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NEUTRAL CITATION NUMBER: [2023] EWHC 2997 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

No. PT-2022-000711

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 26 October 2023

Before:

HIS HONOUR JUDGE PAUL MATTHEWS

(Sitting as a Judge of the High Court)

B E T W E E N :

PINCUS — Claimant

- and -

SINGH & ANOTHER — Defendants

MS C BURZIO appeared on behalf of the Claimant.

MR J MEETHAN appeared on behalf of the Defendants.

J U D G M E N T

JUDGE PAUL MATTHEWS:

1 This is an application by the defendants by notice dated 22 May 2023 for an order to set aside two default judgments, one against each of the two defendants. They were entered in February of this year. The matter arises in an action between the freehold owner of 21 Millicent Road, Leyton, and two defendants. These are the freehold owner of the next door property, 19 Milicent Road, and a Mr Sandeep Singh who appears to be concerned in the management of the freehold owner.

2 The claim form in this matter was issued on 19 August 2022. At that time the sole defendant was named as Sonil Singh. In that claim form a declaration was sought as to the claimant's proprietary right, and claims were made for damages for interference with a right of access and for an injunction to prevent a continuation of the interference. Ultimately, it turned out that Sonil Singh was an incorrect name. The correct name for the defendant, now first defendant, is Sandeep Singh Johal. The freehold owner of 19 Milicent Road was added as second defendant at a later stage.

3 The claim progressed, and particulars of claim were served. Eventually, in September 2022, amended particulars of claim were produced. On the same day an application was made by notice for an interim injunction against the defendants. That application was heard by Mr Justice Miles on 20 September 2022, when he granted an injunction. I will come back to the terms of that injunction.

4 In substance, the claim is about a concrete platform which lies on the defendant's land at 19 Millicent Road, but provides a means of access to the claimant's own property at 21 Milicent Road. The concrete platform is in effect a ramp leading from no 21 to no 19. This enables the occupiers of no 21 to unload goods onto the ground at no 21, and take them up

the ramp over no 19 to the side entrance to the claimant's property. This lies on the boundary between nos 19 and 21, with the entrance facing no 19. The claim had arisen because the defendants appeared to be removing, or at any rate damaging, part of that ramp in front of the entrance to the defendant's property. So, as I say, an application was made for the relief which I have indicated. The judge's order on 20 September said at paragraph 5:

> "The respondent must, on or before 1 November 2022, reinstate the loading platform at 19 Millicent Road, Leyton, E10 7OG that lies adjacent to the flank wall of 21 Millicent Road, Leyton E10 7LG ('the loading platform') to the width of the original foundations and to a distance of 13 feet in length as measured from the southwestern corner of the building at 31 Millicent Road that is shown at point B on the plan accompanying the transfer of part of 21 Millicent Road dated 28 August 1987 and made between HJ Victor Limited and David and Valerie Cornish and as described in the second schedule to that transfer".

5 Paragraphs 6 and 7 of the order then say:

> "6. Having complied with paragraph 5 of this order, the respondents must not,
>
> > (a) damage, destroy or otherwise interfere with the structure of the loading platform; or
> > (b) obstruct or interfere with the claimant's right of way over 19 Millicent Road including the loading platform and including but not limited to any works, behaviour, conduct or activities".
>
> 7. This order shall continue until the conclusion of the trial in these proceedings or further order whichever may be earlier".

I do not think I need to read any more of the order for the moment.

6 Following that order, a number of meetings took place. Eventually, the tenant being dissatisfied with what was happening, the claimant entered judgment in default on 15 February 2023 this year. There was one judgment against each of the two defendants. It is to be noted that the claimant wrote at that time to the court to say that the claimant was giving up the claim to declaratory relief which was in the original claim. However, the claimant made a *request* for the default judgments under rule 12.4(1) rather than an *application* for such judgments under rule 12.4(3). The difference is that, if a claimant wishes to obtain a default judgment for any remedy other than money, the claimant must make an application to the court, to be decided by a judge

7 The significance of this in the present case is that there was still some relief which was not purely for a money sum or for damages, because there was also a claim for injunctive relief, both positive and negative. In the present case, therefore, strictly speaking, there should have been an application to the court under rule 12.4(3) rather than a simple request to court staff under rule 12.4(1). That said, it appears that the master did consider the case, and directed that default judgments should be entered. As I say, that was on 15 February this year. The defendants, rather surprisingly, took until 22 May to apply to the court by notice for an order setting aside those default judgments. I will have to come back to the question whether that was a prompt application, because that is a matter to which the court is required to pay particular attention.

8 Again surprisingly in the circumstances, there was no witness statement filed in support of that application. Instead, the defendants rely simply on the evidence set out in the usual paragraphs in box 10 of the application notice which reads as follows:

> "This application seeks to set aside the judgment against both defendants on 15 February 2023. Letters from the claimant's solicitors on 13 and 16 January 2023

contended that the defendants' appointed expert, Mr Charalambous, was of the view that his advice had not been followed. The defendants' solicitors sought to confirm the position with Mr Charalambous who stated that:

> 'I can confirm that the front wall which was built in a single skin of brickwork was taken down and rebuilt as a brick on edge solid wall. This was as agreed by the surveyors. The remainder of the slab was broken out and repoured as per the request of Dr Antino'".

I interpolate here that Dr Antino is the claimant's surveyor. Mr Charalambous continued:

> "'I did not say that I was of the view that my advice had not been followed'".

9 Box 10 of the application notice goes on:

> "The defendants' solicitors e-mailed the claimant's solicitors to inform them that the works to restore the platform at 21 Millicent Road, Leyton, E10 7OG, as per the order of the Honourable Mr Justice Miles on 20 September 2022".

10 Then there is a full stop. I must assume that some words are missing such as "have now been completed" or something to that effect. The email asked the claimant's solicitors to confirm this. The claimant's solicitors responded that their surveyor was preparing a report. However, at that date this had not been received. Again, I interpolate to say that report was actually dated 3 July, so it was not in existence at the date of this applications.

11 The last paragraph of box 10 reads:

> "To allow these judgments to stand it would be unjust to defendants as the defendants have clearly complied with the injunction and reinstated the platform to the degree required. The defendants therefore request an order setting aside the

judgments against both defendants under CPR 13.3(1)".

12 That is the application to set aside, and the evidence in support of it. What is perhaps even more surprising than the lack of a witness statement, and simple reliance on box 10, is that no draft defence has ever been filed, even today. This is an application which was made three months after the default judgments were entered, and we are now some five months further on. Yet there still is no draft defence. As far as I can see from the documents the only indication of any kind of defence in box 10 itself is the assertion that the works required by the judge, if it actually is an assertion, had been completed, and that it would be unjust not to set aside the default judgments.

13 However, ingeniously, Mr Meethan, on behalf of the defendants today, has raised a pertinent question. That is the question of causation of loss. He says, in relation to the default judgments for damages to be assessed, that that requires proof of some loss, and it is perfectly possible that, on the assessment of damages the claimant is unable to prove any such loss. For example, he makes the point that the claimant is not actually in occupation of the property because it is let to a commercial tenant. Therefore, Mr Meethan says, there is even a question as to whether the right claimant is involved in the litigation. So, he says, there is a real prospect of success in putting these points forward. Therefore, there is a defence with a real prospect of success. That is the submission.

14 I turn to the relevant rules. CPR rule 13.2 sets out the cases where the court must set aside a default judgment. It says this:

> "The court must set aside a judgment entered under Part 12 if the judgment was wrongly entered because ..."

Then there are three cases (a), (b) and (c). The only one to which I need to refer in this

connection is:

> "(c) The whole of the claim was satisfied before judgment was entered".

That is the case where there was nothing left of the claim by the time the judgment was entered. But that is not this case.

15 Rule 13.3 deals with cases where the court has a discretion to set aside or vary judgment entered under Part 12. Rule 13.3(1) says this:

> "In any other case, the court may set aside or vary a judgment entered under Part 12 if --
>
> (a) the defendant has a real prospect of successfully defending the claim; or
>
> (b) it appears to the court that there is some other good reason why --
>
> (i) the judgment should be set side or varied; or
>
> (ii) the defendant should be allowed to defend the claim."

16 Rule 13.3(2) provides:

> "In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly".

I make the point here that the focus of Mr Meethan's submission is directed to rule 13.3(1)(a), that the defendant has a real prospect of successfully defending the claim. It is not directed at rule 13.3(1)(b).

17 As I mentioned a few moments ago, there may have been an error of procedure in the present case in proceeding by way of request under rule 12.4(1) instead of by application

under rule 12.4(3). It may be in this particular case that the result would have been the same. This is because it appears that the master actually looked at the papers, and decided that it was appropriate to enter judgment. It may be that this very point was considered at the time. But I do not know. However, the question is whether this error of procedure makes any difference anyway. It might have been argued, though in the event it was not, that by, adopting the request approach, the claimant was abandoning all claims except the claim to damages, the money claim. As I have already said, the claimant had, in fact, informed the court that *declaratory* relief was no longer being pursued. But nothing was being said about the *injunctive* relief.

18 I was referred to the decision of Tugendhat J in the case of *Robins v Kordowski* [2011] EWHC 1912 (QB). In that case, a rather similar problem arose. The proceedings began thus:

> "9. On 11 March 2011 the Claimants commenced proceedings [libel] against Mr Kordowski and Mr Smee claiming damages and an injunction. On 14 March the proceedings were served, and on 17 March there was an acknowledgement of service. The Particulars of Claim are dated 11 March. The Claimant sought an interim injunction. On 30 March 2011 that application came before Henriques J. Following a hearing which I am told lasted a day, he granted an injunction restraining publication of the words complained of or any similar words defamatory of the Claimants until trial or further order."

19 Then going back to paragraphs 5 and 6:

> "5. There are now before the court two application notices. By an application notice dated 7 June 2011 Mr Kordowski applies to set aside a judgment for damages to be assessed. It was dated 12 April 2011 and entered against him in default of Defence in

the libel proceedings brought against him by the Claimants."

6. By an application notice dated 27 June 2011 the Claimants ask for summary disposal of their libel claim against Mr Kordowski, in accordance with Section 8 of the Defamation Act 1996 ('the Act'). Although they have already obtained judgment in default of Defence, the draft order includes an application for judgment to be entered against Mr Kordowski under section 8 of the Act. The Claimants also ask for relief in the forms of: a declaration that the words published or caused to be published by the Defendants were false and defamatory of the Claimants; publication of a suitable correction and apology; damages and an injunction. These are the forms of relief provided for by section 9(1) of the Act."

20 Then I turn to paragraphs 55 and following:

"55. Mr Crystal [counsel for the defendants] submits that, by using the procedure in part 12.4(1) instead of 12.4(2) ..."

I think that is a mistake for 12.4(3).

"… the Claimants have irrevocably abandoned their claims for any relief other than the relief by way of a money claim. He submits that there is accordingly no jurisdiction to grant relief by way of summary disposal under section 8.

56. I reject this contention. In *Loutchansky v Times Newspapers Limited* … [2002] QB 783, the court [that is the Court of Appeal] considered the application of section 8 of the Act in circumstances where the judge at first instance had given judgment for the Claimant with damages to be assessed. It was argued that, following that judgment, the court had no jurisdiction to make an order under section 8 of the Act. In paras 93 to 99 the Court of Appeal rejected that submission".

21 I jump over some words, paragraph 57 says:

> "The same reasoning must apply where the judgment on liability is one that has been entered in default of defence.
>
> 58. Moreover, I would reject Mr Crystal's interpretation of CPR Part 12 on the ground that it leads to an unnecessary and unjust result. The overriding objective in part 1.1 provided 'these rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly'. It goes to say:
>
> > '1.2 The court must seek to give effect to overriding objective when it
> >
> > …
> >
> > (b) interprets any rules.'
>
> 59. It would be plainly unjust to interpret Part 12.4 to the effect that by making the application by request, instead of by application under Part 23, the Claimant must be held to have irrevocably abandoned their claim for relief other than money damages. In my judgment the effect of the Claimants having made a request under Part 12.4(1) is that, if they wished to pursue their other claims for relief, they had to make an application to the Court. That is what they have done, pursuant to section 8 of the Act.
>
> 60. In any event, as Mr Singla submits, where there has been an error of procedure, Part 3.10 gives the court power to make an order to remedy the error. If I were wrong on the interpretation of Part 12, I would make an order setting aside the judgment in default, and substituting an order under section 8 of the Act (also on the ground that the defence has no realistic prospect of success). It is to be recalled that there has since 30 March been in force the injunction granted by Henriques J, and

until Mr Crystal thought of this point last night (it is not in his Skeleton argument) it had not occurred to anyone that the Claimants had abandoned their claim for an injunction".

22 In that case, as in this, because an error of procedure may have occurred, the claimant has preceded by way of a request for a default judgment rather than by way of an application under Part 23. Nevertheless, the claimant was not to be taken to have abandoned the claim to injunctive relief in the claim form. To his credit Mr Meethan did not seek to argue to the contrary. Instead, he pointed to the different factual context in which that judgment was given (in a libel claim, and in relation to section 8 of the Defamation Act). But I do not think that the principle can be different in our case.

23 I turn to look at the factual background against which I have to decide this application. As I have said, on 20 September 2022, there is the order of Mr Justice Miles requiring works to be done by 1 November last year. That is a period of six weeks, which ought to have been enough time. However, it is clear that the works were not done by then. In fact it is clear that they had not even been started by then.

24 On 5 December 2022, there is an email from Mr Charalambous, the defendants' surveyor, to Dr Antino, the claimant's, which said that the works had not yet been done. There is then an email from Dr Antino, dated 21 December last year, to Mr Charalambous. This complains that what is being proposed does not involve reinstating the platform, which is what was ordered by the judge. There is then a further email from Mr Charalambous at some point before 17 January 2023 from which an excerpt has been included in box 10 of the application notice of 22 May 2023. That is the excerpt that reads:

> "I confirm that the front wall, which was built in a single skin of brickwork was taken down and rebuilt as a brick on edge solid wall. This was agreed by the

> surveyors. The remainder of the slab was broken out and re-poured as per the request of Dr Antino. I did not say that I was of the view that my advice hadn't been followed".

We do not have the full email in the bundle, and so we do not know what else it says.

25 On 24 January 2023, Dr Antino emailed Mr Charalambous. The terms of that email are of some importance. It reads as follows:

> "I hope you are well. Please find attached photographs which have been taken by my client regarding the concrete works undertaken by your client's contractors. I will be very surprised if you were to suggest that this is acceptable work. I think the standard is deplorable, it is not acceptable to my client or myself".

26 The reply to that by Mr Charalambous to Dr Antino is sent about 25 minutes later, and it reads:

> "Thank you for your email but I am struggling to decipher what is being shown in the photos/report. They are very grainy. I haven't been to site to inspect the works myself. I have been sent a photo, albeit from an angle showing the front wall and not the entirety of the platform. I note that the slab has been broken out to the extent you had requested and that the wall in front is now a 9-inch brick on edge. When are you going to site to inspect?"

27 I interpolate here to say that it appears from the earlier documents, which I have not read out, that the first attempt to reinstate the platform involved building a thinner brick retaining wall. But subsequently this was agreed to be removed, and rebuilt as a 9-inch brick edge. That is the reason for the specific reference in Mr Charalambous's email.

28 As I say, on the 24 January, Dr Antino says the standard of work in his view is deplorable,

and Mr Charalambous says that he has not actually been to the site, he has only seen a photograph. The very next day, on 25 January, an email is sent from the defendants' solicitors to the claimant's solicitors saying:

> "Further to our email below, we are advised that the works have been completed. Please confirm that the matter is now closed".

29 The claimant's solicitors wrote back the same day effectively saying No, it is *not* closed. What they said was:

> "We are instructed by our client that some works have been completed at Millicent Road. However, the quality and standard of the works is far from satisfactory. We have instructed our surveyor to prepare a report relating to the same. Our client is not prepared to accept shoddy workmanship which in itself represents a breach of the Court's order, it being implicit but obviously clear that the platform had to be reinstated to an acceptable standard. We are instructed by our client to seek to go back before the Court asking for the order to be varied to permit our client to reinstate the platform in a proper workmanlike fashion, the costs of this to be paid by the Defendants. We will revert to you about this once we have our surveyor's report. In the interim, we would suggest that you advise your clients of their failings. This represents a final opportunity for them to remedy the position".

30 The next important thing is that on 15 February the claimant obtained the judgments in default. More than three months later, in May, the defendants issue an application to set aside the default judgments. Then, some six weeks or so later, on 3 July 2023, we have the report of Dr Antino. This report sets out what Dr Antino calls the historical background and narrative and, with one exception, it is not necessary for me to go through that. But I will simply point out that Dr Antino says, on page 3 of the report, in the 4th paragraph:

> "The works undertaken on 25.11.2022 were defective and following my inspection there was concern as to the adequacy of the works. Historically there had been a 225 mm (9-inch) wall acting as a support for the raised platform, but this had now been reconstructed in 112.5 mm (4½ inches) single skin brickwork which was unacceptable. This was brought to Mr Charalambous attention and following a further meeting he agreed that the works were inadequate. The brick wall subsequently demolished and reconstructed in 225 mm (9-inch) double skin brickwork".

So that confirms the point which I made a few moments ago.

31 What the surveyor then says is this:

> "The works progressed with the backfilling of the ground and the pouring and levelling of the concrete platform. There were also concerns regarding the adequacy of these works. I undertook a further inspection on 31.01.23 and noted the following concerns:
>
> (1). The incorrect levels of the concrete and the manhole cover created a significant trip hazard and an obstacle for the moving of pallets when delivered from the car park area up the ramp and into the unit;
> (2). This is an issue that had to be resolved and can only be achieved by carrying out further remedial works which are set out below".

32 Then, on the next page, under the heading "Necessary remedial works", Dr Antino sets out a number of paragraphs. The important ones are, first of all, this:

> "The existing concrete slab has to be broken out and re-laid to an adequate thickness and level. It must be flush with the manhole cover so that the trip hazard is removed

> and the concrete level with the retaining wall. This will allow safe access to and from the building".

Then Dr Antino goes into some detailed explanation of why he says that is necessary. He then goes on to say:

> "There have been some difficulties in obtaining a quote for the works primarily due to contractors' busy schedules and the fact that this is in construction terms a relatively small concrete. However, I have been provided with a quote produced by Palm Properties Development Limited which was sourced by my client Mr Pincus. The quote in itself lists various works which are not all related to the interference and the trespass with the platform. However, the price for those works necessary to reinstate the interference into Mr Pincus property to a condition that pre-existed is identified at £8,500. That is, in my view, a reasonable estimate for the works listed in the 8 bullet points under the heading scope of works".

33 Then he reaches this conclusion:

> "This matter was unnecessarily drawn out due to the evasive and inconsistent actions of Mr Singh who would agree one strategy and then adopt an altogether different strategy. This delayed the works from progressing even through his own contractors, which in any event the work was substandard, as agreed between myself and Mr Charalambous. The works generally have not been carried out to the standard of the ordinarily competent contractor".

I do not think it is necessary for me to say any more about that report, except that it contains the usual statements about an expert's duty and a statement of truth, and also an understanding of the duties of experts under Part 35 of the Civil Procedure Rules.

34 The first question that I must ask myself on this application is whether the defendants have any real prospect of successfully defending this claim. It is a claim which led, not merely to litigation, but to the grant of a mandatory and prohibitory injunction by a High Court judge for various works to be done. These works appear not to have been done within the time specified, and, when done, were done to a substandard level, and had to be redone. Even having been redone, they are now criticised by Dr Antino in his report of 3 July. They are also described in an email to his colleague, Mr Charalambous, as being of a "deplorable" standard.

35 I accept, of course, that the defendants may well disagree with that assessment, but I am looking to see whether there is any real prospect of their successfully defending the claim. The only basis which is actually put forward by the defendants in their documents is that the works *had* been completed. So, what is being done, it seems to me, is strong evidence to show that in fact the works have not been completed, and have been done to a substandard level. If I am asked, therefore: do the defendants have any real prospect of successfully defending the claim on the basis that all the works that were required have been done? I would say, Not much. I am not sure that I would even describe it as a real prospect, but even if it could be said somehow that the works required have actually been done, that would not in itself be an answer to the claim.

36 This is where Mr Meethan's new submission comes in. He says that the only other claim really, apart from the requirement that the works be done, is that there be money compensation for the loss suffered by the claimant. He says that it may well be that no loss has been suffered by the claimant, and that there is a real prospect of establishing that. However, this is not something which was ever advanced by the solicitors. It appeared for the first time, I think, in the skeleton argument produced either one or two days ago, and the

defendants obviously have not had any considerable amount of time to deal with it.

37 I park that for one moment, and I look at the consideration of promptness, which the rules require me to do. I ask myself this: have the defendants made a prompt application? In my judgment, they have not. I am referred to decisions of the court, in particular *Regency Rolls Limited v Carnall*, CA unreported, 16 October 2000, where Lord Justice Simon Brown held (at [45]) that 30 days was too long a delay before making the application. I was also referred to the High Court's decision in *Hart Investments v Fidler* [2006] EWHC 2857 (TCC), [25]-[26], where HHJ Coulson QC (as he then was) was held that a delay of 59 days in the circumstances of that case was "very much at the outer edge of what could possibly be acceptable".

38 These decisions of the court as to what is prompt refer to periods which are rather less than the (more than) three months taken here. I am entirely satisfied this application was nothing like prompt. In my judgment, it is all of apiece with the correspondence which I have read and the documents which I have seen. These indicate that the defendants were unwilling to respond to the legitimate complaint of the claimants that his rights were being infringed and that he needed the platform to be reinstated. They also indicate that nothing was done until a High Court judge made a mandatory order to that effect. It was not in fact done at all within the time that the judge wanted it done but, instead it was delayed and delayed. When it *was* done, it was done to a defective standard. Then it was redone, and now it is said by the claimant's expert, hiss surveyor, to be still of a defective standard.

39 As I say, leaving it for more than three months after the default judgments were entered is simply not prompt. In these circumstances, I can see no good reason why I should give any more leeway to the defendants. They have had months and months to solve this problem. They have failed to do so on a number of occasions. Certainly they have failed to comply

with the order of the court, and they have allowed default judgments to be entered against them. They have not bothered to put in a witness statement setting out in detail what their case is. Instead, they have required the court to infer the nature of the case they were putting forward at the time of their application from the scanty evidence, in box 10 of the notice. They have not, even eight months after the default judgments were entered, bothered to prepare a draft defence. Instead, counsel has attended and, as I state again, ingeniously argued that actually there is a point here, quite different from their bald assertion that the works have been completed.

40 However, I say, enough is enough. As a result, I am not prepared to set aside these judgments.

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