Neutral Citation Number: [2019] EWHC 3053 (QB)

Case No: E32YX327

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 15th of November

Before :

SIR ROBERT FRANCIS QC
(Sitting as a Deputy Judge of the High Court)

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Between :

INNOVATIVE AGED CARE LIMITED	**Claimant**
- and -	
MS BRITT-MARIE TIDELIUS	**Defendant**
[By Her Litigation Friend,	
MR ALEXANDER PEEBLES]	

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Thomas Elias (instructed by **Kinglsey Napley LLP**) for the **Claimant**
Duncan Lewis (instructed by **Duncan Lewis**) for the **Defendant**

Hearing dates: N/A

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR ROBERT FRANCIS QC

Sir Robert Francis QC :

Introduction

1. This matter was listed on 22 July 2019 for hearing of the claimant's application to set aside the order of Master Thornett dated 13 June staying application of a Writ of Control dated 14 May 2019 [hereinafter called "the set aside application"], and to restore and dismiss the defendant's application for a stay of the writ [referred to hereinafter as "the stay application"]. The day before the listed date of hearing the Court was notified that the application had been settled, and on 22 July a Consent order was presented to me which I duly noted. Part of that order was that the costs of the claimant's and the defendant's applications be determined and summarily assessed on the papers with consequential directions for the serving and filing of written submissions. This judgment is my determination of those applications for costs.

2. In order to come to my conclusion, I have read and had regard to:

   i) The consent order dated 22 July 2019 sealed on 25 July 2019

   ii) The defendant's written submission on costs dated 24 July 2019

   iii) The defendant's schedule of costs for summary assessment which is undated, and is not in the required form N260, but appears to refer to costs incurred between 9 and 26 July 2019.

   iv) A four page bundle of correspondence supplied with these submissions

   v) The claimant's written submissions on costs dated 24 July 2019

   vi) The claimant's schedule of costs in form N260 dated 22 July 2019

   vii) The claimant's reply submissions on costs dated 26 July 2019

   viii) A 10 page bundle of correspondence supplied with the claimant's submissions

   ix) The defendant's response to the claimant's submissions on costs dated 26 July 2019.

   x) Such documents from the hearing bundle as are referred to in this judgment and/or in the parties' written submissions.

3. I should say a word of explanation for the time elapsing between the date of this order and this judgment. It was not until 6 August 2019 that the claimant's submissions arrived in my chambers, by which time I had departed on my annual holiday, and I only received the defendant's submissions on 5 September, by which time I had become engaged in many other commitments. It would be disproportionate to inquire into the reasons for this, and I am prepared to assume that the directions in the consent order were complied with and that the delays were due to issues around administrative communication. Nonetheless I cannot resist pointing out that normally contested costs applications are dealt with in relation to a matter listed for hearing at the hearing, as are any consequent summary assessments. The advantage of doing so is obvious in terms

of the presence of the parties, the papers and the time available. It strikes me that the process adopted in this case is disproportionate to the issues involved.

Background

4. The claimant owns and operates a dementia care home in London in which the Defendant, who lacks capacity to litigate and suffers from dementia, resided between February 2017 and December 2018. A claim was brought by the claimant on 5 April 2018 for possession, and on 12 April 2018 for outstanding fees. Mr Alexander Peebles, a solicitor who had acted for the defendant in various capacities, has been her litigation friend in these proceedings since November 2018. An assessment had concluded that the defendant lacked litigation capacity since June 2018. Mr Peebles has had a lasting power of attorney for the defendant; this was registered with the Office of the Public Guardian on 17 May 2018.

5. An order for possession was obtained on 25 June 2018 and enforced by High Court Enforcement Officers on 19 December 2018. Following protracted proceedings described by Mr Richard James Foss in his witness statement of 1 July 2019, the claimant obtained judgment in the Central London County Court on 20 February 2019 for £172,452.31 and the costs of the proceedings to be assessed on the standard basis.

6. The judgment ordered the defendant to pay £140,000 into court by 29 March 2019 to abide the event and enforcement of the judgment was stayed until the same date. If the defendant complied with the order to pay money into court the judgment for the debt and costs was to be set aside and replaced by directions enabling the defendant to file a defence. If the defendant failed to make the payment into court the claimant was to be at liberty to proceed to enforce the judgment. Permission to appeal was refused.

7. It is and has not been disputed that the defendant did not comply with the requirement to pay £140,000 into court and accordingly the claimant was free to enforce the judgement from 29 March 2019. On that date the claimant's solicitors wrote to Mr Peebles notifying him that enforcement action would be taken, and on 14 May 2019 a writ of control for enforcement of the judgment sum was obtained. On 7 June service of the writ on the defendant was purported to be made at the address of Cadogan Tate. In the statement referred to above Mr Foss explained that the address on the writ was that of Cadogan Tate where the assets on which the claimant wished to enforce the judgment, namely a collection of paintings, was stored. He accepts that this was a mistake, as it was not the defendant's address. A correctly addressed writ was served on 13 June. Mr Peebles in his witness statement of 12 June states that he was unaware of the initial writ until receiving an email on 7 June from Cadogan Tate's solicitors

8. On 12 June Mr Peebles served the Stay Application and appeared through counsel before Master Thornett on 13 June. Mr Foss complains that this was in spite of the service of a notice of application which on its face was to be heard at a hearing in the usual way. In a witness statement of 12 June in support of the Stay Application Mr Peebles proposed that the debt should be settled by the sale of the art collection at auction, apart from a picture by David Hockney. He requested a stay of at least five months to allow this to happen. He suggested that it would be detrimental to the value of the collection for the claimant to take possession of it as it needed to be sold through a specialist auction house. He exhibited a valuation of the collection from Christie's showing a total value of between £341,400 and £516,700. Of this the Hockney

represented £30,000 to £50,000. He stated that other than the art collection, he was holding about £75,000 in cash, some jewellery worth between £50,000 and £70,000, a car and some Swedish Krona. There were other assets not yet under his control. The defendant was currently in hospital and there was a need to find a suitable care home, which would cost about £11,000 a month.

9. The Stay Application came before Master Thornett in the afternoon of 13 June. It was attended by counsel and solicitor for the defendant. The claimant was not represented for the reasons explained above. However, on 12 June Mr Peebles had emailed the claimant's solicitor informing them that he was about to make the stay application, but suggested that "on the basis that we agree to auction all items except the Hockney at the sale, is your client prepared to suspend the writ so as to dispense with the need for our application. As I have said previously, so far as I am concerned, the art is already held to order and I am relaxed about how and where it is stored". According to a note taken by the defendant's solicitor Master Thornett accepted that there was a case for stay, describing his proposal as "insightful" and "rational". He suggested that the course proposed by the defendant for realising assets appeared to be the "only realistic one" and that he was not sure the High Court Enforcement Officers "had better expertise in selling such items than people with specialist knowledge of the items." He went on: "I grant the stay and would suggest that a new hearing is made on notice only if Kingsley Napley [the claimant's solicitors] can provide a sensible analysis for the strategy to complete sale and reasons for emergency. With my cost neutral hat on, if Kingsley Napley (with or without the high court enforcement officers) comes back next week without the evidence, I will take a dim view of that." Counsel for the defendant responded: "As you say, it may be best if the parties try to be grown up and come to an agreement. There appears to be an argument over nothing. There is logic in the approach outlined: it makes sense." The order of Master Thornett, sealed on 24 June 2019, stayed the writ of enforcement, giving a right to the claimant to apply to restore the writ and/or vary or set aside the order on notice. The costs of the application were reserved. It was following this order that the claimant, on 1 July, made the application to set aside Master Thornett's order and to restore and dismiss the defendant's application for a stay. Mr Foss in his witness statement points out that there appears to have been no discussion about the existing costs order in the claimant's favour under which more than £84,000 is claimed but is as yet unassessed.

10. The essential basis of the application as set out in Mr Foss's witness statement in support was that "if matters are left in the hands of Mr Peebles, they have no comfort that Mr Peebles will in fact authorise the sale of the paintings in September 2019 or pay off the judgment debt from the sale of the paintings." He complained that Mr Peebles had a history of not paying court orders promptly in spite of being in control of the defendant's assets. Payments were made eight and three months late in respect of costs. However, he also disclosed that there had been an agreement made on 16 January 2019, as evidenced in a consent order of that date, to instruct Cadogan Tate not to allow any of the stored artwork except for two specified paintings to be transferred out of its custody without the express written permission of the claimant and the defendant. Mr Foss further explained that Cadogan Tate were now expressing an unwillingness to continue storing the paintings, and that Mr Peebles had apparently turned down offers by Christie's to sell paintings at four sales between January and September 2019. He argued that there was therefore no certainty that Mr Peebles would, if left to his own

devices, sell the paintings at all, or if he did, would pay the judgment debt out of the proceeds of sale.

The consent order

11. The consent order, apart from its provisions as to the determination of costs described above, provided among other things that:

    i) Master Thornett's order of 13 June 2019 be set aside

    ii) The stay application be dismissed.

12. The order recorded in schedule 1 is an agreement between the parties as to the sale of the artwork and the disposal of the proceeds of sale. In summary its terms were that:

    i) The enforcement officers would take control of the artworks at Cadogan Tate and would instruct them to continue to store them.

    ii) The claimant would instruct Christie's to sell the artworks, and accept Christie's advice on the location and timings of sale, provided that this would be within three months of the order. Should Christie's be unable or unwilling to sell the artworks the claimant would attempt a sale through other reputable auctioneers in accordance with their statutory obligations

    iii) The proceeds of any sale would be remitted to the claimant's solicitor who would retain disbursements, sufficient to discharge the judgment debt, 50% of the claimant's costs associated with the sale, and a further £10,000 on account of the unassessed costs, with any residue to be paid to the defendant's solicitors.

The applications for costs

13. The claimant seeks an order that the defendant pay the claimant's costs of and relating to the defendant's stay application and their own set aside application. The schedule of their costs totals £35,367.08. The defendant seeks an order that the claimant pays the costs of her application and the stay application. The total in her schedule is £10,060.80.

Principles

14. If the court decides to make an order as to costs, the normal rule is that the "unsuccessful party" will be ordered to pay the costs of the successful party, but the court may make a different order [CPR Pt 44.2].

    In deciding what, if any order to make about costs, the court must have regard to all the circumstances, including:

    (*a) the conduct of all the parties;*

    (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply [CPR Pt 44(4)]

The "conduct of the parties" includes:

(*a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction—Pre-Action Conduct or any relevant pre-action protocol;*

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim. [CPR Pt 44.2(5)]

The orders which the court can make include an order that a party must pay

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment. [CPR Pt 44.2(6)]

The court can and should consider reflecting the relative success of parties on different issues by making a proportionate costs order, and in assessing the order the judge should consider what costs are referable to each issue and what costs are common to several issues: it will often be reasonable to award the overall winner not only the costs specific to the issues on which he has won but also the common costs: *Multiplex Constructions (UK) Ltd, Cleveland Bridge UK Ltd* [2008] EWHC 2280 (TCC)*; Mears Ltd v Leeds City Council [2011] EWHC 2694 (TCC)*; Supreme Court Practice §44.2.8. The exercise of making a percentage costs order, if that is the approach adopted, has to be "broad brush": *Sycamore Bidco Ltd v Breslin* [2013] EWHC 583 (Ch).

In relation to the assessment of costs, if to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue; costs which are disproportionate to the matters in issue may be disallowed or reduced even if reasonably and proportionately incurred [CPR Pt 44.3(2)].

In assessing costs the court must have regard to all the circumstances, and where assessing on the standard basis must consider whether the costs were proportionately and reasonably incurred or in amount. [CPR Pt 44.4(1). The court must have regard in its assessment to:

(*a) the conduct of all the parties, including in particular—*

(i) conduct before, as well as during, the proceedings; and

(ii) the efforts made, if any, before and during the proceedings

in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case;

(g) the place where and the circumstances in which work or any part of it was done; and

(h) the receiving party's last approved or agreed budget. [CPR Pt 44.4(3)].

The claimant's argument

15. In summary the claimant makes the following points:

i) Overall the claimant is the successful party

ii) The defendant's initial application was premature in that it was commenced without any discussions with the claimant and without any or at least sufficient, notice.

iii) The defendant's application was misconceived in that there were no justified concerns as to the enforcement officers' care for the artworks or ability to obtain a fair price for them.

iv) In any event the claimant had proposed to store the artworks with Cadogan Tate, this meeting the defendant's concerns, but the defendant only agreed to this proposal on 19 July. The only concession, it is argued, is that the claimant has agreed to postpone the sale of the Hockney by 3 months.

v) Finally, the need for a writ of control has only come about because of the defendant's failure to satisfy the judgment debt. Any prior proposals had been vague and part of "a pattern of delay" on the part of Mr Peebles.

The defendant's arguments

16. The defendant's points in summary are:

i) She had entered without prejudice negotiations regarding the transfer of the artworks to the claimant by 5 February 2019.

ii) The writ of control was applied for although the defendant had already offered to transfer the artworks to the claimant.

iii) The claimant's application for the writ was made without any notice to the defendant.

iv) The claimant then refused to accept the defendant's offer to stay the writ for further negotiations.

v) The claimant has not obtained through its application anything not otherwise available.

17. Observations on the claimant's arguments

i) It is correct that overall the claimant is the successful party in the sense that an order has been obtained regulating the disposal of assets from which the judgment debt can be satisfied. However, it is far from clear to me that it was necessary to issue a writ of control, still less to seek to act on it, given the explanations given by Mr Peebles and the suggestions he made. I do not accept that he was unduly delaying taking reasonable steps to dispose of the artworks and generally administer a somewhat challenging estate on behalf of the defendant. The sale of artworks is to remain in the hands of Christie's and are to be held by Cadogan Tate to the order of the claimant. I see nothing to suggest that this outcome was not available by way of what Master Thornett called "grown up" behaviour.

ii) In these circumstances, given Mr Peebles' duties to preserve the defendant's assets, I do not consider that the stay application was premature.

iii) While it is true that the enforcement officers are under a duty to take reasonable care to obtain a fair price, it was not unreasonable to explore whether it would better ensure the ability to get the best price by leaving the existing arrangements in place.

iv) Whatever may be the position about the claimant's willingness to leave the artworks in the custody of Cadogan Tate, the claimant did make a concession with regard to the timing of the sale.

v) It is of course correct that at all material times the defendant has been in default of paying the judgment debt and that the claimant was being kept out of money owed. In due course as the law requires, the compensation for that is represented by the additional interest due.

18. Observations on the defendant's arguments

i) The so-called offer of 5 February 2019 is said to be evidenced by an email of that date. This refers to "the gallery" claiming a lien over the artworks which they were unlikely to release until paid what was owed to them (£18,000). The email stated that Mr Peebles expected this to be paid in full from the sale of one painting which was already with Christie's for that purpose. While Mr Peebles stated he would be willing to agree to a transfer of the artwork to the claimants, he doubted "the gallery" would be willing to do so until they were paid. This was not in my judgment an offer on which the claimant would reasonably be expected to rely. I assume the reference to the "gallery" is a reference to Cadogan Tate, but whether or not this is the case does not impact on the weight to be attached to Mr Peebles' proposal. A later email from Mr Peebles of 13 March inquired whether the claimant would accept an offer to settle on terms of their taking some of the artworks. Again, this was not an offer but an inquiry. It was in any event not the same in scope as the consent order which covers all the artworks apart from the Hockney.

ii) The application for the writ of control was indeed made without notice on 29 March 2019 and then served in error on Cadogan Tate not the defendant on 7 June. It is not clear to me that a creditor is obliged to give notice of such an application, and in any event the claimant had notified the defendant of their intention to make such an application by a letter dated 29 March. The error was corrected by re-service on 13 June. I fail to see how the defendant has been materially prejudiced in any event. At all material times she – or rather Mr Peebles – was aware that the judgment debt was outstanding and that the claimant was free to take enforcement action.

iii) There is more substance in the defendant's criticism of the claimant for not acceding to a pause to allow for further negotiation. It is clear that Master Thornett thought that reasonable parties could agree a way forward at the time of his hearing on 13 June. I agree with what he had to say. The offer made the day before that hearing was indeed sensible, and I can see little material difference between it and the outcome contained in the consent order. The claimant argues that they had no time to consider the offer before the application for a stay was heard: this is true, but given the claimant's actions in pursuing the writ of control it was entirely reasonable for Mr Peebles to persist with his application to protect the defendant's position. Further, as pointed out in the defendant's submissions in reply, the proposal was not accepted as the basis for settlement until just before the hearing listed before me.

iv) The claimant has substantially obtained what they sought except for a concession as to timing. However, I accept that in all probability this result would have been obtained by further discussion without an application.

Conclusions on the appropriate order for costs

19. Applying the principles I have to apply to these observations, the starting point in my judgment is that the claimant has at all material times had an unsatisfied judgment for a specified and substantial sum against the defendant. They were and are entitled to enforce that judgment in any reasonable and proportionate manner including by way of a writ of control. The complications caused by the sad incapacity of the defendant and the complexities of her estate do not diminish this entitlement. Those complexities do, however, inevitably affect the exercise of the court's discretion with regard to the time that needs to be allowed to enable assets to be gathered in and liquidated to satisfy the debt.

20. Turning to the conduct of the parties, I do not accept the implied assertion that Mr Peebles has been employing delaying tactics to avoid paying the debt. In my judgment he appears to have been setting about using his best endeavours to identify assets which could be sold, while at the same time preserving the value of the defendant's estate. I consider he acted reasonably in applying for a stay of the writ. I have already expressed my agreement with the observations of Master Thornett, and I see nothing in the evidence offered to the court which satisfies me that the position changed between then and the final settlement of these applications on the eve of the hearing listed before me.

21. In my judgment it is appropriate to make an order in favour of the claimant that the defendant pay a proportion of their costs. Even though I have concluded that the matter could and should have been settled substantially earlier, the claimant was nevertheless

entitled to stake steps to enforce their judgment. I do not consider the defendant should be awarded her costs. Mr Peebles actions were not unreasonable in the context of protecting the interests of an incapacitated defendant and her estate, but that is no reason why the judgment creditor should have to pay the costs of him doing so. In my judgment the fair order for me to make is that the defendant should pay the claimant 75% of the assessed costs of their own application and of responding to the defendant's stay application and no order on the defendant's costs application.

Assessment

22. As I have already said, the claimant has submitted a schedule totalling over £35,000. I observe that this is significantly higher in amount than the defendant's schedule of costs. I take into account the fact that the claimant had more work to do in making applications, but my broad impression is that there is a surprising amount of time attributed to the partner rate, and that the work required was increased to some extent by the relatively uncompromising attitude taken to the case. Therefore, applying a broad brush to the assessment in my judgment the appropriate amount to assess with regard to the total claimed in the schedule of costs is £30,000. On the basis of my earlier conclusions the claimant is entitled to an award of costs of 75% of that figure, namely £22,500.

Order

23. Accordingly, I order that the defendant shall pay the claimant 75% of their assessed costs, namely the sum of £22,500, and there shall be no order for the defendant's costs