Neutral Citation No: **[2023] EWHC 1390 (KB)**

Case No: KA-2023-000002

IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

HIGH COURT APPEAL CENTRE, ROYAL COURTS OF JUSTICE

ON APPEAL FROM THE ORDER OF MASTER THORNETT
DATED 19 DECEMBER 2022
CASE NO: QB-2020-000527

Royal Courts of Justice
Strand, London WC2A 2LL

Monday, 24 April 2023

BEFORE:

MR JUSTICE KERR

BETWEEN:

JACQUELINE SAMUELS
(t/a SAMUELS & CO SOLICITORS)

Appellant / Claimant

- and -

CHRISTOPHER JOHN LAYCOCK

Respondent / Defendant

MS JACQUELINE SAMUELS appeared in person
MR CHRISTOPHER LAYCOCK appeared in person

APPROVED JUDGMENT

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(Official Shorthand Writers to the Court)

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MR JUSTICE KERR:

1. This is an appeal by permission of Murray J against an order striking out the claim, made by Master Thornett on 9 December 2022. The basis of the appeal is that the Master made his order while unaware of the witness statement of the claimant which had been CE-filed on 7 December 2022.

2. The facts are these. The appellant and claimant is a sole practitioner solicitor in Leeds trading as Samuels & Co Solicitors. The respondent and defendant is a worldwide flight attendant. Both parties appear in person; or the claimant, it may be, appears through her firm, which for present purposes comes to the same thing.

3. The background is as follows. In the summer of 2019 the claimant's firm acted for the defendant in a lease extension transaction relating to a property in London. The defendant informs me, and I accept, that the purpose of the transaction was to facilitate a sale of the property. He had a potential buyer lined up and provided a memorandum of proposed sale to the claimant's firm at the time of the lease extension transaction.

4. After the claimant's firm's retainer had been completed the sale took place. By then the claimant's firm had ceased acting, having completed the lease extension transaction. I am told that the sale of the property was completed on 9 October 2019. The defendant had no reason, at the time, to inform the claimant about the completion of the sale.

5. On or about 19 October 2019, the defendant entered a review of the claimant's firm's services on an online platform called *Google My Business*. The publication stated in uncomplimentary terms the defendant's opinion of the standard of service which was provided by the claimant's firm when dealing with the lease extension. The publication included the phrase "as I found them quite deceitful."

6. The claimant brought a claim on 7 February 2020 for damages for libel arising from that publication. Particulars of Claim were attached to the claim form. In the claim form, the claimant stated that she did not expect to recover more than £10,000 in damages.

7. The claim was served at what the claimant regarded as the defendant's last known address, namely the London property which by then had been sold. The claimant informs me, and I accept, that she checked the Land Registry record and found that the property was still registered in the defendant's name, before serving the proceedings there.

8. It will be recalled that the March 2020 lockdowns began at that time, in the time of the pandemic. The events over the rest of that year and the following year took place against that background.

9. In May 2020, the claimant applied for summary judgment. That application was heard by Master Thornett, by telephone, on 21 October 2020. The claimant appeared in person (or it may be through her firm, it does not matter). The defendant did not appear but the Master, as is apparent from the order, was satisfied that he had been properly served and given notice of the hearing.

10. That was because there were produced to the Master certificates of service, proving service at the address of the property which had been sold. The defendant assures me, and I accept, that he knew nothing of the hearing before Master Thornett on that date.

11. The Master made an order that the phrase "as I found them quite deceitful" was defamatory in its ordinary meaning. He stayed the remainder of the claim and ordered that it would be struck out unless an application to restore it was made by 5 April 2021.

12. On 8 January 2021, the claimant wrote to the defendant by email, enclosing the order of Master Thornett. She used the defendant's same email address is the one used when the parties were communicating in the summer of 2019 in connection with the lease extension transaction. It remains the defendant's email address to this day and is included on court documents filed by the defendant in emails sent by him to the court.

13. In response, on 21 January 2021 the defendant applied to set aside the judgment and order of Master Thornett on the ground that he had not received the claim form, the notice of hearing and, as he said, "I believe I was not properly served." He stated that

he lives overseas and gave an address in Amsterdam in the Netherlands. That application was received by the court.

14. On or about 26 March 2021, the claimant applied to "restore the remainder of the claim and the relief" because "the claim has not been resolved". On 12 May 2021, in response to both parties' applications, Master Thornett caused a letter to go to the parties in the following terms:

> "The combined response is that (a) if the Defendant wants to proceed with his 01.21 Application, he needs to serve and process it correctly, and perhaps refer to the QB Guide if he is unsure (b) the Claimant's more recent Application might (just) suffice as an Application made within the time limit imposed by Para 3 of the Order sealed on 26.10.21 but I am not going to make an order simply restoring a case without more progressive directions thereafter. What does the Claimant have in mind? I anticipate the probable result will be to co-ordinate restoration with the Defendant's Application, assuming the Defendant wishes to continue with it. … it really would help if both parties instructed representatives who are familiar with litigation practice - and in High Court defamation cases."

15. On 26 May 2021, the claimant emailed the court and, in clear breach of rule 39.8 of the CPR, did not copy in the defendant. She said in that email that the posting had been removed but that she sought "a direction to proceed to trial." No further details of what that meant were given.

16. On 13 September 2021, she emailed the court again and again failed to copy in the defendant for no good reason that I can see, in breach of rule 39.8. She asked for her email to go to Master Thornett for consideration. For some reason it did not occur to her, although she is a solicitor, that the defendant was entitled to know about this dialogue between her and the court.

17. On 30 November 2021, the defendant telephoned the court office asking why his address had not been updated. He was asked to file a letter on CE-file with his change of address so that the court file could be updated.

18. On 22 December 2021, the court emailed the claimant, not copying in the defendant. That was remiss of the court, which should not conduct a one-sided dialogue with a party other than for a compelling reason, any more than a party should with the court. I apologise on behalf of the court for that omission. It was important. The email stated:

"Further to your correspondence below I write to confirm that Master Thornett has noted the response but has commented as follows:

(a) it is still unclear about the potential interpolation of the Defendant's Application. The position should have been established by the Claimant, having carriage of the claim. There is much difference between a claimant informing the court that, despite enquiry, there still seems no prospect of an Application from an opponent, and a claimant that merely refers to uncertainty about it. The court needs to know the actual position, or at least as best as it is known.

(b) the 26.05.21 e-mail does not come even close to sufficing as proposed directions. Assuming that a Consent Order on directions is unlikely to be agreed, there will have to be a CCMC (and so preferred dates are required). The QB does not list trials simply upon a confirmation that a claimant wishes to proceed to trial. This is not the County Court in a Fast Track claim. Greater clari[t]y is required. The court will need to see properly drafted and considered proposed directions for that hearing (whether agreed or not), as well as cost budget(s) needing to be filed. perhaps it may be that a M&C List experienced counsel ought to be instructed by the Claimant for the CCMC? In short, the progress in this case remains with the Claimant."

19. On 4 January 2022, the court office wrote, fortunately this time to both parties, by email as follows:

"Dear both,

Further to the defendant's email below which was forwarded to the Master for his directions. He has responded with the following:

'Inform the parties that the Defendant's 21.01.21 Application will be listed upon receipt of a (as completed by both sides) Masters Appointment Form. The Defendant should refer to the QB Guide as to what this is and the reason for the information required. He should also ensure before providing such completed Form that he (beforehand) has perfected his Application with such Witness Statement and evidence upon which he relies to justify his Application (and as will have been both served and CE Filed). It follows that the Claimant Respondent must also file and serve any Witness Statement in response. I will look at both when considering the parties' submissions as to listing'

The claimant's solicitors should note the defendant's new address as detailed in his email. The Court recorded has been updated to reflect this" (bold in original).

20. On about 4 January 2022, so at the same time, the defendant applied by written application supported by a witness statement to set aside "the court order" of 21 October 2020. He did not submit a Master's Appointment Form. The court responded to both parties pointing this out by email the same day.

21. On 24 February 2022, the defendant wrote to the claimant (and CE-filed the letter) complaining that she, the claimant, had not properly attempted to ascertain his residence. He claimed entitlement as of right to have the judgment of Master Thornett had set aside.

22. On 11 March 2022, the defendant submitted a Master's Appointment Form. For some reason, more than seven months then went by until 3 November 2022, when the claimant applied for default judgment.

23. On 9 November 2022 the court i.e. Master Thornett wrote to the parties as follows:

> "In response to the Claimant's 3.11.22 I have attempted to piece together the various events and submissions since the Order sealed on 26.10.20. The task is almost impossible because, with respect, it seems that neither side has paid much attention to what they need to do, as commented upon in correspondence from the court. I emphasise here that the court does not provide legal advice but is entitled to make observations about what is being / has been attempted.
>
> In this regard:
>
> (a) the Claimant appears to have taken no meaningful steps to progress the case as per the requirement of Para 4 in the Order, save for the inchoate N244 dated 26.03.21;
>
> (b) the Claimant appears to have given no thoughts to the court's response to her 26.03.21 Application until recently filing what is (in context) a wholly meaningless N227 seeking judgment (for reasons unspecified). The impression, instead, is that the case therefore has automatically been struck out anyway;
>
> (c) the Defendant in contrast keeps issuing Applications without following correct procedure, not explaining why he had not followed the procedure previously, not evidencing his attempts to serve the Claimant or - very importantly - explaining his obvious delay in making his Application(s). An application to set aside an order must be made not just correctly but promptly. If neither, it is liable to be dismissed irrespective of perceived underlying merits.
>
> In conclusion:
>
> (i) the N227 is dismissed as having no relevance to the Order sealed 26.10.20;
>
> (ii) no hearing will be listed or decision made on the papers until there is final clarity as to formulation and service of Applications, the response from each party to those Applications as served and, most importantly, a Witness Statement from the Claimant how and why her case ought not to be treated as automatically struck by now owing to non-compliance with the opportunity provided in the 2020 Order to progress it.
>
> The above steps are NOT to be resolved by continued general correspondence with the court or lodging of random submissions or documents. The court will consider only formal Part 23 Applications which might, for example, feature applications to amend former applications. Evidence must be submitted by way of Witness Statement. The only other material to be judicially considered will be that required to prepare, and present Applications as set out in the KB Guide.
>
> The court will then consider all of the Applications in this case on a date after 4.00pm on 12.12.22. After 12.12.22 no further submissions will be effective for the purposes of that consideration.
>
> The parties are therefore, again, strongly advised to seek legal advice from those who understand both civil litigation and as applied to defamation law."

24. On 7 December 2022, the claimant made a witness statement with four exhibits, attaching them and including in the fourth exhibit proposed directions for trial. It did not appear to have occurred to her that the defendant had not filed a defence; that no

effective CCMC (case and costs management conference) had taken place; disclosure had not taken place; and directions for witness evidence at trial had not been given.

25. In the witness statement, the claimant explained that her claim should not be automatically struck out as, she said, "there has been no failure on her part to comply with a rule, practice direction or court order."

26. I infer that this witness statement and the exhibits did not come to the attention of Master Thornett. His order made on 19 December 2022 makes no reference to that witness statement. In that order he repeated some of the procedural history and recited at paragraph (v):

> "No submissions having been received from the Claimant as at 19 December 2022, the date this Order was made …".

27. He ordered that the claimant's application to restore was dismissed and the claim stands as struck out. It is against that order that the claimant now appeals, having first tried unsuccessfully to have it set aside. The appeal was brought on 10 January 2023. As the claimant points out, the defendant has not formally responded to it but both parties appeared before me today in person.

28. The ground of appeal is that the order is unjust because of a serious procedural or other irregularity in the lower court, because the witness statement must have failed to reach Master Thornett and he made his order in ignorance of it. Further, the claimant says that the order is not valid, having been made on the court's own initiative under CPR 3.3(4); as it does not contain a statement of the right of a party affected by the order to apply to have it set aside, varied or stayed in accordance with CPR 3.3(5)(b).

29. The claimant says that there was a serious procedural irregularity here and that the Master's decision was wrong. The defendant says it should stand. In determining those rival contentions I need to bear in mind the following rules.

30. First, rule 39.8(1) requires that:

> "Any communication between a party to proceedings and the court must be disclosed to, and if in writing (whether in paper or electronic format), copied to, the other party or parties or their representatives."

I need not quote the rest of rule 39.8. There are a number of exceptions but none of them apply here.

31. Rule 52.20 gives the appellate court all the powers of the lower court. The appeal court has power to affirm, set aside or vary any order or judgment below, to refer the matter back and to make various ancillary orders. Rule 52.21(3) provides that the appeal court will allow an appeal where the decision of the lower court was wrong, or unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

32. The defendant says, as I have mentioned, that he knew nothing of the hearing in October 2020 and that it beggars belief that the claimant genuinely thought that he had received documents at the address which was the subject of the lease extension transaction, the whole purpose of which was to make that property saleable and in circumstances where he had provided a memorandum of the proposed sale to the claimant.

33. The claimant says that she accepts that there have been shortcomings in her compliance with procedural obligations, for which she apologises; and suggests that her lapses should sound in costs rather than affecting the substance of the appeal.

34. I accept that there was a serious procedural or other irregularity here because Master Thornett did not know that the claimant's witness statement had been filed by her on or about 7 December 2022. But after considerable reflection, I have come to the conclusion that it would not be unjust to allow the Master's order to stand despite the irregularity. My reasons are as follows.

35. First, the claimant has done precious little to bring her claim to trial. She mentions that she has had medical issues and has had to go to hospital several times. I sympathise with that predicament but I must bear in mind that there was no medical evidence before me.

36. Second, the claimant is a solicitor and must be taken to be aware of the legal obligations under the CPR including importantly rule 39.8.

37. Third, the claimant was urged more than once by the court in communications from it to consider getting representation from someone experienced in Media and Communications List cases.

38. Fourth, the breaches of rule 39.8 were longstanding and reprehensible. The apology is welcome but comes very late.

39. Fifth, the claim is a modest one for damages not exceeding £10,000. The online post has been removed and the claim is now to quite a large extent historic.

40. Sixth, the claimant did not, I am informed (and she does not dispute), respond to overtures from the defendant to consider a compromise.

41. Seventh, the defendant has been put to much unnecessary correspondence and is not legally qualified, while the claimant is.

42. Eighth, he says he has a defence which would have to be aired at trial. That defence in truth or justification. A trial would therefore have to include airing of the unedifying issue as to whether the claimant's firm acted in a deceitful manner back in 2019. That would have to occur probably four years or so after the event, a delay which is quite unnecessary and was easily avoidable.

43. Ninth, the action has made no progress in over three years and that is much more the fault of the claimant than the defendant, though neither is blameless.

44. Tenth and finally, the witness statement in December 2022 did not even attempt to make substantial progress towards the trial. The directions sought were unrealistic.

45. In all the circumstances, I have come to the conclusion that it would be unfair and oppressive now to subject the defendant to a trial. I am satisfied that even though the Master took his decision in ignorance of a relevant document, it would not be unjust to allow his order to stand. The appeal is therefore dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
Email: civil@epiqglobal.co.uk