IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

QA-2019-000125

[2019] EWHC 2297 (QB)

31 July 2019

Before:

MRS JUSTICE LAMBERT

B E T W E E N :

JOAN ANGELA KEMBER
(As Personal Representative of the Estate of LEONARD JOHN KEMBER, Deceased and on her own behalf and on behalf of his dependants)

Respondent/Claimant

-and-

(1) CROYDON HEALTH SERVICES NHS TRUST
(2) KING'S COLLEGE HOSPITAL NHS FOUNDATION TRUST

App

Hearing Date: 26 July 2019

MR P. REYNOLDS (instructed by Capsticks Solicitors) appeared on behalf of the Appellants.

MR J. HAND QC (instructed by McMillan Williams) appeared on behalf of the Respondent.

J U D G M E N T

MRS JUSTICE LAMBERT:

1. This is an appeal from the Order of Master Gidden of 26 April 2019 refusing the Defendants' applications for an extension of time for filing a Defence and for relief from sanction. Permission to appeal was granted on the papers by Sir Alastair MacDuff on 5 June 2019.

2. The claim arises from the death of Leonard John Kember on 15 October 2014 at the age of 67. It is brought on behalf of his estate under the Law Reform (Miscellaneous Provisions) Act 1934 and on behalf of his dependants under the Fatal Accident Act 1976. The main thrust of the claim is that the death would have been avoided but for the failure (to which both Defendants contributed) to perform heart surgery within a reasonable time of a diagnosis of heart failure in March 2014.

Procedural History

3. A pre-action letter was served on 1 June 2017 and a letter of response served on behalf of both Defendants on 29 November 2017. Proceedings were issued on 6 June 2018 and served on 28 September 2018 (an agreement having been reached between the parties that limitation would not be raised as a defence if proceedings were issued before 15 December 2018). The Defence was due to be served on 26 October 2018 but there was a series of agreed extensions to 23 November 2018, to 18 January 2019 and finally to 4pm on 15 March 2019.

4. The Defence was not filed and served by 4pm on 15 March 2019. It emerged during the hearing before the Master that a draft of the Defence had been sent to the Defendants on 12 March 2019 and that one of the Trusts (the Second Defendant) had raised queries on 15 March 2019. On 15 March 2019, the Defendants' solicitor contacted the Claimant's solicitors seeking consent to a further extension of time for service of the Defence but the case handler was not in the office. An application for an extension of time for service was sent to the Court by fax at 17.34 on 15 March, advice having apparently been received from a member of the court staff that it was acceptable to file the application by fax. The application sought a further six-week extension for service of the Defence.

5. On 11 April 2019, the Defendants' solicitor contacted the Court to clarify whether the application had been received and, if so, when the application was to be considered. She was informed that the application had not been received and that applications by fax were not accepted. She issued a further application for an extension of time for service together with an application for relief from sanction on 12 April 2019. The statement served in support recorded that the Defence was still not available as it had yet to be approved by the Second Defendant, that further comments had been provided which would need to be considered by the Defendants' solicitors and by counsel before once again reverting to the Defendants and NHSR for the Defence to be approved and signed. The witness statement asserted that the delay in making the application was of only 1 hour and 34 minutes and was not therefore a serious or significant failure. It also asserted that there was a good reason for the delay given that the claim was a complicated clinical negligence action and that, given that the Claimant had delayed in issuing proceedings for 10 months following receipt of the letter of response, so the Defendants should be permitted 10 months for filing their Defence. She noted that if the application were refused then the Defendants would be prejudiced in not being able to defend the claim on liability.
6. The Defence was eventually served on 23 April 2019.

The Master's Ruling

7. The applications came before Master Gidden on 26 April 2019. In his pithy ex tempore ruling he found the relevant default to be the failure to serve the Defence, that service of the Defence was a "*a crucial stage in the proceedings*" and the delay in service to be serious and significant. He observed that the passage of time from October 2018 (when the Particulars of Claim had been served) and "*the ripple of events*" through to March and April 2019 could not be characterised as anything other than a serious and significant breach. He found that there was no good reason for the breach and that the fact that there were two hospital Trusts involved was not a good reason for the delay in serving the Defence. He considered all of the circumstances, identifying the prejudice to the Defendants in not being able to defend the claim. He found that the application for relief from sanction was not made promptly, although there had been a prompt application for an extension of time for service of the Defence on the 15 March. However, his view was that this was the wrong application, and the right application was that of relief from sanction which had not been made until the 12 April. He commented generally that it was "*extraordinary that Defendants defending a claim of this nature can be so relaxed about complying with deadlines, particularly successive deadlines as occurred here in the belief that the court will think it just to indulge further delay*". He refused the applications commenting that otherwise "*he would be sending out quite the wrong message*".

The Appeal

8. At the appeal before me, the appellant was represented by Mr Paul Reynolds and the respondent by Mr Hand QC. I am grateful to them both for their helpful submissions.

9. Mr Reynolds submitted that there had been no need for the Defendants to make any application for relief from sanction as CPR 15.4 does not prescribe the effect and consequences of a failure to serve a Defence within time, nor was there any order in the litigation which stipulated a sanction in the event of failure in compliance. He relied upon *Salford Estates (No. 2) Limited v Altomart Ltd* [2015] 1 WLR 1825 at [10] where the Court of Appeal stated that the language of CPR 3.8 was concerned with a sanction imposed by a rule, practice direction or order of which the applicant was in breach and that where the rule, practice direction or order which has been breached does not provide a specific sanction for the breach then it is for the court to decide what consequences should follow. An extension of time for service of the defence does not fall within CPR 3.9 either expressly or by analogy and therefore such applications are governed by CPR 3.12(a) which grants the court a general discretion to extend time. Mr Reynolds accepted that although there was no need for an application for relief from sanction, an application for an extension of time made, as in this case, after the expiry of the time limit, would be approached by the Court adopting the principles set out in *Denton & Ors v TH White Limited* [2014] 1 WLR 3926, see *R (Hysaj) v The Secretary of State for the Home Department* [2014] EWCA Civ 1633.

10. Applying the *Denton* principles to the application for an extension of time for service of the Defence, Mr Reynolds accepted that the five-week delay in serving the Defence constituted a serious and significant breach of the Rules. However, he submitted that the Master had gone wrong by taking into account the history of extensions which preceded the breach and that the Master should have considered the seriousness of the breach in isolation from the preceding history. Mr Reynolds also conceded that there was no good reason for the breach. His submissions focussed upon the Master's consideration of all of the circumstances, including those matters referred to in CPR 3.9(1)(a) and (b) (the need for litigation to be

conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders).

11. Mr Reynolds submitted that the Master had misdirected himself in taking into account the timing of the application for relief from sanction: such an application had not been needed and therefore was irrelevant and should not have been brought into account. He submitted that, given that the Master had found that the application for an extension of time for service of the Defence had been made promptly (only one and a half hours after compliance was due) the Master should have, and would have but for his misdirecting himself, allowed the application for an extension of time for service of the Defence. Mr Reynolds also made the point that the Master's examination of all of the circumstances was distorted by the fact that he had impermissibly taken into account at stage 1 the surrounding circumstances of the breach which had led him to consider the breach to be more serious and significant than in fact it was. By overstating the breach, the Master started off his examination of the broader circumstances on the wrong footing and was bound to reach an unduly critical conclusion.

12. Mr Hand QC who appeared on behalf of the Respondent submitted that a narrow textual analysis of the Master's ex tempore ruling was inappropriate and that it was important that the ruling was considered as a whole and in conjunction with observations and comments which the Master made during the course of the hearing. Adopting this approach, he submitted that it was apparent that the Master was highly critical of the delay of over five weeks in filing the Defence - irrespective of the fact that this delay followed three extensions to the time limit prescribed by CPR 15.4. Mr Hand did not necessarily accept that the relevant application was that for an extension of time (rather than relief from sanction) but he submitted it made no difference given that the court's approach would be the same whichever application were being considered. The Master applied and worked through the three *Denton* stages. At the third stage he took into account all the relevant factors. He bore in mind the effect of the delay in serving the Defence when he remarked that service of the Defence was a crucial stage in the proceedings. He also considered CPR 3.9(1)(b) when observing that, if he were to permit the application, he would be sending out the wrong message to the profession. He clearly had the need to comply with the rules and court orders well in mind when he observed that it was "*extraordinary that defendants defending a claim of this nature can be as relaxed about complying with deadlines, particularly successive extended deadlines as occurred here, in the belief that the Court will think it just to indulge further delay*." The Master took into account the prejudice to the Defendants in being deprived of the opportunity of defending the claim. It was clear from his criticism of the handling of the litigation by the Defendants that the Master considered that the sanction was proportionate to the breach. Mr Hand therefore submitted that, even if the Master had mistakenly taken into account the timing of the application for relief from sanction, it made no difference. Nor if he had taken a wrong turn could he be criticised given that the Defendants had made the application for relief from sanction and Counsel instructed on behalf of the Defendants at the hearing (not Mr Reynolds) had conceded it to be the relevant application.

Discussion and Conclusion

13. In the event, the legal framework was not significantly in dispute. I agree with Mr Reynolds that the appropriate focus for the hearing before the Master should have been the application for an extension of time for service of the Defence and that there was no need for an application for relief from sanction given that neither CPR 15.4 nor any of the court's orders in this litigation prescribed a sanction in the event of default. Although Mr Hand did not

concede the point, he did not argue seriously against it. If no sanction is prescribed then the proper application is, in the context of this case, one for an extension of time adopting the three stage *Denton* test. Given the proper concessions that the breach was significant and serious (stage one) and that there was no good reason for the breach (stage two), the only real question for me in this appeal therefore is whether, when considering all of the circumstances, including the effect of the breach on the litigation and the need to uphold the rules, the Master misdirected himself by focussing upon the application for relief from sanction and if so whether it was a material misdirection such that the ruling cannot stand.

14. I accept Mr Reynolds submission that the Master was in error in approaching his stage three assessment of all of the circumstances against a finding that there had been a delay in making the application for relief from sanction and that he should have approached his analysis on the basis of his finding that the application for an extension of time for service of the Defence had been made promptly. I note however that given that the Defendants had made the application for relief from sanction and that Counsel who appeared before the Master had accepted that that application should have been made on 15 March, the Master cannot be criticised for going wrong, as I find he did. However, the timing of the application was only one of the considerations which influenced the Master's ruling. The Master also took into account the effect of the delay on the litigation as a whole and by inference the prejudice to the Claimant in an already stale claim. He took into account the history of delay in serving the Defence with multiple extensions being obtained, culminating in the application for a further six-week extension on 15 March and the final service of the Defence only shortly before the hearing. Most significantly however he was scathing in his criticism of the conduct of the litigation by the Defendants. He understood (correctly) that part of the rationale for the *Denton* approach was the need for all parties in litigation to adhere to the rules and that if the application were to be allowed it would send out to the profession "*quite the wrong message*." It was the Defendants' wrong assumption that a yet further extension would be "*indulged*" which was pivotal to the Master's decision. Given these critical comments, even if the Master had concentrated upon the application for an extension of time for service of the Defence as he ought to have done, I have no doubt that he would have refused the application. Nor am I persuaded that the discretion was distorted in any way by the Master having overstated the seriousness of the breach as Mr Reynolds submits. At stage three, the Master was fully entitled to consider the breach in context: whether this was done at stage one or stage three makes no difference.

15. In summary therefore, although I find that the Master misdirected himself on a point of law, ultimately his misdirection was not material. On this basis, the decision was not wrong and I dismiss the appeal.

16. If I am wrong in my conclusion and the misdirection which Mr Reynolds has identified was such as to vitiate the Master's decision, then both parties are in agreement that I should set the decision aside and, rather than remitting it back, go on to exercise my discretion afresh. For the reasons which I set out below, I would, in these circumstances refuse the appeal.

17. The Court is required at the third stage of *Denton* to take into account that litigation is to be conducted efficiently and at proportionate cost and the need for the parties to litigation to adhere to the rules and to court orders – see CPR 3.9(1)(a) and (b).

18. It was common ground before me that consideration of CPR 3.9(1)(a) requires the Court to examine the effect of the delay on the litigation. Here the delay in service of the Defence

stalled the case management hearing in a claim which goes back to 2014. Although, viewed in isolation, the delay in setting matters in train for a case management conference and the directions timetable would not lead me to refuse the application, this factor must be considered in conjunction with the need to enforce compliance with the rules under CPR3.9(1)(b) and other matters.

19. There had been three extensions for service of the Defence before the further application made in January 2019. There was no good reason for the delay. I do not accept, as asserted in the witness statement of the Defendants' solicitor, that this is a particularly complicated clinical negligence action. The claim boils down to no more than two or three allegations of negligence, each of which were set out in the pre-action letter of claim; the Defence as finally drafted adds little to the letter of response which had been served several months earlier. Although I accept that the fact that there are two defendants makes handling the litigation more cumbersome, it is by no means unusual for more than one Trust to be involved in litigation of this nature. It requires those conducting the litigation to act efficiently, but no more.

20. In the absence of a good reason for the delay, I agree with the Master's assessment that the Defendants' approach to the litigation generally and to the rules and court orders was very relaxed. This attitude is evident from the witness statement served in support of the two applications of 12 April 2019 in which the author stated that, given that the Claimant had required 10 months to serve the Particulars of Claim following the letter of response, so the Defendants should be afforded the same period of time to prepare their pleadings in response. The statement does not take into account that delay before issue of proceedings is different from delay after issue, when the course and timetable of the litigation are prescribed by the rules. This relaxed attitude is also revealed by the fact that the draft Defence was only provided to the Defendants two days before the date for service on 15 March, a fact which emerged during the hearing before the Master. It could not have come as a surprise to the Defendants' solicitor that if issues were raised by one of the Defendant Trusts then it would prove impossible to serve the Defence by 4pm on 15 March. Even after the faxed application to the Court on 15 March, there does not appear to have been any urgency in the Defendants conduct of the litigation. The witness statement records that, as of 12 April 2019, the Defence was still not ready to be served and further comments from the Trust had yet to be considered by those instructed by the Defendant, and Counsel, and NHSR before the document was signed off by the Defendant. The statement records no acknowledgement that the rules are there for a purpose to ensure the efficient, fair and proportionate conduct of litigation and that, absent good reason, they must be adhered to.

21. Unlike the Master, I do not find that the application for an extension of time for service of the Defence was made promptly. Although an application was faxed to the Court at 17.34 on 15 March, the application was not accepted. I accept, as did Master Gidden, that the application had been preceded by a telephone call to the court when someone had apparently informed the Defendants' solicitor that issuing by fax was acceptable. However, speaking with court staff is no substitute for reading the rules. Filing an application which attracts a fee by fax is permissible in only exceptional circumstances of unavoidable emergency. The situation facing the Defendants' solicitor was not one of unavoidable emergency. Issuing by fax after close of business would not be effective until the next working day and, so, nothing was in fact gained by attempting to issue by fax over and above issuing in the usual way on the next working day. Nor was the situation unavoidable given that the situation arose because of the Defendants' late sending of the draft Defence to the Trusts.

22. Standing back, I ask myself whether the sanction is proportionate to the breach. I accept that the effect of my decision is that the Defendants are now only able to defend the claim on quantum and not on the merits. Nonetheless I, like the Master, consider that the sanction is proportionate to the breach. Such disregard of the rules as demonstrated in this litigation cannot be justified or excused.

Conclusion

23. The appeal is dismissed.