Neutral Citation Number: [2019] EWHC 3343 (Ch) Claim No.:CH-2018-000283

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

CHANCERY APPEALS (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Tuesday, 19 November 2019

Before:

MR JUSTICE FANCOURT

Between:

MR EARL PATRICK BADEJO Claimant / Appellant

- and -

MR ADEDAYO CRANSTON Defendant / Respondent

MR G. ARMSTRONG appeared on behalf of the **Claimant / Appellant**.

MR M. CLARK (instructed by David Benson Solicitors) appeared on behalf of the **Defendant / Respondent**.

Hearing date: 19 November 2019

Approved Judgment

MR JUSTICE FANCOURT:

1 This is an appeal by Mr Badejo in a claim brought by him for repayment of about £120,000 that he paid to the defendant, Mr Cranston, pursuant to what Mr Badejo says was an option agreement. The parties were preparing for a trial due to start in the County Court at Central London on 10 September 2018. The trial was estimated to last two days, and only involved three witnesses of fact, and only the defendant himself for the defence.

2 On 5 June 2018 the appellant's solicitors were sent a notice of the trial date. As well as informing the parties of the date, 10 September 2018, it stated, as is standard form these days:

> "Unless the claimant does by 4pm on the 13 August 2018 pay the court trial fee of £1,090 or file a properly completed application (i.e. one which provides all the required information in the manner requested) for help with fees then the claim will be struck out with effect from 13 August 2018 without further order and, unless the court orders otherwise, you will also be liable for the costs which the defendant has incurred."

3 That statement gives effect to rule 3.7A(1) of the Civil Procedure Rules, which was introduced in 2017. The same rule provides certain conditions that have to be complied with if relief against sanctions is applied for and granted.

4 The due date for payment of the trial fee was therefore four weeks before the trial, but it was not paid. The claim of the appellant therefore stood automatically struck out. The claimant's solicitor realised his error on the evening of Monday, 20 August 2018. The following day he conferred with his partners and then issued an application for relief against

sanctions on behalf of the appellant on 22 August. It is understandable in the circumstances that the solicitor felt the need to confer with his partners before he was able to prepare the proper application.

5 The application notice that was issued identified the nature of the relief sought, and attached a draft order. It indicated that the applicant wanted to have the matter dealt with at a telephone hearing, and estimated that the hearing would last thirty minutes, though this had not been agreed by the parties. It correctly gave the details of the fixed date for the trial as being 10 and 11 September 2018, and suggested that a district judge should hear the application, and that the respondent should be served with it.

6 The County Court at Central London did not list the hearing as requested. On 6 September, when the appellant's solicitors made enquiry as to what was happening, they were informed by the court that the application would be heard on the first open date after seven days, but that no order had been made adjourning the trial. It appears therefore that in this case the trial had not been removed from the list as a result of the automatic strikeout that had occurred. This indeed was acknowledged in the judgment in the lower court. The trial date was in fact vacated by the court on the following day, Friday 7 September, but the application for relief against sanctions was not heard until 4 October 2018, by HHJ Roberts.

7 The Judge refused relief against sanctions. The appellant accepted in the lower court that non-compliance with the requirement to pay the court fee was a serious matter, but not at the top end of serious breaches, and further accepted that there was no good excuse for it. That meant that the question for the Judge, applying the well-known approach in *Denton v T H White Limited* [2014] 1 WLR 3926, was whether it was just in all the circumstances, in the light of a serious and unexplained breach, to grant relief against sanctions.

8 The appellant argued below that the refusal of relief would be disproportionate, since all the parties were ready for a trial and a claim against the appellant's solicitors for negligence would be a more difficult claim to bring, and could possibly only give rise to a partial recovery of losses. The respondent below relied on the fact that the breach was serious and unexplained, and that the trial date had been lost, and so significant costs, including so-called "hidden" costs, had been wasted; and the respondent pointed out that in the same claim the appellant had previously had to apply for relief against sanctions in relation to the preparation of expert evidence.

9 The Judge set out in his judgment the arguments of the parties, and then gave his decision in the following single paragraph:

> "In this case it is accepted by the claimant that the breach of the court's order was serious and significant, and there was no good reason for it. Whilst I accept the breach was inadvertent and not the most serious, it was a serious breach. Further CPR 3.7A(1)(vii) provides for automatic strikeout if the trial fee is not paid, and therefore it is not open to the claimant to submit that the sanction is disproportionate. Regarding the third stage, I must bear in mind when considering the need to ensure compliance with rules that this was not the first breach of an order of the court by the claimant. Further in my judgment it counts very much against the claimant that the trial date was lost. The loss of the trial date is a matter of great weight. As a consequence significant additional costs and hidden costs have been incurred. I bear in mind that if relief from sanctions is not granted, the claimant would have to sue his solicitors to obtain compensation. However, when balancing all the

> factors in the present case, this does not constitute either in itself or when taken cumulatively a good reason for granting relief from sanctions.
>
> Finally, although the claimant's solicitor applied for relief from sanctions two days after they say they became aware of the breach, the application was not in my judgment made promptly after the breach, and in any event this factor has limited weight in the context of this case."

10 In my judgment the Judge misdirected himself in saying that the appellant could not rely on the criterion of disproportionality in relation to the sanction. In paragraph 13 of his judgment, he had recorded the appellant's submission that it would be disproportionate not to grant relief from sanctions for an inadvertent failure. It seems to me clear that in the paragraph of his judgment that I have just read, the Judge is not referring to whether or not the rule itself is disproportionate in imposing a sanction of automatic strikeout, but is referring to the argument as to whether or not it would be disproportionate to refuse relief.

11 The test, when one reaches the third stage of the *Denton v White* analysis, is whether it is just in all the circumstances to grant relief, and therefore proportionality of the sanction, as compared with the effect of the breach and the consequences of refusing it, must lie at the heart of the analysis. It is inevitably harder for an applicant to say that refusing relief would be disproportionate to the breach where the breach is a serious breach and is unexplained, but the court must assess the justice, including the proportionality, of refusing or granting relief in all the circumstances of the case. It appears to me that the Judge did not appropriately consider the proportionality of the consequences of refusing relief to the nature of the breach because he considered that it was not open to the appellant to argue about proportionality.

12 I also consider that the Judge was wrong in principle to hold against the appellant as strongly as he did the fact that the trial date was lost. In a busy court centre, it may well happen that when an automatic strikeout occurs, a case is removed from the list, the hearing vacated, and another case takes its place. In those circumstances the trial date may well be lost, but the Judge did not say that that was what happened in this case, and indeed it is clear that that did not happen because the appellant's solicitors were told the contrary on 6 September. The case was only removed from the list on 7 September, when the parties were ready for a trial and were seeking to know whether the trial and the application would be heard.

13 The application for relief was issued nearly three weeks before the trial. It identified the trial date, and asked for a telephone hearing. Although the word "urgent" was not used on the face of the application, the purpose of indicating the trial date is so that the court is able to see how soon an application must be heard, and whether it should be heard by the trial judge, either in advance of or at the trial itself. While acknowledging that court staff as well as judges are very hard-pressed and that it may not always be possible to process applications as swiftly as is desirable, that matter should not be held against litigants.

14 If the trial had not been vacated, as was the case, it ought to have been possible to list either a thirty-minute telephone hearing in advance of the trial date, or alternatively to have the matter heard before the trial judge, either in the week before or at the start of the trial. In these circumstances, in my judgment, that should have happened. Had that been done, the trial date would not have been lost. Mr Clark for the respondent acknowledges that if the application had been heard in the week before the trial, or even at the start of the trial, he could not sensibly have opposed it. I consider that concession to be properly made, and it casts particular light on what it was just to do on the facts of this case.

15 Thus, although the failure to pay the trial fee contributed to the loss of the trial date, in that it provided the opportunity for the trial date to be lost, on the facts of this particular case, it was not the cause of the trial being derailed. In view of what I have said about the judge's approach, it is clear that the exercise of his discretion was legally flawed. In those circumstances it is appropriate for this court to exercise the discretion afresh, as both parties agree.

16 The starting point is that the breach was a moderately serious breach, and that there was no proper justification for it. It was a matter of inadvertence. I do not accept that the breach was hardly serious at all. Part of the purpose of the early payment of a trial fee is to enable the listing of cases for trial to proceed in an orderly way, in the interests of all court users. But as has been acknowledged in other cases, it is clearly far from the most serious of the breaches that litigants can commit.

17 Nevertheless there will need to be some countervailing considerations to justify the grant of relief. The relevant factors in my judgment are the following:

1. The promptness of the application for relief. The application was not made immediately but it was made a very short period of time after the appellant's solicitors became aware of their default. I accept that the solicitor had to speak to his partners in order to provide a candid witness statement in support of the application. In those circumstances, given that the default was not known about for six days, I consider that there was no undue delay, and certainly the delay did not itself imperil the trial date.

2. What additional costs and inconvenience are caused to the respondent. In my judgment that should be limited in the circumstances of this case to the consequences of dealing urgently with such an application, not the wasted costs attributable to the loss of a trial date and any adjourned trial. That is because there should not have been in the circumstances an adjourned trial, and it was not the appellant's fault that there was.

3. The question of additional demands on the court's own resources. This is a significant factor. The court service is under considerable strain. A breach of the overriding objective was established because the case did not progress in accordance with the rules, and efficiently. The need for a late application placed urgent demands on the court's administrative and judicial resources.

4. There had been a previous occasion of default by the appellant, and a need to apply for relief against sanctions. However, the appellant was not the only party at fault in that regard. The respondent on one occasion had also previously had to apply for and be granted relief against sanctions.

5. The consequences to the appellant of refusing relief against sanctions.
A valuable claim for money would be lost, together with all the costs incurred in preparing for the trial, and indeed the costs that the appellant would have to pay to the respondent. It is not possible to assess the merits of the appellant's claim beyond saying that it appears cogent as pleaded, but that says nothing about the likely outcome at trial. The claim does involve a substantial amount of money. There is always prejudice, regardless of the size of a claim, and often a substantial costs liability as a consequence where a claim is struck out, or relief

against sanctions is refused. So, there is nothing exceptional about the appellant's case in this respect. Nevertheless the consequences of refusal of relief would be serious, and it is, subject to the next point, a material factor to take into account in considering proportionality.

6. The question of what alternative remedy may be available to the appellant. That clearly will not always apply. A litigant in person who fails to comply with the rules, or a litigant whose solicitors remind him of the need to take certain steps but the litigant fails to do so, will not be able to bring a claim instead against his solicitors. But in some cases there will be an alternative claim.

18 In this case, the apparent loss of the claim against the respondent could be tempered by two matters:

1. The ability of the appellant to bring a new claim, subject to first paying the costs in relation to the claim that has been struck out.

2. The ability to bring a claim in negligence against his solicitors.

19 As for bringing a new claim against the respondent, it appears to me there would be no obstacle in principle given that there has been no determination on the merits of the first claim, however in practise the costs of the first claim would first have to be paid. There may be a limitation issue in part in relation to any payments that were made by the appellant to the respondent before November 2013, but that does not affect most of his claim.

20 The claim that may be brought against the solicitors is of course a harder claim to bring and prove, and would be more expensive for the appellant, and the measure of damages recovered may well be less than the full amount of the claim against the respondent.

21 The effect of refusing relief would be to impose on the appellant a substantial costs liability for all the costs of bringing the first claim, and preparing for trial. The parties' costs budget were in aggregate £72,000. Most of those costs will have been incurred, and perhaps others in addition. The total claim is for £120,000. A consequence of refusing relief would therefore be very significant in terms of diminishing the real value of the appellant's claim. Another consequence of refusing relief is that it is then likely that the court's resources will be further stretched by the bringing of at least one and possibly two further claims by the appellant.

22 If the county court had heard the application shortly before or at the trial, I cannot conceive that if a solicitor's undertaking had been given to pay the trial fee, relief would have been refused, though no doubt relief would have been granted on terms as to the costs of the application and any costs wasted. Those costs would have been significantly less than the budgeted costs of the whole claim. The fact that the application was heard at a time after the trial date had passed is not the fault of the appellant, for reasons that I have given. So, the application should not be judged as one where the breach caused the loss of the trial date.

23 Ultimately, in my judgment, despite the fact that a moderately serious breach was committed without mitigating circumstances, justice is better done in this case by enabling the current action to proceed to a trial, rather than requiring the appellant to start new proceedings for his claim, or alternatively a claim for negligence against the solicitors, or possibly both. Paying all the costs of the current claim, and incurring the cost of funding

two new actions, would in my judgment be disproportionate to the seriousness of the breach and any harm done to the administration of justice or to the respondent that is attributable to the breach, as opposed to being attributable to the court's failure to list the application urgently. So far as prejudice to the respondent is concerned, the respondent would be equally troubled by a new claim that the appellant would be able to bring.

24 Of course in general terms defaulting litigants who have to apply for relief against sanctions may not find themselves in a position where the trial date can be saved. A busy court centre may well vacate the hearing date when it is aware that the trial fee has not been paid. In those circumstances a breach will have caused the loss of the trial date, and that will be a significant factor, as the Judge in the lower court considered it to be, in the exercise of discretion. I do not by granting relief in this case suggest that a prompt application will always be liable to result in relief being granted. In any given case, there may be circumstances that make it unjust to grant relief, particularly if the applicant has previously been in serious breach of directions or rules of the court. Litigants and solicitors are therefore well advised to take no risk with the late payment of court fees. For the reasons I have given, however, I will allow the appeal in this case, with the consequence that relief against sanctions is granted to the appellant. I will hear counsel now on the terms on which such relief should be granted.

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