failure to comply with the relevant rule, practice direction or court order. The second is to consider why the default occurred. The third is to evaluate all the circumstances of the case so as to enable the court to deal justly with the application. One factor to consider at the third stage is the promptness with which the application for relief has been made.

The judge's reasoning

19. The judge dealt with ETL's application in a careful and detailed extempore judgment running to 68 paragraphs in transcription. His reasoning with respect to the three stages in *Denton* may be summarised as follows.

20. So far as the first stage was concerned, he held that the failures were serious and significant for the following reasons:

> "39. … each breach was a serious and significant breach in my judgment. These were peremptory orders of which the claimant was well aware and should have been scrupulous about complying with. … Foxton J made unless orders … That was, I infer, because there had been extensive litigation already in the personal claim …
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> 40. If the claimant wished to challenge the enforcement via fresh proceedings and injunctive relief, it needed to make expeditious progress with that action and providing the evidential foundation for that claim … This was because, at a pretty late stage … there was an attempt to restrain the auctioning of the vehicles. In those circumstances the court was rightly requiring the claimants to take really prompt action and making it crystal clear - the order could not have been clearer - about the ramifications of any degree of non-compliance with those orders. So, to breach those key unless orders with tight deadlines, not by hours but by days, was, in

> my view and in each instance, serious and significant. This was not some 'near miss' when someone serves something an hour late but it is dealt with on the same day. Here there was non-compliance for at least two full days or longer in the regards set out above. … The non-compliance here derailed the Court's intended timetable from the outset."

21. Turning to the second stage, the judge found that there was no good reason for any of the defaults. So far as the issue of the claim form was concerned, the judge said at [43]:

> "… the claimant could have avoided these problems by making the court aware of the unusual nature of the signatory's name and not making an error on the face of the claim form. … I also have in mind that if a party is applying for injunctive relief, that party can and should anticipate that it will need to issue a claim more or less immediately. … So, these proceedings could and should have been carefully checked and ready to go, so to speak, prior to Foxton J ever saying this is what must be done in short order. This was not the sort of injunction where there had been developments at the very last minute and matters were dealt with, for instance, so urgently that an out of hours hearing was requested. So, the proceedings and associated correspondence were not prepared as a matter of great urgency at the very last minute or, if they were, then the claimant was unwise to leave matters to the last minute and was courting disaster if it was not done with scrupulous care, given the unless orders."

22. Later in his judgment, at [49], the judge added that there was no evidence of ETL chasing the issue of the Claim Form with the Court or seeking the Defendants' agreement to an extension of time or applying for an extension of time.

23. As for the service of the claim form, the judge noted at [44] that there was no explanation as to why personal service had not been effected nor why there had been no application to extend time for service.

24. In relation to service of the evidence, the judge said at [45] that "14 days was an ample period of time" for ETL to do this. He noted that much of the evidence was available from the earlier proceedings, and so it was not as if it had had to be prepared from scratch. He also noted that there had again been no application for an extension of time, and no explanation as to why not. He went on in [46] to say that, given that ETL was seeking an injunction, it should have known that it would have to support the application with evidence "in short order" and that it could and should have planned ahead. He added at [47] that it was important that the evidence was served promptly because "these were injunctive proceedings restraining commercial entities from carrying out their normal business, that should not be done without some evidential basis." He noted at [48] that the only reason for the delay that had been identified by ETL was that Mr Elo was resident in Florida, which was in a different time zone, but he did not consider that a good reason. Finally, he noted at [50] that ETL had not

asked the Defendants to consent to an extension of time, nor had it attempted to effect personal service on 27 April 2022.

25. The judge considered the third stage at length from [52]-[68]. The key points he made in this section of his judgment were as follows. First, the need to focus on compliance was acute where the non-compliance was with a peremptory order. Secondly, by taking the "relaxed and, frankly, reckless approach … of leaving things to and beyond the last minute" ETL was the author of its own misfortune. Thirdly, the time and resources which had already been expended by the parties and the court in dealing with Mr Elo's personal proceedings meant that it was all the more important for the overriding objective to be served by ETL making expeditious progress with these proceedings, but ETL had failed to do so. Fourthly, that was compounded by ETL's failure to notify the Defendants of its application for relief for sanctions when filed, resulting in Bonhams' application and the McGowan Order. Fifthly, although valuable vehicles were at stake for ETL, the issues raised by ETL's claim were not complex ones. Sixthly, the application for relief from sanctions had not been made promptly. The application notice was filed 18 days after the failure to issue the Claim Form in time, 12 days after the Claim Form should have been served and five days after the evidence should have been served. Furthermore, there had been no explanation as to why, having missed the first deadline, ETL had waited until after the second had passed; or why, having also missed the second deadline, ETL had waited until after the third had passed before making the application. Yet further, ETL had not sent the Defendants the draft application notice and had waited six weeks for the Court to seal the application notice.

26. Overall, the judge was driven to conclude that ETL had viewed the dates in the Foxton Order as targets rather than strict deadlines to be complied with. Its defaults were almost wholly unexplained. The Defendants had been prejudiced by the delay and extra costs, in particular for the storage of the Cars, and it was unclear whether those costs could be recovered from ETL. ETL was the author of its own misfortune. In all the circumstances the sanctions imposed on ETL were proportionate to its breaches. The appropriate exercise of the court's discretion was therefore to refuse relief.

The appeal

27. Although ETL relied on eight grounds of appeal, counsel for ETL only pursued the first four of these in his submissions to the Court. I shall nevertheless deal with ground 5, since it was central to Coulson LJ's decision to grant permission to appeal. Before turning to the grounds, it should be noted that none of the eight grounds challenged the judge's assessment that each of ETL's failures to comply with the Foxton Order was serious and significant. Nor did any of grounds 1-5 challenge any of the judge's reasoning with respect to ETL's failure to comply with paragraph 5 of the Foxton Order even though that was sufficient on its own to trigger the sanctions imposed by paragraphs 8 and 9.

28. Ground 5 is that the judge was wrong to hold that there was no good reason for the failure to comply with paragraphs 2 and 3 of the Foxton Order. The reason for both failures was that the Court failed to issue the Claim Form until 19 April 2022, and by then the earliest date upon which it could be served was 21 April 2022. I see no error in the judge's assessment, however. As he pointed out, ETL could and should have anticipated that, unless it was explained, Mr Elo's highly unusual first name might be

queried by the Court. Furthermore, ETL could and should have ensured that the correct fee was stated in the Claim Form. Thus there was no good reason for ETL's failure to ensure that the Claim Form was issued in time. More importantly, there was no good reason for ETL's failure to chase the Court when the Claim Form was not issued in time. It does not even appear that ETL made the Court aware of the unless orders it was subject to. Thus even if the failure to comply with paragraph 2 of the Foxton Order was excusable, the failure to comply with paragraph 3 was not. Still further, as the judge also pointed out, there was no good reason for ETL's failures to notify the Defendants of the delay in getting the Claim Form issued, to seek their consent to a short extension of time for service and to apply for an extension of time if consent was not forthcoming.

29. This takes me to ground 4, which is that the judge was wrong on this point because there was no duty on ETL to correspond with the Court to explain Mr Elo's first name. The judge did not, however, say that there was any such duty. He was considering whether there was a good reason for the deadlines being missed by ETL. His point that one source of the delay could have been avoided by ETL taking a prudent step which it failed to take was one that he was perfectly entitled to make. Moreover, as I have explained, this was not his only basis for finding that there was no good reason for ETL's failure to comply with paragraphs 2 and 3 of the Foxton Order.

30. Ground 1 is that the judge erred in relying upon ETL's failure to effect personal service of the Claim Form. As is common ground, personal service of the Claim Form would not have made any difference to the deemed date of service: see CPR rule 6.14, *Godwin v Swindon Borough Council* [2001] EWCA Civ 1478, [2002] 1 WLR 997 and *Anderton v Clywd County Council* [2002] EWCA Civ 933, [2002] 1 WLR 3174. (By contrast, as is also common ground, personal service would have made a difference when it came to service of the evidence: see CPR rule 6.26.) It follows that the judge was indeed in error in this respect. It does not follow, however, that the judge was not entitled to conclude that ETL had failed to establish that there was a good reason for its failure to serve the Claim Form in time. The judge gave other reasons for that conclusion which were quite sufficient.

31. Ground 2 is that the judge was wrong to hold that ETL's application for relief from sanctions had not been made promptly. Counsel for ETL relied upon the dictum of Simon Brown LJ in *Regency Rolls Ltd v Carnall* [2000] EWCA Civ 379 at [45] that, in the context of CPR rule 39.5, "promptly" means "with all reasonable celerity in the circumstances". Counsel for ETL submitted that it was sufficient for an application to be made within 14 days. There is no basis for that submission. As Simon Brown LJ's statement recognises, promptness depends on the circumstances. Whether ETL applied promptly in the circumstances of the present case was a matter for the judge's evaluation. It cannot be said that his evaluation was plainly wrong. In any event, this was only one of the factors he took into account at stage three of *Denton*.

32. Ground 3 is that the judge was wrong to criticise ETL for failing to send the Defendants an unsealed copy of its application notice since ETL was not under a duty to do so. Again, however, the judge did not say that ETL was under such a duty. His point was that ETL had failed to keep the Defendants apprised of its application either by sending an unsealed copy of its application notice or in any other way, and this was another instance of its unsatisfactory approach to the proceedings. He was perfectly entitled to take that view.

33. For the reasons given above I do not consider that the judge made any material error in deciding to refuse ETL relief from sanctions.

Lord Justice Stuart-Smith:

34. I agree.

Lord Justice Moylan:

35. I also agree.