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IN THE HIGH COURT OF JUSTICE
COMMERCIAL COURT
[2020] EWHC 3508 (Comm)

No. CL-2019-000596

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 20 November 2020

Before:

MR JUSTICE CALVER

B E T W E E N :

IPSUM CAPITAL LIMITED — Claimant

- and -

LYALL & Ors. — Defendants

MR G. ROSEMAN appeared on behalf of the Claimant.

MR A. GUPTA appeared on behalf of the Defendants.

J U D G M E N T

(via Skype)

(Transcript produced from poor quality recording and without access to documentation)

MR JUSTICE CALVER:

1 This is the hearing of the defendants' application dated 18 February 2020 to set aside a default judgment dated 4 November 2019. The claimant's claim is a simple one in respect of monies owed by the defendants under a personal guarantee of which the claimant is the assignee. The guaranteed sum was limited to £370,000 excluding interest and costs. The defendants' case is that the execution of the guarantee came about in the following way. The first and third defendants, ("D1 and D3"), who are the husbands respectively of D2 and D4, the two wives, were directors of two companies, SKR Limited ("SKR") and Piers View Limited ("PV") and they were concerned with the running of residential care homes. A Mr Kulwant Singh Rai ("Mr Rai"), it is said, previously owned the underlying care home business of SKR and PV. He apparently also may have been the original guarantor of the company's debts to Santander, although I query whether that is in fact the case.

2 On 10 December 2004 SKR borrowed £375,550 from Abbey National under a loan agreement and on 29 August 2013 PV borrowed £500,623 from Santander under a further loan agreement. On 17 September 2013 the defendants executed personal guarantees in respect of the two loan agreements. SKR and PV's businesses failed and Santander enforced its legal charges over the properties owned by SKR and PV, sold the relevant assets and that left a shortfall of £385,000-odd. On 30 January 2017 Santander sold the debt to the claimant who gave notice of the assignment on 10 February 2017 and the claimant has demanded payment from the defendants who have failed to pay.

3 The defendants wish to advance a defence which is essentially as follows. On 17 September 2013 Mr Rai, whom I have already mentioned and who was employed in some capacity by Asghar & Co, solicitors, contacted D1 and D3 by phone and requested D1 to D4 to attend Asghar's offices to sign a document which it was said would discharge the debentures that SKR and PV had granted to Santander. D1 and D3, it is said, informed D2 and D4 of what Mr Rai had told them, and D1 to D4 all attended Asghar's offices and thereafter were individually summoned by Mr Rai into Naseem Kadri, solicitor's, office, she being a partner of Asghar. Whilst in Ms Kadri's office, Mr Rai in Ms Kadri's presence produced the composite guarantee from a file of documents in his hand and asked each defendant to sign it, repeating, it is said, that it was merely to discharge the debentures, and each defendant duly signed the same. The defendants say that at no time prior to signing the guarantee did any defendant have any contact whatsoever with Asghar, Ms Kadri and Santander and, secondly, at no time prior to signing the guarantee did D2 or D4 receive any independent legal advice or receive any information whatsoever from either Asghar, Naseem Kadri and/or Santander about the guarantee.

4 As to the content of the guarantees, the defendants say that someone, and they suggest most likely Santander, typed in the defendants' names and addresses into a schedule to the guarantee which, they say, means it is inherently likely that, firstly, Santander had instructed Asghar to act on its behalf in respect of the personal guarantees and/or, secondly, that Santander had previously been requested by Naseem Kadri or Mr Rai to provide copies of the guarantees to either of them so that they could procure the defendants' signatures on the same. By reason of these matters, it is said that Mr Rai as Santander's agent with ostensible authority, fraudulently misrepresented the true nature and effect of the guarantees, thereby entitling the defendants to rescind the same *ab initio*.

5 As regards the position of the wives, D2 to D4, the defendants say that they are housewives and carers for the parties' children, their first language is Punjabi and they place complete trust and confidence in their husbands in relation to their financial affairs, which it is said gives rise to a presumption of undue influence and, secondly, at no time, the defendants say, prior to signing the guarantees had Santander communicated with the wives or, indeed, made any attempt to do so about them. It is said that it would have been clear to Santander that D2 and D4 were the wives of D1 and D3 and that the wives were acting as surety in respect of the latter's liabilities which put the bank on enquiry of the presumption of undue influence. It is said then that Santander failed to comply with the mandatory requirements imposed on banks in these circumstances following *Barclays Bank v O'Brien* and *Etridge*. It is said that Ms Kadri failed to provide any advice whatsoever to the wives and merely sat back while Mr Rai asked them to sign the guarantees and, accordingly, the guarantees should be set aside on the basis of misrepresentation and/or undue influence.

6 Finally, as regards Santander's sale of the defendants' liabilities to the claimant, it is said that the claimant has refused to provide a copy of the contract that purportedly assigned the said liability and therefore it is unknown whether the same was properly executed for the purposes of sections 44 and/or 46 of the Companies Act and Mr Roseman elaborated upon that in his submissions.

7 So far as the procedural history of this case is concerned, which is important in view of the current application, it is as follows. Firstly, the claimant issued the proceedings on 23 September 2019. Second, on 27 September 2019 the defendant filed and served an acknowledgement of service indicating that they did intend to defend all of the claim. Thirdly, the defendants then spent time seeking to obtain a copy of Asghar's file and copies of any relevant correspondence from Santander about the guarantees in July and August 2019 but those requests of the claimant's solicitors and Asghar fell on deaf ears. Fourthly, the defendants requested the claimant to agree to an extension of time to file and serve a defence to 14 November 2019. The claimant agreed to extend time to 1 November and so, fifth, by an application dated 4 November 2019, which the claimant's solicitors accepted service of by email, the defendants issued an application for third party disclosure against Santander and Asghar and to extend the time for the service of their defence; and on the same day, 4 November 2019, the claimant requested default judgment to be entered.

8 On 31 January 2020 the defendants' application came before Andrew Baker J who, by paragraph 1, made an order that unless the defendants were to file and serve a defence by 4.30 p.m. on 7 February, judgment in default would be entered in favour of the claimants. At 11.08 a.m. on 7 February 2020 the defendants' solicitors sent the defence and counterclaim to the claimant's solicitors at the same email address which they had previously used in relation to the application. At 3.49 p.m. on the same day the claimant's solicitors informed the defendants' solicitors that they refused to accept the defence and counterclaim by email which left the claimant with insufficient time before the 4.30 p.m. deadline to serve the document upon the claimant.

9 On 18 February 2020 Henshaw J ruled as follows. He said following the further correspondence received from the defendants' solicitors on 17 February, it appears that pursuant to CPR 6A PD, para.4, the claimants had not given any positive indication that they would accept service by email, that the defence was served late and the claimant was therefore entitled to judgment pursuant to the order of Andrew Baker J of 31 January 2020. As a result of that ruling, judgment in default was entered in favour of the claimant as of 4 November 2019. The defendants now apply to set aside this judgment.

10 Finally, I note in passing that the claimant served a reply and also a defence to counterclaim despite the ruling of Henshaw J on 4 March 2020.

The issues

11 As the defendants state in their skeleton argument, the following issues arise for determination against this background: firstly, whether the claimant is estopped from denying it received service of the defence and counterclaim by the deadline; secondly, whether, if the claimant is not estopped, the defendants should be given relief from sanctions; and, thirdly, whether if the defendants are not given relief from sanctions default judgment should be set aside pursuant to CPR 13.3. I would slightly reorder those issues and I will come to that in a moment.

12 First of all, service of the defence by email. The service of documents by email is governed by Practice Direction 6A, para.4.1. That reads under the heading "Service by fax or other electronic means":

> "Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means –
>
> (1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving –
>
> (a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and
>
> (b) the... e-mail address... to which it must be sent..."

13 Then the Practice Direction provides in subparagraph (2) that the following are taken as sufficient written indications for the purposes of 4.1:

> "...an e-mail address set out on the writing paper of the solicitor acting for the party to be served but only where it is stated that the e-mail address may be used for service..."

It is not suggested that that applied in this case.

14 In the present case in his third witness statement Mr Sohal, solicitor for the defendants, says that on 4 November the defendants' solicitors served upon the claimant's solicitors by email the defendants' application for extension of time to file their defence and relief from sanctions. No objection was raised by them to that service, he says, and they went on, indeed, to instruct counsel to oppose that application on 31 January 2020. The defendants say that as a result they were lulled into mistakenly believing that the claimant would accept service by email generally and, therefore, when they served their defence and counterclaim upon the claimant's solicitors on 7 February 2020. I accept that evidence and I accept that the claimant's behaviour in entering default judgment despite service upon it of a defence and counterclaim by email on 7 February 2020 was somewhat opportunistic even if in accordance with the rules. However, the fact remains that by leaving service of the defence until the very last moment in this way and then failing to comply with the rules as to service, the defendants were the authors of their own misfortune. As I put to Mr Roseman in

argument, the simple course would have been for the defendants' solicitors to have served their document both by email and personally and the problem would not have arisen.

15 Practice Direction 6A, para.4.1 requires, for there to be good service, for the claimant to have previously indicated in writing to the defendants that it was willing to accept service by email. It had not done so. In those circumstances, it is difficult to see how it could have made any unequivocal representation to the defendants, whether in writing or by conduct, that it was willing to accept service by email and that it had agreed to forego for all time its right to refuse to accept service by email in order for it to be estopped as alleged by the defendants.

16 Accordingly, it follows in my judgment that the defendants are required to apply for relief from sanctions in seeking to set aside the default judgment under rule 13.3, as indeed appears to be common ground. In *Regione Piemonte v Dexia* [2014] EWCA Civ 1298 the Court of Appeal held that the correct approach to this issue was as follows. CPR 13.3 requires an applicant to show that he has real prospects of a successful defence or some other good reason to set the judgment aside. If he does, then the court's discretion is to be exercised in the light of all the circumstances and the overriding objective. The court must have regard to all the factors it considers relevant of which promptness is both a mandatory and an important consideration. Since the overriding objective of the Rules is to enable the court to deal with cases justly and at proportionate cost, and since under CPR 1.1(2)(f) the latter includes enforcing compliance with rules, Practice Directions and orders, the considerations set out in CPR 3.9 are to be taken into account.

17 It follows therefore, and this is why I said that I would slightly reorder the issues set out by Mr Roseman in his skeleton, that the starting point in determining this application is whether the applicants can show that they have real prospects of a successful defence or some other good reason to set the judgment aside.

18 In my judgment, despite having some misgivings, the circumstances in which the guarantees came to be taken do call for some explanation. Mr Sohal, the defendants' solicitor, states that Mr Rai previously owned the underlying care home business, as I have said, that was conducted through SKR and PV, and, indeed, it appears that he may himself have given a guarantee previously to Santander and that it is that guarantee which was being replaced in this case. Separately, it appears he was working for Asghar at the material time. He was the person who asked the defendants to go to Asghar's offices to sign the document which was a guarantee but which they say he told them was the discharge of a debenture and he is the same person who then witnessed their signatures. The question arises why was he so involved in the effecting of the guarantee and that requires some explanation. What was his involvement with Bank Santander? Was he acting on their behalf? If Santander did not engage him or Asghar, then one would expect to see some exchange of communications between Santander's solicitors and Asghar regarding ensuring that the defendants entering into this guarantee obtained proper legal advice. Mr Sohal says that the defendants did not pay any monies to Asghar for any legal advice and never entered into any formal retainer with them. That seems to me to be a highly material factor in my determining that there is an issue here which requires some explanation.

19 The somewhat muddled confirmation on the last page of the guarantee also raises a question mark over whether the defendants received genuine, independent legal advice. That reads, and it is the confirmation of Naseem Kadri:

> "I confirm I am a solicitor acting for RS Lyall, I am not advising any group member or the principals and that prior to the execution and delivery of this deed I explained its nature, content and effect of signing it to Santander and he/she informed me that he/she wished to proceed with the transaction."

20 As I have said, that does seem to me to be an obvious mistake but it does raise the issue as to whether or not the defendants were given impartial and clear legal advice as to the effect of their signing this document, which they say they were not.

21 The factual position may, of course, become clearer upon disclosure but, at this stage, I cannot say that the defence has no real prospect of success, in running a defence of fraudulent misrepresentation. The claimant had its opportunity to close this point down when the defendants wrote to it on 1 July 2019 asking for documents and information as to whether Santander nominated Asghar to act for it and what precautions were taken to ensure that the defendants had independent advice. The claimant refused to engage in that correspondence on the basis that it was a mere assignee. However, it seemed to me it would have been a straightforward matter for them to contact Santander and to ask for confirmation that Santander had separately instructed solicitors to act on the transaction or whether or not Santander had simply used its in-house lawyers to act on the (inaudible) but, nonetheless, in order to make clear that at no stage did Asghar act for Santander; but instead the claimant chose simply not to engage with the correspondence.

22 Mr Gupta for the claimant made the powerful point that if, in fact, the defendants were told by Mr Rai that they were to attend to discharge the debentures that had been given by the company over its assets, then why was, in particular, D4 attending the meeting? There would be no purpose in her doing so. Whereas if, in fact, they were not misled and they were told they were coming to sign guarantees, then it would make sense that the two wives should have to attend as well. This seems to me to be a powerful point that will require explanation and it made me hesitate long and hard before determining that the applicants had shown real prospects of a successful defence or some other good reason to set the judgment aside.

23 Mr Sohal in para.6 of his witness statement says that Mr Rai told the defendants that the guarantee was not a deed of guarantee but a document to cancel a debenture and requested the defendants to attend the offices of the first respondent because Mr Rai was working for the first respondent at the time and that obviously is unparticularised and requires considerable elaboration. Mr Roseman pointed out to me that the defence provides more information about precisely what happened and, in fact, what is pleaded is that the first and third defendants were telephoned by Mr Rai and asked to come to discharge the debenture and that they asked their wives to attend with them. However, it still does beg some question as to why the wives would then still need to attend, which, as I say, caused me to have some pause for thought before deciding that, in fact, I should let this matter go forward.

24 But it seemed to me that I cannot say, certainly at this stage, that the wives' defences, D2 and D4, do not disclose a real prospect of success. As I said, they run a *Barclays Bank v O'Brien* undue influence defence. That is, where the creditor is aware that the debtor and the surety are husband and wife and the transaction on its face is not to the financial advantage of the surety as well as the debtor, then the creditor will be fixed with constructive notice of any undue influence, misrepresentation or other legal wrong by the debtor unless it has taken reasonable steps to satisfy itself that the surety has entered into the obligation freely and with knowledge of the true facts. It is the combination of the fact that

the parties here are husband and wife and that the transaction is, on its face, not to the wives' advantage that seemed to me it is certainly arguable should have put the creditor on notice and if D2 and D4 are able to establish that at trial, then, in principle, they could have the transaction set aside.

25 It seems to me that defence of the wives does have a real prospect of success at this stage on the evidence and it seems to me, therefore, that there is a good reason why the husbands' defence, despite my misgivings, should also go forward at this stage because the court is going to be examining all of the circumstances surrounding the effecting of the guarantees in this case in any event and I think that there is just sufficient evidence before me to get them over the threshold of showing a real prospect of success or, as I say, alternatively, there is some other good reason why their defence should be allowed to proceed at this stage. I should also say that, contrary to the claimant's submission, if the alleged misrepresentation were to be proved, then that would indeed amount to a defence to the claim because, of course, it would allow the defendants to rescind the guarantee if they could establish as they plead that Mr Rai or Asghar was acting for the bank.

26 As a result of my findings on real prospect of success or some other reason why the matter should proceed, I turn next and finally to the three-stage test laid down in *Denton* because now that falls to be applied. The first stage is to identify and assess the seriousness and significance of the failure to comply with any rule, Practice Direction or court order because if the breach is neither serious nor significant, then the court is unlikely to need to spend much time on stages 2 and 3, so that is the first stage. Stage 2 is to consider why the default occurred and stage 3 is to evaluate all the circumstances of the case to ensure that the court deals justly with the application, including rule 3.9(1)(a) and (b), namely the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with the rules, Practice Directions and orders.

27 In the present case, Baker J had already made an unless order against the defendants which they then failed to comply with and so I consider that this was not a breach which was neither serious nor significant. It was. It was a breach of an unless order. I also bear in mind the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, Practice Directions and orders. Up to now, that has not occurred and the defendants have been responsible for that in large part. However, it is the case that the contents of the defence and counterclaim were in fact brought to the attention of the claimant by email on the day on which the defence and counterclaim were ordered to be served and when the claimant entered its judgment in default it knew that the defendants had tried to bring the contents of that pleaded case to its attention. The default occurred as a result of the defendants' misreading of CPR 6 but that misreading occurred as a result of the claimant's previous conduct in accepting service by email and the claimant latched onto that.

28 In view of the fact that the defence, in my judgment, is not fanciful; in view of the fact that the mistake on service was a genuine mistake and that the defendants were somewhat misled, albeit it was their error; in view of the fact, importantly, that the claimant was made aware of the contents of the defence within the time period laid down by Baker J; and bearing in mind that the claimant has subsequently itself served a reply to the defence, I consider that, in all of the circumstances of the case, the court should grant relief from sanctions and set aside the judgment in default and I accordingly do so.

CERTIFICATE

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