Neutral Citation Number: [2022] EWHC 1268 (Ch)

Case No: BL-2019-MAN-000080

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester, M60 9DJ

Date: 15/03/2022

Before :

MR JUSTICE FANCOURT
Vice-Chancellor of the County Palatine of Lancaster

- -

Between :

(1) ROY HARRY COLE **(2) BURY VAN HIRE LIMITED** **(3) BURY VEHICLE LEASING LIMITED** **(4) H&A HOLDINGS LIMITED**	**Claimants**
- and -	
(1) ANDREW HOWARTH **(2) MAX HENRY KAY** **(3) JOSEPH TYRRELL**	**Defendants**

- -

- -

MR. JONATHAN DALE (through Public Access) for the **1st Claimant**
The Second to Fourth Claimants not represented
The First Defendant and the Second Defendant in person
The Third Defendant not present or represented

Hearing date: 15 March 2022

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Approved Judgment

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MR JUSTICE FANCOURT :

1. This is an application issued today by Mr Max Kay, the second defendant to this claim, to set aside a judgment against him that was entered on 26th February 2020. The application was first sent to the court as a draft on 10th February 2022 but was not issued or served at that time. Mr Kay did not attend the first day of the trial, for which two different explanations have been given to me involving his health and traffic problems, but he has attended at the start of the second day of the trial to pursue his application.

2. The claim by the claimant against Mr Kay, the second defendant, is based on a guarantee of a loan for £200,000 that was signed by Mr Kay and by Mr Tyrrell, the third defendant, in October 2015. It appears that Mr Kay does not dispute that he signed that guarantee. He refers to himself in the skeleton argument that has been provided in support of the application as being the borrower in connection with the loan. He says the loan was made to him and him alone but it appears that what may be meant by that is simply that he accepts that he signed a guarantee document in relation to the full amount of the loan.

3. What would be Mr Kay's defence is that he suggests that, by a series of monetary payments and the transfer of other property over a period of three to four years from 2015, Mr Cole has effectively been repaid. Some detail in that regard is provided in a witness statement that Mr Kay prepared in connection with the trial, or someone on his behalf prepared, which is dated 10th February 2022. However, Mr Kay has not been an active defendant in this claim since judgment was granted in February 2020.

4. He, frankly, accepts that he knew about the judgment about three or four weeks after judgment was entered when he found bailiffs attending at his property seeking to execute it. Although it may make no significant difference, it also is clear to me from a note recorded by the court staff on the CE file that Mr Kay attended the court building two days before the hearing of the summary judgment application asking for assistance and indicating that he wanted to apply to have that hearing adjourned. However, no application was made and Mr Kay did not attend the hearing of the application when judgment was entered.

5. Under paragraph 8 of Practice Direction 24 in the Civil Procedure Rules, the following is provided:

> "8.1 If an order for summary judgment is made against a respondent who does not appear at the hearing of the application, the respondent may apply for the order to be set aside or varied.
>
> 8.2 On the hearing of an application under paragraph 8.1 the court may make such order as it thinks just."

The court is therefore given a very wide discretion. In my judgment, that discretion is to be exercised by analogy with the position where a defendant applies to set aside a default judgment which has been regularly entered. On such an application the court requires to be satisfied that the defendant has acted promptly in seeking to set aside the judgment and, further, that there is a real prospect of successfully defending the claim.

6. There is no question but that Mr Kay has failed to act promptly in making his application to set aside the summary judgment. On his own case, he knew about the judgment against him by about the end of March 2020. He accepts that he put his head in the sand. However, it is clear that he is in communication with Mr Howarth about the substantive issues in this case and that he was aware that the proceedings were nevertheless continuing and moving towards a trial due to take place in March 2022. It is in connection with Mr Howarth's proposed defence of the claim, I have no doubt, that Mr Kay prepared, with the assistance of a solicitor, the documents that were filed on the 9th or 10th February 2022 seeking to set aside the judgment and provide evidence at the trial. When I asked him about why the application had been made so late, Mr Kay said that he was not so much bothered about the judgment. What really mattered to him was that he wanted to be a witness and give evidence in this case.

7. The fact that the application was not made promptly and the consequences of the lateness of the application are illustrated when one considers the question whether or not Mr Kay has a valid defence, or may have a valid defence to this claim, the only defence suggested being that the amount of the loan and any interest due has been repaid. The content of Mr Kay's witness statement explaining how it was that repayment took place becomes highly material. There is some detail provided about a transfer of a valuable car, about the transfer of a block of nine freehold properties worth a substantial amount of money, and six individual payments in cash that are alleged to have been made.

8. However, Mr Kay has been, so to speak, out of this litigation since March 2020 and, therefore, has not given disclosure in the way that he would have done as a defendant had he remained an active participant. Further, Mr Cole, the claimant, has perfectly properly not addressed in his evidence, or in his preparation for this trial, questions of whether or not Mr Kay repaid the loan in the way that is now alleged in Mr Kay's witness statement. If those matters were to become live, I have no doubt that it would be necessary to adjourn this trial so that the appropriate processes of disclosure and preparation of witness evidence in relation to all those issues, which are not otherwise live issues at this trial, could be prepared and dealt with justly between the parties.

9. There being no good explanation for why the application to set aside the judgment was only issued today, I am unable to accede to that application. It is clearly far too late at this stage to allow Mr Kay now to seek to defend because it would mean that the trial could not proceed fairly at this stage. The court only in very rare circumstances adjourns the date of the trial when the parties are otherwise prepared for it and able to proceed. My rejection of Mr Kay's application is therefore on the basis that it is simply too late now to allow it. I do not make any decision as to whether or not what he says is a valid defence to the claim against him is true or false. It is simply too late for those matters to be fairly investigated at the trial now and I therefore refuse the application for those reasons.

This judgment has been approved by Fancourt J.

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