IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

[2013] EWHC 3687 (QB)

No. QB/2012/0452

Royal Courts of Justice

Thursday, 7th November 2013

Before:

MR. JUSTICE JAY

B E T W E E N :

BEHZAD POORSALEHY — Appellant

- and -

LONDON BOROUGH OF WANDSWORTH — Respondent

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JUDGMENT

(Approved)

MR. JUSTICE JAY:

1 This is an appeal brought with the permission of Mrs. Justice Sharp (as she then was) dated 18th June 2013 against a decision given at the Wandsworth County Court by His Honour Judge Welchman on 1st August 2013 striking out the appellant's notice of appeal on the ground that it was out of time and that no good reason for the delay in applying for permission had been given.

2 The facts in a nutshell are these. The appellant applied to the respondent Local Authority for homelessness assistance under Part 7 of the Housing Act 1986. This was refused and an adverse review decision was notified on 9th March 2012. The 21 day time limit for appealing expired on 30th March 2012. On that day the appellant instructed solicitors to act for him and a notice of appeal was prepared in haste and filed out of time on the next working day, which was 2nd April 2012. The notice failed to contain an application for an extension of time.

3 By letter dated 18th April 2012 Messrs. Sharpe Pritchard, acting for the Local Authority, warned the appellant's solicitors that they would be taking the time point in the skeleton argument (see p.79 of the bundle). The appellant's skeleton argument was filed on 16th May. It acknowledged that an extension of time was required and had not been made. The skeleton argument stated that the appellant sought permission to extend time. That said, no application for an extension was made at that stage.

4 The Local Authority's skeleton argument was filed on 29th May 2012. It stated that the appeal was out of time, that no formal application for an extension had been made, and that no evidence explaining the delay had been provided.

5 On 27th July 2012 those then representing the appellant made a formal application to extend time (see p.67 of the bundle). This application was supported by a witness statement from the appellant dealing with the period before 2nd April 2012. There was no evidence either from the appellant or his solicitor dealing with the period of delay between 2nd April and 27th July 2012, being one of nearly four months.

6 The judge dealt with the application for an extension of time as a preliminary matter. He was referred to Section 204(2A) of the Housing Act 1986, which provides, and this is the amended version:

> "(2A) The court may give permission for an appeal to be brought after the end of the period allowed by subsection (2), but only if it is satisfied-

(a) where permission is sought before the end of that period, that there is good reason for the applicant to be unable to bring the appeal in time; or

(b) where permission is sought after that time, that there was a good reason for the applicant's failure to bring the appeal in time and for any delay in applying for permission."

7 It is common ground between the parties that the court's discretion does not arise unless both of the Section 204(2A)(b) criteria are satisfied, namely, (1) good reason for the applicant's failure to bring the appeal in time, and, (2) good reason for any delay in applying for permission.

8 The judge held that the first criterion was satisfied and this issue therefore falls out of account. As for the second criterion, the judge had an evidential *lacuna*, which he referred to more than once. In para.18 of the transcript of his judgment the judge clearly examined the submissions which were advanced before him, as summarised at para.14, and held that they did not amount to a good reason. In reality, moreover, no reason was advanced for the delay because no evidence was filed on that issue. Accordingly, in the absence of explanation the applicant had failed to discharge the burden of persuasion which rested on him under Section 204(2A)(b).

9 Mr. Jan Luba QC, who did not appear below, and represents the appellant before me a *pro bono* basis, advances two grounds of appeal on behalf of his client. His primary ground is that the judge's approach was flawed in that it focused on the solicitors' default not the appellant's. He submits that on the available evidence the appellant personally could not have been responsible for the delay - and the verb "could" in that sentence is to be emphasised - and that there was no rule of law which visits the default of solicitors on to their clients. Put another way, the irresistible inference was that the appellant was not personally responsible and that his solicitors were.

10 Mr. Luba's second ground, advanced very much as a subsidiary matter, is that the existence of a draft undated consent order signed by the Local Authority's solicitors and not the appellant's, and referred to by the judge at para.12 of the transcript, should give rise to the inference that the appellant's solicitors believed that no point would be taken on the absence of a formal application notice. The difficulty with this submission, as Mr. Luba recognised in argument, is that there was no evidence from the appellant's former solicitors that this was indeed their belief. It follows that the appellant's second ground is unsustainable and I rule against the appellant on it.

11 Mr. Luba drew my attention to early decisions of Insurance Commissioners in support of the proposition that "good cause" for delay in claiming relevant benefits could well be constituted by a claimant for benefits relying on the advice of his solicitors. For example, in case CSI 10/50(KL), tab 2 of the bundle, the evidence was that the claimant had consulted a solicitor and relied on his advice. Para.6 of the determination records that evidence was filed by the claimant's solicitor which fully explained what happened. Accordingly, the Insurance Commissioner was able to find as a fact that:

> "The claimant as a result of his meetings with his solicitor and an official at the office of the Assistance Board reasonably believed that he was acting prudently and properly and in accordance with his solicitors' advice in accepting payments from the board and delaying to do anything further in connection with the claim under the National Insurance Industrial Injuries Act 1946 until his solicitor at a much later date advised him that a claim should be made. I am satisfied that he had adequate grounds for that belief and that he acted reasonably throughout, and on that ground I hold that he has shown reasonable cause for the delays which occurred."

12 On further analysis, therefore, it is far from clear that this case avails Mr. Luba's argument. In contrast to the instant case the Insurance Commissioner was treated to a full explanation in witness statements as to the reasons for the delay. The Insurance Commissioner was scarcely obliged to attempt to draw inferences on the basis of incomplete and/or inadequate material.

13 The same point may be made about the case located under tab 3 of the authorities' bundle, namely, CS 50/5(KL), where there again the Insurance Commissioner had evidence from the claimant explaining the delay. The observations of the Insurance Commissioner set out in paras.6 and 8 of the determination need to be viewed in that context. Paras.8 and 9 are worthy of being set out in full:

> "8. If for any other reason a person chooses to consult his solicitor on a legal question relating to his rights under the scheme, or as to the proper procedure, and is advised by him, as a result it could not be said to be unreasonable to rely on the solicitor's advice.
>
> 9. In the circumstances explained, in order to prove good cause for delay in making his claim, it is enough for a claimant to show that he took reasonable steps to ascertain his rights by obtaining the advice of a person qualified to advise him and that the delay was due to his acting on that advice..."

14 The reference to "as a rule" in para.8 of this determination means "as a general rule" not an inflexible one. This is the gloss I place upon what the Insurance Commissioner was saying.

15 These matters were considered in the present context of Section 204 of the Housing Act 1986 by Sr. Thomas Morrison in *Barrett v Southwark* [2008] EWHC 1568 Comm, tab 9 of the authorities' bundle. In that case the court had the benefit of a lengthy witness statement from Mrs. Barrett setting out the history and seeking to justify the delay (see para.3 of the transcript). At para.23 Sir Thomas Morrison stated that whether a reason, or a conjunction of reasons, amounts to a good reason is a question of fact and value judgment. Paras.25 and 26 are also relevant, in particular Sir Thomas Morrison's reliance on what Lord Justice Sedley said in *R (Tofik) v IAT* [2003) EWCA Civ 113 at para.46:

> "There is no general principle of law which fixes a party with the procedural errors or his or her representative"

16 However, as Mr. Beglan submitted in argument, and I agree, there is no rule of law to the contrary effect, namely that a litigant will always be able to shelter behind the mistakes of his legal advisors. Here, Sir Thomas Morrison's mention of "fact and value judgment" is particularly important. This means that good reason is not a matter of law or presumption. Its existence depends on all the circumstances of the case as known to the court by direct and inferential evidence; and, thereafter, secondary evaluative conclusions derived from that evidence. It cannot depend on speculative inferences.

17 I should add that Lord Justice Sedley's dictum chimes with what Lord Justice Buxton said in *Corbin v Penfold*, unreported, 6th April 2000 para.22. That said, I do not read Lord Justice Buxton's observations as going any further.

18 Mr. Beglan did seek to go further the other way, as it were, and he drew my attention to the case of *Hi-Tech Information Systems Limited v Coventry City Council* [1997] 1 WLR 1666, tab 6 of the authorities' bundle. The context of that case was of intentional and contumelious failure to comply with an 'unless' order in civil litigation. It was somewhat different from the public law, or *quasi* public law context of the present case. At p.1675 G-H Lord Justice Ward said this:

> "Ordinarily this court should not distinguish between the litigant himself and his advisors. There are good reasons why the court should not. First, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation. Secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs. Thirdly, it seems to me that it would become a charter for the incompetent, as Mr. McGregor eloquently puts it, were this court to allow

almost impossible investigations in apportioning blame between solicitor and counsel on the one hand or between themselves and their client on the other. The basis of the rule is that orders of the court must be observed, and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself."

19 The final sentence of this citation merits emphasis:

> "The basis of the general rule is that orders of the court must be observed, and there are powerful public policy reasons why the intentional defaults of lawyers should be visited on their clients. None of these considerations applies to statutory appeals under the Housing Act."

20 My reading of the authorities is that it is incumbent on a claimant to satisfy the relevant body or tribunal that good cause or good reason for delay exists (cause and reason and synonyms in this context), and that in the majority of cases a claimant will discharge the burden of persuasion by establishing that he or she relied on apparently competent legal advisors. Although there is no general rule in this context of statutory appeals relating to the distribution of publicly financed resources to the effect that the defaults of solicitors are to be visited on their clients, it may be going too far to say that there is a general rule to the effect that a client will be able to shield behind the established defaults of his legal advisor. The correct analysis is that whether he or she will be able to do so will always depend on the facts of an individual case, the length and quality of the delay, the nature of the claim being made, and the knowledge, or lack of it, of the claimant himself. Many claimants are able to prosecute Housing Act appeals without the benefit of legal advice, and the provisions of Section 204(2A) are readily available online.

21 Mr. Luba's argument was that the absence of evidence relating to the post 2nd April period should not count against the appellant. The judge below knew that his client had instructed experienced solicitors who had conduct of the case at all material times after 2nd April. Indeed, Mr. Luba turns the matter round in this way: he submits that there is no evidence to support the proposition that his client was at fault and all the evidence points irresistibly to the influential conclusion that the solicitors were at fault and entirely to blame for this procedural mess. He further submitted that the judge appears to have proceeded on the basis that the appellant could not hide behind the errors of his solicitors. Indeed, the judge looked at the delay solely from the perspective of the solicitors and not from that of the appellant at all. This was an error of approach.

22 My starting point is to agree with Mr. Luba that the evidence points ineluctably to the conclusion that the solicitors were at fault. They were warned of the procedural position, quite properly, by Sharpe Pritchard, representing the Local Authority, yet did nothing to address the matter until the eleventh hour. The judge correctly

characterised this delay, viewed from the solicitors' perspective, as without good reason. The final sentence of para.15 of the transcript of the judgment, and much of para.18, is directed to this point.

23 Logically, the next issue which arises is whether the judge applied a rule of law fixing the appellant with the defaults of his solicitors. If he did, then Mr. Luba would have established an error of approach enabling this court more readily to intervene. During the course of argument I suggested that the judge might have done so either *sotto voco* or *sub silentio*, if I may be forgiven for mixing Romance languages.

24 I have read the judgment several times now and have come to the conclusion that the judge did not perpetrate this solecism; or, more precisely, I cannot be satisfied that he did. Nowhere is there reference in the judgment to any rule, still less a general rule, to that effect. Furthermore, one must recognise that the judge was merely reacting to the way the case was being advanced before him. Those then representing the appellant focused on the solicitors' delay and the reasons for it and did not address submissions to the effect that the appellant personally should be exonerated. It may well be that the explanation for this is that the appellant's advisors rather assumed that this issue could only be resolved in the appellant's favour, but the fact remains that the point was not directly addressed.

25 In the context of a statutory appeal the judge should not be criticised for following this approach. In putting the matter in those terms I recognise that I am adding to my criticisms of the lawyers' conduct of the litigation below. They should have presented this case in the same way as Mr. Luba put it to me on appeal. However, this failure by the solicitors below scarcely avails the appellant at this stage.

26 Mr. Luba's final point was that the judge should have allowed himself to be driven to the conclusion that all the fault lay with the solicitors and none of it could reside with the appellant personally. This, he submitted, was the only reasonable inference on the available material, notwithstanding the paucity if not the absence of evidence to that effect. During the course of oral argument I suggested to Mr. Luba that the correct approach to this case might lie in the drawing of inferences. If, for example, one could not draw the inference that the appellant was personally at fault then it might be said that there was no need for evidence to be adduced by him personally.

27 Mr. Beglan strongly submitted that the approach I was tentatively putting forward was incorrect. Inferences cannot be drawn on the basis of judicial instinct as to the likely state of affairs if relevant evidence bearing on that state of affairs is non-existent. Inferences are conclusions of secondary fact which predicate the existence of some evidence.

28 Ultimately, I exceed to Mr. Beglan's formulation. My analysis is that the establishment of clear blame on the solicitors does not rule out the possibility of concurrent, albeit slightly different blame, on the appellant personally. I have already said that there is no rule of law to the effect that the litigant will always be able to armour plate himself against the imputation of responsibility in this sort of case once he or she has instructed lawyers. It must always depend on the particular facts, or, more precisely, all the available evidence.

29 Here, the judge observed that the delay was profound and prolonged, and by implication that it merited a full explanation. The judge did not know whether the appellant saw any of the relevant correspondence or the respondent's skeleton argument, nor what involvement (if any) the appellant took in the proceedings. It is possible that he left everything to his solicitors. Unless the judge was bound to conclude that the only reasonable inference was that the appellant personally could not have been at fault, it seems to me that Mr. Luba's appeal on this issue cannot succeed. But the judge was not bound to draw that inference from all the available material, and in the circumstances the judge's stricture that there was an evidential black hole after 2nd April seems to me to be entirely warranted. The issue, as Mr. Luba recognises, is whether the judge's approach was "wrong", not whether this court would have reached the same conclusion.

30 Not without some reluctance I therefore dismiss this appeal.
