Neutral Citation Number: [2014] EWHC 1878 (Ch)

Appeal Ref: CH/2013/703

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE ROYAL COURTS OF JUSTICE
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
Orders of DJ Clarke dated 23 July 2013 and 29 October 2013;
Order of DJ Hart dated 29 November 2013
COUNTY COURT CASE 2312 – 2012
Appeal ref: CH/2013/703

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17th June 2014

Before:
HENRY CARR QC
(sitting as a Deputy Judge of the High Court)

BETWEEN:

SIMON PATTERSON
(THE TRUSTEE IN BANKRUPTCY OF GEORGE SPENCER)
Claimant and Respondent

and

(1) GEORGE SPENCER
(2) LINDA SPENCER
(3) BERYL DELORES LENNON
(4) WINSTON BANCRAWF SPENCER
(5) GARY ANTHONY SPENCER
Defendants

(6) BEVERLY MONICA SPENCER
Defendant and Appellant

Mr Nicholas Macleod-James (instructed directly) for the Appellant
Mr Nigel Owen of Nigel Owen & Co for the Respondent

Hearing date: 4th June 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Introduction

1. This is an application for relief from sanctions made pursuant to CPR 3.9(1) by the Appellant, Beverly Spencer. This matter arises in the following circumstances. On the 29th October 2013 DJ Clarke heard an application made by the Trustee in Bankruptcy of the First Defendant ("The Trustee") for a declaration that the transfer by the First Defendant of the property at [an address], Chesterfield, to the Third, Fourth, Fifth Defendants and the Appellant constituted a transaction defrauding creditors, contrary to Section 423 of the Insolvency Act 1986 and/or was a transaction at an undervalue, contrary to Section 339 of the Insolvency Act 1986 ("the Underlying Application"). The Trustee also applied for an order that the First and Fourth Defendants and the Appellant be debarred from defending the action because of their breach of an Order dated 21st May 2013.

2. By an Order dated 29th October 2013 DJ Clarke ordered that the First and Fourth Defendants and the Appellant be debarred from defending the Underlying Application and granted, amongst other things, a declaration in the terms sought by the Trustee. By an Order dated 28th November 2013, DJ Hart dismissed an application to set aside the Order of 29th October 2013. On the 20th December 2013 the Appellant filed an Appellant's Notice seeking permission to appeal from, amongst other Orders, the Orders of 29th October and 28th November 2013.

3. By an Order dated 16th January 2014, Arnold J ordered that an appeal bundle (to include the transcript of the Judgment of DJ Clarke given on 29th October 2013) be filed within 28 days. An appeal bundle was filed on 14th February 2014 that included a transcript of the hearing before DJ Clarke but not a transcript of the Judgment. By an Order dated 4th March 2014 Arnold J ordered that unless the Appellant, by no later than 21st March 2014, filed transcripts of the Judgment of DJ Clarke dated 29th October 2013, the appeal should stand struck out as of midday on the second working day after the 21st March 2014.

4. A transcript of the judgments was not filed by 21st March 2014. Accordingly, on the 2nd May 2014 the Appellant was informed by letter from Chancery Appeals that Arnold J had noted that because of non-compliance with the Order of 4th March 2014 the appeal had been struck out, and that if she wished to pursue her appeal she would need to file an application for relief from sanctions.

5. At the hearing before me the Appellant was represented by Mr Macleod-James and she was present at the hearing. Mr Owen, a solicitor of Nigel Owen & Co, appeared on behalf of the Trustee. Although the Trustee was not formally a party to this application I invited Mr Owen to make submissions.

Relief from sanctions – CPR 3.9(1)

6. The Rule provides as follows:

> "3.9
> (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case so as to enable it to deal justly with the application, including the need –
>
> a) for litigation to be conducted efficiently and at proportionate costs; and
> b) to enforce compliance with rules, practice directions and orders
>
> (2) An application for relief must be supported by evidence."

7. CPR 3.9(1) was considered the Court of Appeal in the landmark Judgment in *Mitchell v Newsgroup Newspapers Ltd [2013] EWCA Civ 1537; [2013] 6 Costs LR 1008, CA.* In particular the Master of the Rolls, who gave the Judgment of the Court, referred to the matters which the Court was required to consider under CPR 3.9(1)(a) and (b), and stated that this reflected a deliberate shift of emphasis. He said:-

> "These considerations should now be regarded as of paramount importance and be given great weight. It is significant that they are the only considerations which have been singled out for specific mention in the Rules" (paragraph 36)

8. The Master of the Rolls then referred, at paragraph 37, to the requirement under CPR 3.9 for the Court to consider "all the circumstances of the case, so as to enable it to deal justly with the application." He said:-

> "The reference to dealing with the application justly is a reference back to the definition of the "overriding objective". This definition includes ensuring that the parties are on an equal footing and that a case is dealt with expeditiously and fairly as well enforcing compliance with rules, practice directions and orders. The reference to "all the circumstances of the case" in CPR 3.9 might suggest that a broad approach should be adopted. We accept that regard should be had to all circumstances of the case. That is what the rule says. But (subject to the guidance that we give below) **the other circumstances should be given less weight that then two considerations which are specifically mentioned.**" (emphasis added).

9. At paragraph 38, the Master of the Rolls referred to his implementation lecture on the Jackson Reforms delivered on 22nd March 2013, which made clear that there was now to be a shift away from exclusively focusing on doing justice in the individual case. Amongst other passages from that lecture, he cited the following, which was endorsed by the Court of Appeal at paragraph 39:-

> "26. The revisions to the overriding objective and to rule 3.9, and particularly the fact that rule 3.9 now expressly refers back to the revised overriding objective, are intended to make clear that the relationship between justice and procedure has changed. It has changed not by transforming rules and rule compliance into trip wires. Nor has it changed it by turning the rules and rule compliance into the mistress rather than the handmaid of justice. If that were

> the case then we would have, quite impermissibly, rendered compliance an end in itself and one superior to doing justice in any case. It has changed because doing justice is not something distinct from, and superior to, the overriding objective. Doing justice in each set of proceedings is to ensure that proceedings are dealt with justly and at proportionate cost. Justice in the individual case is now only achievable through the proper application of the CPR consistently with the overriding objective.
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> 27. The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgement that the achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations. Those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds. But more importantly they serve the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the court enables them to do so."

10. The Court of Appeal set out guidance as to how the new approach should be applied in practice at paragraphs 40 to 46 and made clear that the new, more robust approach will mean that from now on relief from sanctions should be granted more sparingly than previously. However if the nature of the non-compliance could properly be regarded as trivial the court would usually grant relief provided that an application was made promptly. Furthermore there could be a good reason for the default, likely to arise from circumstances outside the control of the party in default.

11. The Master of the Rolls summarised the position at paragraph 46:-

> "46. The new more robust approach that we have outlined above will mean that from now on relief from sanctions should be granted more sparingly than previously. There will be some lawyers who have conducted litigation in the belief that what Sir Rupert Jackson described as "the culture of delay and non-compliance" will continue despite the introduction of the *Jackson* reforms. But the Implementation Lectures given well before 1 April 2013 were widely publicised. No lawyer should have been in any doubt as to what was coming. We accept that changes in litigation culture will not occur overnight. But we believe that the wide publicity that is likely to be given to this judgment should ensure that the necessary changes will take place before long."

The facts of this case in more detail

12. DJ Clarke observed at paragraph 2 of her Judgment of 29th October 2013 that this matter had a long history. The following is a summary of the facts that she set out in her judgment.

13. In the 12th February 2013 DJ Hart debarred the Third and Fifth Defendant from defending the Underlying Application for breach of her Order dated 23rd January 2013

(the Second Defendant is deceased). On 12th February 2013 the Underlying Application was set down for a two day hearing to consider the defences of the Fourth and Fifth Defendants and the Appellant. An Order was made by DJ Hart that the First Defendant might attend by video link because it was claimed that he was too ill to travel from London to Chesterfield.

14. On 14th May 2013 the hearing of the Underlying Application was ineffective. Only Counsel for the Trustee and the Appellant attended. In documents filed by the Third Defendant, the First Defendant was said to be in Jamaica and unable to return in time for the hearing as he was too ill. A letter from a doctor at the Edgewater Medical Centre in Jamaica dated 13th May 2013stated that he was suffering from a "chronic degenerative brain disorder". The Appellant, through her Counsel, expressed the belief that the First Defendant had no capacity to be involved in the proceedings. Accordingly on 14th May 2013 DJ Clarke ordered the First Defendant to provide a full medical report of his capacity to give evidence and take part in the proceedings. She ordered that if the report advised that that First Defendant did not have the capacity to give evidence then efforts should be made for a litigation friend to be appointed. The report was required by 28th June 2013.

15. On 23rd July 2013 DJ Clarke reviewed the file and found that no such report had been filed. A letter from the Appellant stated that the First Defendant was back from Jamaica. He wanted his English GP, Dr Andrews, to prepare the report. However, the Appellant's letter stated that when Dr Andrews was approached he indicated that a referral to the mental health team would be necessary (as he was not willing to provide a capacity report) and that referral might take 2-3 months. No documentation from Dr Andrews himself was provided.

16. By an Order dated 23rd July 2013 (against which the Appellant seeks permission to appeal out of time) DJ Clarke set out a new timetable and ordered that the First and/or Fourth Defendant and/or the Appellant file and serve evidence of the referral to the mental health team by 5th August; then evidence of the appointment date fixed for assessment by 2nd September; followed by written confirmation of the First Defendant's attendance at the assessment on the notified date within 3 days of the assessment; and that the First and Fourth Defendant and/or the Appellant file and serve a copy of the completed assessment report no later than 28th October 2013. She ordered that:

> "the Fourth Respondent and Sixth Respondent [the Appellant] shall ensure that the timetable set out in paragraph 1 of this order is met. Any failure to meet any such timetabled date shall be notified to court promptly by way of witness statement signed with a statement of truth and attaching evidence in support.....setting out the failure, the reasons for it, and proposed next steps to ensure the overall timetable can be met with as little delay as possible."

17. No evidence of the referral of the First Defendant to the mental health team nor any evidence of an assessment was provided by the dates specified by DJ Clarke. Accordingly, the Trustee made an application on the 3rd September 2013 seeking an "unless order". On 29th October 2013, by which date an assessment report had still

not been filed. Therefore the Trustee made an application asking for the First and Fourth Defendants and the Appellant, the only respondents who still had an active role in the proceedings, to be debarred from defending the application.

18. The First and Fourth Defendant and the Appellant did not attend the hearing on 29th October. DJ Clarke received a letter from the Appellant explaining that she was unwell, that she had recently had a major operation and had been advised not to be in public places for at least a year. The letter stated that she would be hospitalised from 27th October and could not say when she would be well enough to be discharged. As to the Order of 23rd July 2013, she explained that she had no control over the medical procedures, timetable or actions of her father, the First Defendant, so she could not meet the obligations imposed by that Order.

19. At paragraph 12 of her Judgment of 29th October, DJ Clarke noted that the only person in the proceedings who had raised capacity issues about the First Defendant was the Appellant, albeit that she had done so by producing to the Court the letter from the Edgewater Medical Centre in Jamaica, obtained by the Third Defendant, who by that time had been debarred from defending the proceedings. In May 2013 the Appellant also produced to the Court a previous report of a Dr Ali from the GP's practice to which the First Defendant was registered. DJ Clarke observed that Dr Ali's letter did not raise any issues about capacity and the health problems that listed, such as angina, were not relevant to capacity. The First Defendant himself, in spite of having been copied with all the documents, including the May and July 2013 Orders, had not raised any capacity issues. Furthermore the Fourth Defendant had filed a witness statement dated the 26th September 2013 that purported to raise matters of relevance to the Underlying Application (and in fact supported the Trustee's position) but did not touch upon the capacity issues raised by the Appellant.

20. DJ Clarke summarised the position as follows at paragraph 17-18:-

> "17. Where does that leave this court? A great deal of court time has been spent trying to deal with issues raised about the First Respondent's health. The hearing listed in January 2013 was adjourned because the Sixth Respondent told the court the First Respondent was too unwell to travel to London. Shortly thereafter the First Respondent went to Jamaica for a long holiday, despite being, apparently, unable to travel from Chesterfield to London. The hearing listed in May 2013 was adjourned because the Third Respondent (already debarred from defending) and the Sixth Respondent raised issues of the First Defendant's capacity. The Fourth Respondent has made it clear that he has no intention of involving himself in capacity discussions although he may be best placed to understand what his father's capacity is. He has made it clear that he has no intention of defending the Trustee's application by that witness statement now before me.
>
> 18. I believe I have given the Sixth Respondent quite a few indulgences, in terms of allowing her time to provide proper information about her father's capacity or, at the very least, to provide information that her father has been

> referred for somebody to provide to look at his capacity and report to the court and no such information has been provided..."

21. At paragraph 20 she noted that in spite of her various orders she had received no proper medical information about the First Defendant's capacity. At paragraphs 21 to 22, DJ Clarke recognised that the Appellant had health issues and that she had undergone a major operation. She noted a letter from a Doctor Sandra Teare dated 25th October 2013 that the Appellant would be unable to attend the court hearing on the 29th October. However, that letter did not accord with the Appellant's letter saying that she had been *"advised not to be in public places for at least a year"*. It merely indicated that she would be unable to attend a Court hearing in the week following the letter. In all the circumstances she formed the view that the Appellant was seeking simply to delay a decision on the Underlying Application and refused rejected the request of the Appellant to adjourn it (again).

22. At paragraphs 24 to 25 she considered whether the Appellant should be debarred from defending the action. She stated as follows:

> "24.....I am satisfied that the Sixth Respondent should be debarred form defending this action. Everything I have seen from her, suggests to me that, although I accept that she is not in good health at the moment, either I am not being told the whole story about things or she is trying to dig her heels in and delay the Underlying Application reaching a conclusion.
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> 25. I have given her every opportunity to try and move this forward and deal with the issues about the First Defendant's capacity. She has not taken them. She has not kept the court informed of what she has done, and everything seems to fall back to the excuse of her health. I believe that she is not well, but there is more that she could have done and that she has not done. The court has granted her numerous indulgences. These have resulted in adjourned hearings, wasted court time, delay and increased cost to the Trustee. The Sixth Respondent has now responded by saying she can't appear in public for a year. This cannot be right. I am satisfied that in the face of repeated breached orders that debarring the Sixth Respondent from defending, although draconian, is the proportionate and right thing to do."

The present application

23. Mr Macleod-James made the following submissions in support of the application for relief from sanctions. First, the Order of 4th March 2014 referred to "service upon…" the Appellant. In contrast to an order which specified "service", where Mr Macleod-James stated that postage, rather than receipt, was required, this Order required actual receipt in order to be served. I reject this submission. No part of the CPR was drawn to my attention in support of this submission and I do not consider that the wording of this Order was intended to create an exception to that which is accepted to be the norm. Furthermore, for the reasons given below, I have been unable to conclude that the Appellant did not receive the Order in the normal course of postage, well before the date for compliance had passed.

24. Second, he submitted that the Appellant thought that the transcript of the hearing of 29th October 2013, which had been filed with the Appeal Bundle, was the transcript of the Judgment and she made a simple mistake. She had no motivation not to include the transcript of the Judgment. The Appellant claimed that the Order of 4th March 2014 was not received by her until 19th April 2014, which was well after the date for compliance. Although there was no witness statement to this effect, the Appellant claimed the letter had been accidently delivered to her neighbour and had not been seen by the Appellant until 19th April 2014. This was supported by a letter from the Appellant, and a letter (purportedly) from Mr S Norris, the neighbour. The Appellant also produced copies of two envelopes addressed to Mr Norris which she claimed had been wrongly delivered to her address. Although he did not put it in quite these terms, the essence of Mr Macleod James' submission was that this was a trivial breach, which was outside the control of the Appellant.

25. Third, Mr Macleod-James submitted that I should consider the justice of the case. He submitted that Grounds of Appeal contained in the application for permission to appeal were powerful and that if the Appellant were debarred from seeking permission to Appeal she would be denied access to justice. I consider the second and third submissions below.

26. In answer, Mr Owen stated that his firm had sent 33 letters to the Appellant, only one of which was said not have been received. He also pointed out that it had apparently taken many weeks for the neighbour to show the Appellant the letter, for which there was no explanation. He doubted whether this was a true or complete account. Furthermore he drew my attention to the long history of the proceedings and the repeated indulgences which had already been granted to the Appellant, as summarised in the judgment of DJ Clarke.

Assessment

27. It is clear from the Mitchell decision that I must regard the specific considerations referred to in CPR 3.9 as of paramount importance and I must give them great weight. This particular default cannot be viewed in isolation. It is part of a course of conduct by the Appellant described in detail by DJ Clarke whereby the court has granted her numerous indulgences which have resulted in adjourned hearings, wasted court time, delay and increased cost to the Trustee. This is just one more instance of default by the Appellant, the effect of which has been to prevent the litigation from being conducted efficiently and at proportionate cost. The Appellant has demonstrated a persistent failure to comply with the rules and orders of the Court. I have no doubt that delay has been regarded by the Appellant as an end in itself. This cannot be allowed to continue.

28. Necessarily I have regard to the justice of the case. However in all the circumstances I do not consider that it is unjust to deny the Appellant relief from sanctions. The Jackson reform was designed to end a *"culture of delay and non-compliance"*. Such culture would only be promoted if relief from sanctions were given in the present case.

29. As to Mr Macleod-James' specific submissions: In the absence of a witness statement from either the Appellant or her neighbour, I do not accept, on a balance of probabilities the account that the full facts have been provided to the Court. Whilst it is conceivable that this letter was wrongly delivered to the neighbour (although I am unable to conclude that this was the case), no proper explanation has been provided as to why it took so many weeks for it to be given to the Appellant. I do not accept that she did not see the Order of 4th March 2014 well before 23rd March 2014.

30. As to an assessment of the strength of the Grounds of Appeal, I am far from satisfied that this is appropriate on an application for relief from sanctions. However, in case it is relevant, I have carefully considered the Grounds of Appeal. With great respect to Mr Macleod-James, I do not find them at all persuasive and, if the application had been before me, I would have refused permission to appeal. It would be a formidable task to obtain permission to appeal from what was an exercise of discretion by DJ Clarke, supported by detailed and compelling reasons.

31. In conclusion, I dismiss this application for relief from sanctions under CPR 3.9(1) and according the appeal of the Appellant remains struck out pursuant to the order of Arnold J dated 4th March 2014.

32. The parties should try to agree an order consequent on this Judgment. In the absence of agreement I will make an order either on the basis of written submission, or if that is not agreed, at a further hearing.