Neutral citation number: [2020] EWHC 693 (QB)

Appeal Ref: BM90120A

**IN THE HIGH COURT OF JUSTICE**
**HIGH COURT APPEAL CENTRE BIRMINGHAM**
**ON APPEAL FROM THE COUNTY COURT AT COVENTRY**
**(HIS HONOUR JUDGE GREGORY)**

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: 25 March 2020

**Before** :

**THE HONOURABLE MR JUSTICE PEPPERALL**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**PROMONTORIA (CHESNUT) LIMITED**

**Claimant / Respondent**

**- and -**

**(1) MARK ADRIAN GROSVENOR LLOYD STEEDS**
**(2) HAZEL ROSEMARY STEEDS**

**Defendants / Appellants**

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**Graham Sellers** (instructed by **Joanna Connolly Solicitors)** for the **Appellants**
**James McWilliams** (instructed by **Addleshaw Goddard LLP)** for the **Respondent**

Hearing date: 11 December 2019

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**Approved judgment**

I direct that pursuant to CPR PD39A 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.

## THE HONOURABLE MR JUSTICE PEPPERALL:

1. On 24 June 2019, His Honour Judge Gregory dismissed Mr & Mrs Steeds' application for specific disclosure. On 16 October 2019, Jeremy Baker J refused their application for permission to appeal upon the papers. They now renew their application.

2. I heard this renewed application for permission to appeal on 11 December 2019 but, for reasons that I explain below, acceded to counsel's application that I should listen to the recording of the hearing before Judge Gregory before giving judgment. There was then some delay while the recording was obtained and the parties indicated the passages that I was invited to listen to. By reason of the adjournment, this judgment is necessarily to be handed down rather than being given ex tempore immediately following the hearing. Further, because of the nature of the challenge to the judge's conduct, I deal with that matter in more detail than one would ordinarily expect on a permission application. This nevertheless remains a judgment on a renewed application for permission to appeal a case management decision and accordingly my treatment of the substantive challenge to the judge's decision is not as full as if it were given upon the hearing of an appeal.

## BACKGROUND

3. Mr and Mrs Steeds borrowed over £1.6 million from Clydesdale Bank plc in order to fund the purchase of buy-to-let properties. The loans fell into arrears and, on 5 June 2015, Clydesdale purported to assign its interest in the loans to Promontoria (Chestnut) Limited. In September 2017, Promontoria commenced these proceedings against the Steeds seeking recovery of the outstanding loans and enforcement of the securities.

4. An issue in the proceedings is whether the loans were properly assigned such that Promontoria has good title to sue upon the loan agreements and to enforce the securities. Upon disclosure, Promontoria disclosed a redacted copy of the deed of assignment. On 12 June 2018, Deputy District Judge Josephs ordered that Promontoria should also disclose the deed in unredacted form but refused the Steeds' further application for disclosure of the antecedent sale and purchase agreement. By his judgment, the judge drew a distinction between documents of title, such as the deed, and mere contracts which, he observed, did not of themselves pass title.

5. Disclosure of the unredacted deed of assignment revealed that there had been an earlier novation agreement dated 29 September 2014. This led to a further application, made on 27 July 2018, by which the Steeds sought specific disclosure of the novation agreement and "all documents relating to the assignments/novations (including all parties' relevant consents)."

6. Unfortunately, the specific disclosure application did not come on for hearing until 24 June 2019. In response to the application, Promontoria filed a witness statement from its solicitor, Timothy Cooper of Addleshaw Goddard LLP. At paragraph 30 of his statement, Mr Cooper confirmed that:

> "30.1 the SPA [i.e. the sale and purchase agreement] is not a document of title relevant to the pleaded claim of the Claimant on which it relies as to title to sue for the Facilities, Loans and Mortgages relevant to these proceedings, as found by DDJ Josephs in rejecting a request for its disclosure in these proceedings;
>
> 30.2 the Novation Agreement, being as it is described [an] agreement between [National Australia Bank], [Clydesdale] and the Claimant, as a novation of rights and obligations under the SPA, is not a document of title relevant to the pleaded claim of the Claimant, …;
>
> 30.3 there are no other assignments, novations 'along the way' or otherwise in the 'chain of title' relevant to the pleaded claim of the Claimant on which it relies, or indeed at all, …;
>
> 30.4 nothing in those documents, further, is relevant either positively or adversely to the pleaded position of the Claimant or the Defendants (bearing in mind they assert no positive case in any event as to the Claimant's right to sue as claimant in these proceedings)."

7. Judge Gregory concluded that there was no evidence to challenge Mr Cooper's assertions and that accordingly the party's statement on the question of relevance, supported as it was by Mr Cooper's statement of truth, was conclusive. Such finding was sufficient to dismiss the application for disclosure of the novation agreement, but Judge Gregory found that in any event the novation agreement was not a document of title and that accordingly it, like the sale and purchase agreement, was not a disclosable document in this litigation.

8. As to the second limb of the application, Judge Gregory ruled that it was a "hopelessly vague and conceivably exceptionally wide" application that displayed a "scattergun approach to disclosure."

## THE PROPOSED GROUNDS OF APPEAL

9. By their proposed appeal, as developed orally by Mr Sellers, the Steeds seek to challenge Judge Gregory's dismissal of their application on the following broad grounds:

> 9.1 They argue that the hearing was unfair in that the judge did not allow their former counsel to address the court properly; alternatively, that the judge displayed apparent bias against their case.
>
> 9.2 They argue that the judge was wrong to dismiss the application in that he took a simplistic view of title that it was for the Respondent to prove its case and failed to appreciate that it will be impossible for the Appellants to challenge title without disclosure of the novation documents.

## THE CONDUCT OF THE HEARING

10. In his oral submissions on behalf of the Appellants, Mr Sellers, who did not appear below, criticised in trenchant terms the judge's conduct towards his predecessor. He argued that Judge Gregory's interventions were hostile and sought to embarrass and belittle counsel. She was, he submitted, prevented from properly developing the Steeds' case and left shaking when she left court. Mr Sellers argued that the judge's conduct stifled the proper presentation of the Steeds' case, amounted to apparent bias and rendered the hearing unfair. He developed his submissions by taking me carefully through the transcript of the hearing before Judge Gregory. He submitted, however, that the transcript had its limitations and that the court should listen to the recording before ruling on this application for permission to appeal. As I have already indicated, I acceded to this invitation.

11. Mr McWilliams, who appears for the Respondent, had the advantage of having also appeared before Judge Gregory. He conceded that the judge had been "forthright" and that his opponent had found the hearing to be difficult. He submitted that she had, however, been able to develop the points that she had wanted to make. He argued that the judge was justifiably irritated when counsel persisted, despite his clear indication that she should not, in mounting an improper collateral attack upon the deputy district judge's order. He maintained that if the Steeds had wished to challenge that order then they should have done so by way of appeal.

12. Judges do not have to sit mute and allow parties to address the court without restriction. They can and should intervene to ensure that proceedings are conducted efficiently and that submissions remain relevant. Judges can test and challenge submissions; indeed, doing so can be a very useful tool in the adjudicative process. Judges can be robust, particularly with professional advocates, if bad points are taken, if counsel is clearly not properly prepared or strays from matters that are relevant and in evidence or does not move on when asked to do so. The classic statement of the English approach was in the judgment of Sir Thomas Bingham MR (as he then was) in *Arab Monetary Fund v. Hashim* (1994) 6 Admin. L.R. 348:

> "In some jurisdictions the forensic tradition is that judges sit mute, listening to advocates without interruption, asking no question, voicing no opinion, until they break their silence to give judgment. That is a perfectly respectable tradition, but it is not ours. Practice naturally varies from judge to judge, and obvious differences exist between factual issues at first instance and legal issues on appeal. But on the whole the English tradition sanctions and even encourages a measure of disclosure by the judge of his current thinking. It certainly does not sanction the premature expression of factual conclusions or anything which may prematurely indicate a closed mind. But a judge does not act amiss if, in relation to some feature of a party's case which strikes him as inherently improbable, he indicates the need for unusually compelling evidence to persuade him of the fact. An expression of scepticism is not

> suggestive of bias unless the judge conveys an unwillingness to be persuaded of a factual proposition whatever the evidence may be."

13. Further, I agree with the observations of Saini J in *Dorman v. Clinton Devon Farms Partnership* [2019] EWHC 2988 (QB), at [6]:

> "Proactive case management is expected of judges. One must guard against too readily characterising a judge's conduct of case management hearings as indicating apparent bias. Being robust is not to be equated with apparent bias, and merely deciding certain procedural matters against a party cannot properly (in and of itself) suggest an appearance of bias or actual bias. Proactive case management will often leave one party (and sometimes both parties) unhappy with the outcome."

14. There are, however, limits to judicial intervention. Whatever the merits of a party's case, it is plainly wrong and thoroughly distasteful for a judge to bully any lawyer, party, witness or other participant in court proceedings. A judge's duty is to ensure that proceedings are conducted fairly and that a case is not decided against a party without allowing the party a proper opportunity to put his or her case. It is obvious that judges must be impartial, but it is also important that they should not conduct themselves so as to give the appearance of bias. Thus, in *Alpha Lettings Ltd v. Neptune Research & Development Inc.* [2003] EWCA Civ 704, Longmore LJ observed, at [11], that a submission that a hearing was unfair by reason of the conduct of the judge can be put in two different ways:

> "First, it may be said, as in *Jones v. NCB* [1957] 2 Q.B. 55, that if the judge takes over the case and prevents either the witnesses from giving their evidence or the advocates from presenting the case in an orderly and sensible manner, an informed and objective observer would conclude that there has not been a fair trial. Secondly, the judge may intervene in such a way as to show that he is not approaching the evidence of witnesses or submissions of counsel in an impartial manner; in such a case it may be that an informed and objective observer would conclude that there is an appearance of bias."

15. I listened to the recording in this case because I was concerned as to the sharpness of some of the exchanges between the judge and counsel. Having done so, I make the following findings:

    15.1 The judge was justifiably irritated that counsel persisted in mounting an improper collateral challenge to the deputy district judge's order. Counsel was, I regret to observe, slightly flat footed in persisting in the submission and in failing either to move on or explain clearly to the judge how such argument remained open to her clients.

    15.2 The judge was entitled to question why counsel was seeking disclosure of documents to plug a gap in her opponent's case. Again, counsel bulldozed on somewhat rather than answering the judge's question.

    15.3 Perhaps because he was not bowled over by either her advocacy or the quality of her submissions the judge was, regrettably, somewhat sarcastic and patronising towards counsel. She cannot have found this an easy hearing and

> I am very sorry to hear that she was left upset by the encounter. Having, however, considered the transcript and recording with care together with counsel's written arguments, I am satisfied that she was able to make her submissions.

16. I therefore reject the allegations that this was not a fair hearing and that the judge displayed apparent bias. The judge was not impressed by either the application or the submissions made, but a fair-minded observer would not regard his conduct to have been such that the Steeds were denied a fair hearing. Equally, such an observer would not regard him to have been biased; indeed, I am entirely satisfied that he was not and note that the judge was equally firm with Mr McWilliams when he interrupted his opponent's submissions.

## THE JUDGE'S DECISION

17. The application was made pursuant to r.31.12(1) of the *Civil Procedure Rules 1998*, which provides that the court "may" make an order for specific disclosure. It is clear both from the words of the rule and from the case law that there is no automatic entitlement to an order for specific disclosure; rather it is a discretionary order which might be made.

18. Case management decisions do not determine substantive rights but rather determine the appropriate and proportionate way in which a case should be managed so that it can be properly tried. Many case management decisions are ultimately a matter of discretion. Save where an appellant can demonstrate that the judge below misdirected him or herself as to the law, overlooked some relevant factor or took into account some irrelevant factor, it is well established that an appeal court should not lightly interfere with the exercise of such discretion. See *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, at [52], per Lord Dyson MR and *Chartwell Estate Agents Ltd v. Fergies Properties SA* [2014] EWCA Civ 506, at [63], per Davis LJ. Further, appeals against case management decisions engage paragraph 4.6 of PD52A which provides that, among other matters, the court considering an application for permission to appeal may take into account whether the issue is of sufficient significance to justify the costs of an appeal.

19. This application for specific disclosure faced two significant challenges:

    19.1 First, it necessarily challenged Mr Cooper's assertion as to relevance (which I use as convenient, albeit not wholly accurate, shorthand for the standard disclosure test pursuant to r.31.6).

    19.2 Secondly, it sought underlying contracts rather than documents of title.

20. As the judge rightly observed, it is settled law that a party's sworn disclosure statement will ordinarily be conclusive as to issues of relevance: *GE Capital Corporate Finance Group Ltd v. Bankers Trust* [1995] 1 W.L.R. 172 (CA); *Shah v. HSBC Private Bank (UK) Ltd* [2011] EWCA Civ 1154. Here, there was no proper material to entitle the court to go behind Mr Cooper's witness statement, and the judge was

entitled to reject the submission that the earlier mistake in Mr Davis's evidence before the deputy district judge was sufficient for these purposes. Further, the documents sought were not documents effecting a transfer of title but rather the antecedent contractual documents. Judge Gregory was right to distinguish between the contract by which the banks and the Respondent agreed to novate their rights under these loan agreements and the documents by which such rights were in fact assigned.

21. In my judgment, this proposed appeal is not properly arguable:

    21.1 First, Judge Gregory properly applied well known principles in not going behind Mr Cooper's witness statement.

    21.2 Secondly, I agree with Judge Gregory that the novation agreement was not a document of title.

    21.3 Thirdly, the judge was entitled to take the view that the second limb of the application was hopelessly unfocused.

    21.4 Fourthly, even if I disagreed, I cannot detect any error of law, the taking into account of any irrelevant factor or the overlooking of relevant factors. This was a case management decision that was plainly open to the judge and one with which an appeal court should not interfere.

## CONCLUSION

22. Accordingly, this renewed application for permission to appeal is dismissed.