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**IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS
(CHANCERY DIVISION)**

7 Rolls Buildings
Fetter Lane
London

Before THE HONOURABLE MR JUSTICE ADAM JOHNSON

IN THE MATTER OF

BINOD KUMAR SHARMA (Appellant)

- v -

EDITH CLARA MARIA LOVEGROVE (Respondent)

**THE APPELLANT appeared as a litigant in person assisted by a McKenzie friend
MR C FORREST appeared on behalf of the Respondent**

**JUDGMENT
9th NOVEMBER 2023
APPROVED**

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MR JUSTICE ADAM JOHNSON:

1. This is a case with a very lengthy, and rather unhappy, history, but the question I have to resolve today is a narrow one. It is simply whether to give permission to appeal an order made in April this year by HHJ Hellman.
2. The decision Judge Hellman had to make was whether to extend time to allow the Appellant, Mr Sharma, to seek permission out of time to appeal an earlier Order made in November 2021 by DJ Brooks. In turn, the decision made by DJ Brooks was a decision refusing Mr Sharma relief from sanction, after judgment had been entered against Mr Sharma.
3. That happened because of Mr Sharma's default under an unless order made in April 2021 by DDJ Mohabir. The nature of Mr Sharma's default was that although he had been required under the terms of the unless order to make a payment in respect of a fee due to a joint expert, he had failed to do so by the date required for compliance, which was 6 May 2021. Instead, payment was made about a week late. Mr Sharma had otherwise though complied with the unless order.
4. In light of Mr Sharma's default, the present respondent (Ms Lovegrove) applied to enter judgment against Mr Sharma. When the application for judgment was made it misleadingly suggested that there had been wholesale and continuing non-compliance by Mr Sharma with the terms of the unless order. That was incorrect because Mr Sharma had in fact complied with the bulk of the provisions of the unless order, although he had been in default as regards his share of the joint expert's fee.
5. In July 2021 DJ Cridge entered judgment against Mr Sharma.
6. Pausing there, it seems to me that that judgment was correctly entered because, whatever else is unclear, it is clear that there *had* been a failure to comply with the unless order in the respect I have mentioned, that is to say as regards non-payment of Mr Sharma's share of the joint expert fee. That being so judgment was, in effect, the automatic sanction for non-compliance, whatever may have been represented to DJ Cridge at the time.
7. There was then an application for relief from sanction. That was the application before DJ Brooks. It was heard in November 2021. By then Ms Lovegrove's solicitor, Mr Gwilym, had filed a witness statement. In describing the nature of Mr Sharma's default the witness statement accurately recorded that the precise failure relied upon was the failure to pay the relevant share of the joint expert's fee. The witness statement did not, though, go on

and expressly correct the misleading impression given in the application for judgment made to DJ Cridge.

8. At the time of the hearing before DJ Brooks Mr Sharma was in Nepal, in quarantine. He attended by telephone, but his involvement was necessarily limited since Mr Sharma has some serious hearing issues. Others participated on his behalf, however. These were a friend, Mr Norwell, and Krishna, Mr Sharma's son. Mr Norwell in fact made an application to participate in the hearing as a McKenzie friend. That application was refused, but it is apparent from the judgment of HHJ Hellman that he nonetheless remained engaged throughout the hearing.

9. It seems that there was some confusion on the part of DJ Brooks about the picture he was being presented with. The true position, as I have explained, was that there was default only in the narrow respect that Mr Sharma had failed to pay the relevant share of the joint expert's fee. That was the position as explained by Mr Gwilym in his witness statement and so DJ Brooks should, it is said, have realised that that was the default being relied on.

10. It appears, however, that DJ Brooks made an error. The precise reason why the error came about is difficult to discern. It may have had something to do with the state of the documents before him at the time of the hearing.

11. In any event, in delivering his judgment DJ Brooks fell into error because he referred not only to there having been "*non-compliance*" with the unless order, but instead to there being "*continuing non-compliance*". That was inaccurate. There was no continuing non-compliance, because the default as regards payment of the fee to the expert had been rectified. Nonetheless, those were the reasons given by DJ Brooks in refusing relief from sanction.

12. There was then a delay of approximately a year. The judgment given by DJ Brooks was in November 2021. An Application Notice seeking permission to appeal from his decision was filed in November 2022.

13. Thus, when matters came before HHJ Hellman, there had been, on the one hand, an apparent error by DJ Brooks in the way he summarised the relevant facts in his judgment; but on the other hand, Mr Sharma had taken approximately a year to file his Application Notice seeking late permission. In those circumstances, the question HHJ Hellman had to address was whether he should extend time to allow Mr Sharma's permission application to be made out of time, roughly a year after the decision in respect of which permission to appeal was being sought.

14. HHJ Hellman refused that application and determined that he would not extend time. It is that decision which Mr Sharma now seeks to appeal and so I need to determine whether to give permission to appeal.

15. I am required to give permission to appeal if there is a real prospect of the appeal succeeding on the merits or if there is some other compelling reason why an appeal should follow. Those are the questions I need to address.

16. I have already made a determination on the papers and by order made on 13 September 2023 I refused permission to appeal. Mr Sharma now comes before the court having exercised his right to request an oral hearing. As I have mentioned, Mr Sharma suffers from hearing difficulties, but he has been assisted today by his son, Krishna, and I am grateful for both Mr Sharma's presentation of his case and for the assistance that Krishna has provided to him.

17. I turn then to consider the reasoning adopted by HHJ Hellman in order to try and identify whether there is some defect in that reasoning which means that an appeal has a real prospect of success.

18. The approach the judge adopted was an entirely conventional one. He applied the line of reasoning that is relevant when any application is made for relief from sanction; that is to say he asked himself three questions.

19. The first question involved identifying and assessing the seriousness and significance of the failure to comply with the relevant rule, Practice Direction or court order. In this case the relevant rule, Practice Direction or court order was the rule which requires any Appellant's Notice to be served within 21 days of the relevant decision. Here the decision of DJ Brooks was made in November 2021. As I have mentioned, the relevant Application Notice was served approximately a year later, in November 2022. On this first question, HHJ Hellman decided that the relevant delay was a serious and significant one. It seems to me that that part of his decision is entirely unassailable.

20. In his oral presentation today Mr Sharma has drawn attention to the fact that he sent a letter to the court on 24 December 2021, following the decision of DJ Brooks, saying that he wished to appeal. That, I am sure, is true. I accept that as a statement of fact, but it does not seem to me to alter the outcome as far as this first question is concerned, because what the rule requires is service of an Appellant's Notice within 21 days and the sending of a letter is, with respect, not sufficient. The fact that permission was properly sought only some 12 months after it should have been is, on any view, a serious and significant departure from the relevant rule and I think HHJ Hellman was correct to say so.

21. The second question the judge was required to ask himself was about the reasons for the delay. HHJ Hellman set out the reasons for the delay in his judgment between paragraphs [47]-[50] and he concluded that the reasons were not good reasons.

22. In summary, the position seems to have been as follows. After Mr Sharma's return from Nepal in December 2021 and having sent his letter on 24 December 2021, he instructed solicitors at some point in January 2022. In March 2022 the solicitors requested transcripts of both the judgment of DJ Brooks and of the hearing before him. So there was a delay of about a month - and possibly more - between the date on which the solicitors were instructed and the date on which the transcripts were requested. Both transcripts were then in fact provided by the end of March 2022, but it seems that the solicitors made an error and, although they realised that they had a transcript of the hearing, did not realise they had also been provided with a transcript of the judgment and, therefore, did not take any steps to pursue the application for permission to appeal for some time.

23. That issue appears to have been resolved only in about August 2022, when the solicitors realised that they did have a transcript of the judgment. Efforts were then made to instruct counsel but, due to counsel's own personal circumstances (referred to by HHJ Hellman in his judgment at paragraph [40]), the drafting of the Grounds of Appeal could not be completed in a timely manner and in fact the Grounds were not drafted and the Skeleton Argument completed until 3 November 2022, following which, on 16 November, the solicitors filed Mr Sharma's Application Notice.

24. The reasoning of the judge on this point was that there was no good reason for the Application Notice not to have been filed much earlier.

25. Against the background I have described it seems to me that again, that was an entirely correct decision for the judge to make on the available facts.

26. A central problem for Mr Sharma is this. The fact that there was potentially an issue with the reasoning of DJ Brooks should have been clear at the relevant hearing in November 2021, but no point was taken about it at the time or for many months afterwards. I will assume that Mr Sharma himself was likely not able to identify any issue in light of his hearing difficulties, having participated in the hearing by telephone. But he was not the only one who participated. There was also Mr Norwell and Krishna, Mr Sharma's son. So the means were available for any potential issue to be captured.

27. One of the criticisms made by Mr Sharma is that Ms Lovegrove's advisors at the time had failed to correct the obvious error made by DJ Brooks. That seems correct. But one

might equally well say that his error should have been apparent either to Mr Norwell and/or to Krishna.

28. In any event, even if I assume that is wrong, and start from the position that further investigations needed to be undertaken and transcripts obtained before any potential appeal point could be identified, the confusion about the judgment transcript which held matters up between March and August 2022 does not provide a good reason for the ongoing delay during that period; nor, it seems to me, do the difficulties presented by the personal circumstances affecting junior counsel whom Mr Sharma sought to instruct. As HHJ Hellman pointed out, it would always have been possible to instruct another barrister and otherwise take steps to accelerate the process of Mr Sharma's Application Notice being filed.

29. Once again, the question for me on this application is only whether there is a real prospect of the decision made by HHJ Hellman being overturned on appeal. It seems to me that as far as this second point goes there is no real prospect of that happening. On the contrary, it seems to me that the judge's reasoning, given the very extended delay between November 2021 and November 2022, is again unassailable.

30. The final matter for the judge was to evaluate all the circumstances of the case. As to that, it seems to me that the judge did so: he took into account the seriousness of the delay; he took into account the fact that there was no good reason for the delay; and on the other hand, he took into account the fact that there were potential grounds for appealing the judgment of DJ Brooks. Indeed, he went as far as to say (at [49] of his judgment) that: "*The merits of any appeal would have been strong.*"

31. I agree with that because there was an obvious error on the part of DJ Brooks, but that is not the issue. The question for me today is whether HHJ Hellman made any error in the view he took when he evaluated all the circumstances of the case. I do not detect any arguable error in the judge's approach because, as I have explained, he plainly had in mind and took into account all of the relevant factors and came to an overall view in the exercise of his discretion.

32. That is not the sort of decision that an appeal court can readily interfere with. Where a judge at first instance exercises a discretion, the decision made by that judge can only be overturned in limited circumstances: first, if it is shown that the judge failed to take into account some material factor that would have made a difference to his decision; second, if it is shown that the judge took into account a material factor which, on proper analysis, was in fact irrelevant and should not have been weighed in the balance; or third, if it is shown that

the judge's decision was so outside the range of reasonable responses that it can properly be said that no reasonable person could have come to that decision.

33. It seems to me that the present case falls into none of the above three categories.

34. On this part of the case, the points relied on by Mr Sharma included the allegation that the court was misled at the time when judgment was entered by DJ Cridge. As it seems to me, however, those were points that HHJ Hellman had well in mind. It was also said that misleading statements were made at the hearing before DJ Brooks, at least in the sense that the error made by DJ Brooks was not pointed out to him at the time. Again, however, that is a point that HHJ Hellman had well in mind and that he referred to in his judgment.

35. In short, on the third issue HHJ Hellman had to determine, namely the overall justice of the case looked at in the round, again I am afraid I detect no arguable error in his reasoning.

36. That means that I should refuse permission to appeal, subject to being satisfied that there is no other compelling reason why there should be an appeal.

37. Addressing this point gives me the opportunity to address certain other general observations made by Mr Sharma. In particular, he has made complaints about the conduct of a number of hearings preceding the hearing before HHJ Hellman. These were hearings held largely - if not entirely - during the period of the Covid pandemic when Mr Sharma was not able to attend because he was abroad. Attendance by telephone is admittedly problematic for Mr Sharma because of his hearing impairment. In that context Mr Sharma has drawn attention to Practice Direction 1A, which is concerned with the participation of vulnerable parties or witnesses in hearings. It does not seem to me, however, that the present is an occasion for seeking to reopen hearings which took place a long while ago now, even before the hearing in front of DJ Brooks in November 2021.

38. What Mr Sharma in fact invites me to do, in light of Practice Direction 1A, is to make an order quashing all existing decisions against him and neutralising any existing costs orders, because he says that the provisions of Practice Direction 1A were not at the time adequately complied with.

39. It seems to me, however, that this all comes rather too late. I am dealing today, as I explained at the outset of this judgment, with the narrow question whether to grant permission to appeal against the decision made by HHJ Hellman. The very extensive background does not have a direct bearing on that question, and certainly I am not in any position today to quash earlier decisions made against Mr Sharma in relation to costs.

40. I am thus not persuaded that there is some other compelling reason why I should give permission to appeal against the decision of HHJ Hellman. I will therefore refuse the application for permission to appeal.

41. I will add just a few further observations.

42. I am very concerned that if at all possible, the parties' dispute should now be drawn to an end before Mr Sharma's costs exposure increases further. Happily, Mr Sharma has indicated a willingness to involve himself in mediation. As I understand it from Mr Forrest, there have been attempts to communicate with Mr Sharma in relation to the payment of his outstanding costs and as to whether some agreement can be found that allows those costs to be paid in a structured way that does not involve Ms Lovegrove seeking possession of Mr Sharma's residential property. I detect that there is a degree of willingness to have a discussion on that basis and I would very much encourage Mr Sharma, and his son, and anybody else who is able to provide Mr Sharma with assistance, to engage with that process. It is not for me to say what should be done, but what I will say again is that this litigation has had a long and unhappy history, and I very much hope that serious efforts can now be undertaken to bring it to a conclusion.
