Neutral Citation Number: [2020] EWHC 981 (QB)

Case No: E40MA039
Appeal ref: M19X177

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Business and Property Courts Manchester,
Manchester District Registry,
Circuit Commercial Court (QBD)

Date: 24/04/2020

Before:

MR JUSTICE FREEDMAN

- -

Between:

Capital Funding One Limited	**Claimant**
- and -	
(1) Daniel John Esqulant	**Defendant**
(2) Alison Jayne Esqulant	

- -
- -

Arnold Ayoo (instructed by **Kuits LLP**) for the **Claimant**
Dov Ohrenstein (instructed by **Gisby Harrison**) for the **2nd Defendant**

Hearing dates: 8 April 2020

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Approved Judgment

Judgment Approved by the court for handing down.

Mr Justice Freedman:

Introduction

1. This is an appeal by Capital Funding One Limited ("the Appellant") against Alison Jayne Esqulant ("the Respondent"). It relates to a decision of District Judge Ransom ("the Judge") to permit Mr Daniel John Esqulant ("Mr Esqulant") to give evidence. The Judge decided to allow the evidence because the Respondent had issued a summons against Mr Esqulant. It is contended by the Appellant that what was required was an application for permission from Mr Esqulant under CPR 32.10 and for relief from sanctions under CPR 3.9. Since this did not occur, it is submitted that the Judge should not have permitted the evidence to be adduced. Further, the Appellant says that if there had been an application for relief from sanctions, then it would or should have been refused. Insofar as the Judge decided to exercise his discretion to allow the evidence pursuant to CPR 34, it is said that he exercised that discretion wrongly and that he ought to have refused permission to call Mr Esqulant.

2. The case concerned whether Mr Esqulant had a beneficial interest in a property known as 10 Brace Close, Cheshunt, Waltham Cross, London, E76WY ("the Property"). The Appellant sought a final charging order over Mr Esqulant's interest in the Property. The Respondent opposed the charging order on the basis that Mr Esqulant had no beneficial interest. Having heard evidence from the Respondent, Mr Esqulant and the mother of the Respondent, the Judge decided that there was a common intention of the Respondent and Mr Esqulant that Mr Esqulant had no interest in the Property. The challenge in this appeal is not against the principles that were applied in reaching that decision or against any aspects of the trial itself, but entirely against the decision to permit Mr Esqulant to give evidence. If permission had been refused, the Appellant says that the Respondent would, or may, have been unable to prove the common intention.

3. In these circumstances the Appellant says that there was a serious procedural or other irregularity on the part of the Judge and that as a result injustice was caused and/or the decision of the Judge was wrong. The Respondent seeks to uphold the decision of the Judge for the reasons which he gave: alternatively through a Respondent's Notice, she submits that if permission were required to rely on the evidence of Mr Esqulant pursuant to CPR 32.10, permission would have been granted if sought.

4. In this judgment, I shall consider the case in the following order:
   (1) Background leading up to the trial;
   (2) A summary of what happened at trial;
   (3) The hearing before the Judge;
   (4) The Grounds of Appeal;
   (5) Relevant procedural law;
   (6) The Appellant's submissions;
   (7) The Respondent's submission;
   (8) Discussion;
   (9) Discretion;
   (10) Cross-notice of the Respondent;
   (11) Disposal of the appeal.

(1) Background leading up to the trial

5. The Property was registered in the names of the Respondent and Mr Esqulant. They were married and had 3 children. The marriage broke down and the parties separated in or about 2007/2008. They lived in a relatively large property at 17 Bluebell Drive. Following the breakdown of the marriage, and in the context of the financial difficulties of Mr Esqulant, they agreed to sell 17 Bluebell Drive and that a smaller property would be acquired for the Respondent and the children.

6. The Property was purchased on 9th May 2008 for £327,500 in the joint names of the Respondent and Mr Esqulant with the aid of a mortgage secured on the Property. It is common ground that at the time that the Property was purchased, there was no written declaration of trust entered into between the parties. Nor have there been any consequently. Section 11 of the TR1, which is the Land Registry form of transfer deed, contains provision for the transferees to declare any trust on which the Property is held including as joint tenants in equal shares or tenants in common in specified shares. Section 11 was not completed, and neither was the transfer deed signed by either the Respondent or Mr Esqulant. Absent an express declaration, the land registry entered a standard form restriction in the register that no disposition by a sole proprietor is to be registered unless authorised by the court.

7. The issue in the case is, notwithstanding the acquisition of the Property in the joint names and the use of monies from the former matrimonial home of 17 Bluebell Drive, whether Mr Esqulant and the Respondent had agreed that the Respondent would be the sole beneficial owner. The Respondent maintains that the Property was acquired in joint names because she only had a modest income and could not afford to obtain the required mortgage. Hence Mr Esqulant became a party to the mortgage and the joint owner to facilitate the purchase.

8. A decree absolute was granted on 20th November 2008. The Respondent and Mr Esqulant maintain that since that time they have not had contact with one another. Mr Esqulant formed a new relationship with someone else who was pregnant at the time of the divorce proceedings. The Respondent moved into the Property to reside there with the 3 children. The Respondent still lives there but Mr Esqulant never has. In about December 2008, Mr Esqulant became bankrupt.

9. On 23rd May 2018 the Appellant issued a claim against Mr Esqulant arising out of the default of Mr Esqulant on a loan dated 19 August 2016 secured against another property. After selling the other property there was a balance as at time of the claim of £312,877.94. On 17th July 2018, the Appellant obtained a judgment in default against Mr Esqulant for the sum of £276,449.26 together with court fees of £10,783. On 17th August 2018, the Appellant obtained an interim charging order against the interest of Mr Esqulant in the Property which by then was in the sum of £288,932.18.

10. On 1st October 2018, the Respondent filed and served a witness statement in which she claimed to have a 100% beneficial interest in the Property. She stated that *"Daniel has never claimed to have a beneficial interest in the property"*. She exhibited a

signed letter from Mr Esqulant on 26 September 2018 addressed to *"to whom it may concern"*. He stated: *"I had no interest in the Property which should be shown in the legal's* (sic). *Also I assume this is mentioned in the divorce."* In the bankruptcy of Mr Esqulant, his trustee in bankruptcy never made a claim in respect of the Property. All mortgage and property related payments were made by the Respondent and not Mr Esqulant.

11. At a hearing of 9th October 2018, District Judge Swindley ordered that Mr Esqulant should by 4pm on 27th November 2018 *"declare to the court, Alison Esqulant and all other parties a witness statement in response to the statement of Alison Esqulant"*. It appears that Mr Esqulant prepared a witness statement dated 26th November 2018 and that he served the same on the Respondent, but not on the solicitors for the Appellant.

12. On or about 6th March 2019, the Respondent applied to be added as a party to the proceedings so that she could contend that the Appellant's interim charge should be discharged and the Appellant's application for a final charging order should be dismissed. An order was made on 15th March 2019 adding the Respondent as a party to the proceedings. The order provided that there should be heard together the Appellant's application for a final charging order and the Respondent's for a declaration as to the beneficial interest in the Property.

13. At the direction hearing on 15th March 2019, District Judge Bever ordered that all parties must serve witness statements, but Mr Esqulant did not serve the above witness statement or any others. The Appellant says that it prepared for trial on the basis that Mr Esqulant had filed no witness evidence.

14. There were served for the Respondent a second witness statement of her own, a statement from her mother June George and a statement of Michelle Langford who worked for Mr Esqulant. On 21st August 2019, nearly 3 weeks before the trial, the Respondent's solicitor emailed a letter requesting that Mr Esqulant's witness statement be included in the trial bundle. The Appellant's solicitors did not request a copy of the witness statement or query the request. On 27th August 2019, the Respondent applied for a witness summons against Mr Esqulant to ensure that he would attend the trial and a relevant order was also served on him. There was no notice provided of the same at the time. On 4th September 2019, the Appellant's solicitors served hard copies of the trial bundle. The index made reference to the first witness statement of Mr Esqulant, but the statement itself was omitted.

15. On 4th September 2019, the Respondent's skeleton was sent to the Appellant which referred to the witness statement of Mr Esqulant at paragraph 4, and at paragraph 38 quoted from the statement. It also referred to a witness summons served on Mr Esqulant at paragraphs 1 and 39. It now appears that the skeleton argument of the Respondent was not considered by the Appellant's counsel until the evening prior to the hearing: see paragraph 31(1) of the Updated Appeal Skeleton Argument. On the morning of the trial, the Appellant's Counsel said that he had thought that the only evidence from Mr Esqulant was the letter. However, it is apparent from paragraph 4 of the Respondent's Skeleton Argument for the hearing before the Judge that the suggested reading included both the statement of Mr Esqulant *"to be inserted in the*

bundle" and the letter of Mr Esqulant of 26th September 2018. It is not stated whether the solicitors for the Appellant considered the skeleton argument following its receipt on 4th September 2019.

16. It is apparent from the Appellant's skeleton argument for trial below that it apprehended that there was no evidence from Mr Esqulant. It was argued that the letter submitted by him did not specifically describe the agreement in the terms described by the Respondent. It also did not mention an agreement to sell Bluebell Drive nor to use the sale proceeds to purchase the Property. Further, it was submitted that the letter had little to no evidentiary value as it had no statement of truth and was not signed.

(2) A summary of what happened at trial

17. An issue arose in relation to Mr Esqulant's witness statement. Neither the Court nor the Appellant nor the Appellant's solicitors had any record of receiving it. It now appears that it may have been sent to the Court, but to a former address of the then Mercantile Court. The Respondent's representatives were in possession of a witness statement 27 November 2018. The question was then raised, as to what extent Mr Esqulant should give evidence. The Respondent's position was that Mr Esqulant had been entitled to call Mr Esqulant.

18. Mr Esqulant indicated that he wanted to give evidence in order to support his ex-wife and that he had filed and served a witness statement. The Appellant resisted a) the admission of the trial statement as evidence and b) Mr Esqulant giving any evidence at all, whether as a party or as a witness summonsed by the Respondent. The Appellant also said that it had not seen the witness summons documentation.

19. In the judgment, it was recorded that if Mr Esqulant wished to rely on his witness evidence at trial, he would require relief from sanctions. If he had not been a party to the proceedings, then the Respondent would have required permission to call him (paragraph 9 of the Judgment).

20. It was recorded that the Appellant had submitted that in those circumstances, to allow Mr Esqulant to give evidence would be to allow him to rely on his evidence through the "back door". The submission made for the Respondent was that it was sought to allow the evidence of Mr Esqulant to be admitted not because of an application by him but because of a witness summons issued by a witness summon and to support the Appellant's case and not his own.

21. At paragraph 11 of the Judgment, the Judge said that the Appellant had been the main driver of the action. She had complied with orders of the Court, where Mr Esqulant had not complied. Mr Esqulant confirmed that he attended pursuant to the witness summons and that he was not seeking to advance his own case and did not apply for relief from sanctions. On this basis, the Judge was satisfied that permission should be given for the Appellant to call Mr Esqulant to give oral evidence.

(3) The hearing before the Judge

22. The Appellant submitted that since the evidence was from a party, namely Mr Esqulant as the First Defendant, he was subject to an order requiring the filing of evidence. Since he did not do so, the sanction is that CPR 32.10 must apply. He could not be cast aside as a "mere witness" of the Respondent because he was a main party. The claim was as brought by him alone and the Respondent was simply an intervener. It would be to allow his evidence through the "back door" if CPR 32.10 was not applied.

23. It was common ground that the evidence of Mr Esqulant was of central importance. This was a case where the Respondent needed to establish a "common intention" of herself and Mr Esqulant. It followed that whatever Mr Esqulant had to say in corroboration of her account was key. The Appellant had prepared for trial on the basis that Mr Esqulant was not giving evidence and so any cross-examination had to be conducted without preparation. It was submitted that that was prejudicial. It was further prejudicial that Mr Esqulant was not constrained to a witness statement with scope for cross examination to the extent that it departed from what he would say orally or from what the Respondent had said before him. He could now tailor his evidence simply to agree with that of the Respondent and to dove-tail with the court documents. To allow a procedure which bypassed CPR 32.10 was to enable a party to flout directions and indeed benefit from that.

24. Having ruled that permission be given to the Respondent to call Mr Esqulant, the Judge ruled subject to hearing any submissions that he was not minded to permit the witness statement of Mr Esqulant to be submitted. However, the Appellant's counsel then stated that if Mr Esqulant were to give oral evidence, then he would prefer Mr Esqulant's witness statement to be put into evidence. The Appellant's counsel did not apply to adjourn or for permission to appeal at that stage.

25. The trial then proceeded. Oral evidence was given by the Respondent in the morning and part of the afternoon. Mrs George gave evidence and Mr Esqulant gave evidence. Mr Esqulant was cross-examined for about 45 minutes. His evidence was consistent with the case of the Respondent that the Property was to be hers alone and that he would have no interest in it. There was no oral evidence for the Appellant, since its witnesses had no personal knowledge of any of the disputed facts.

26. In the judgment, the Judge found that the Respondent had met the burden of proof and had established that Mr Esqulant had no beneficial interest in the property. The Judge's key findings included the following from paragraphs 30 and 34 of the judgment:

"30. Mr Esqulant was cross examined on a number of points including the circumstances surrounding the separation, divorce and the agreement in relation to the Property. Mr Esqulant was clear he understood and agreed with Mrs Esqulant that the Property was to be hers and he would have no interest in it. He, like Mrs Esqulant, explained it was a difficult time and that in addition to the Property he wished he could have done more financially. He did not engage further in relation to the financial remedy issues as he could not afford solicitors. He does not recall A1 solicitors who

had been acting for him in this respect given it was such a long time ago. Mr Esqulant accepted that he did not contribute or provide any financial assistance following the purchase of the Property and since the divorce had not communicated with Mrs Esqulant or had anything to do with the Property. Mr Esqulant did take issue with the contention he had not provided financial assistance to the children. Rather than any direct payments to Mrs Esqulant he had given money to the children directly and bought them things when he saw them. Mr Esqulant said he did what he could.

….

34. The evidence of Mr Esqulant was consistent with Mrs Esqulant and I found him to be reliable in his evidence as to the intention and agreement as to the Property together with the surrounding circumstances. He made concessions where he could not remember certain events due to the passage of time. However, he like Mrs Esqulant, was clear that there was an agreement and intention at the time of the purchase of the Property and that it would be hers, he would have no interest in the Property. They were divorcing following separation and the arrangement for the sale of the former matrimonial home and purchase of a smaller Property was to ensure Mrs Esqulant and the children had a home. Whilst the net equity of the former matrimonial home was utilised towards this purchase Mr Esqulant understood and agreed the intention was for him to be a joint legal owner as the mortgage would be in joint names since Mrs Esqulant would not otherwise be able to purchase the Property. Mr Esqulant arranged the mortgage and instructed solicitors to deal with the conveyancing. Mr Esqulant was also clear and consistent that they had not communicated afterwards."

27. The key conclusion was at Paragraph 41 in the following terms:

"I am therefore satisfied after considering all of the evidence in this case that there was an agreement and common intention when the Property was purchased that Mrs Esqulant would be the sole beneficial owner and Mr Esqulant would not have an interest."

28. Following the delivery of the judgment on 9th September 2019 the Appellant made an oral application for permission to appeal as regards the decision of the Judge to allow the evidence from Mr Esqulant. The Judge refused to give permission on the basis that it was an exercise in discretion and there was no real prospect of success, or any other compelling reasons why this should be heard.

(4) The Grounds of Appeal

29. The Grounds of Appeal were as follows:

"The First Defendant had not complied with orders to file and serve witness evidence (and had not filed or served any such evidence at court or on the Claimant) but DJ Ranson allowed the First Defendant to give evidence at trial by reason of him having been witness summonsed. This was wrong in law and/or the decision was unjust because of a serious procedural irregularity.

District Judge Ranson erred for the following reasons in particular:

(1) DJ Ranson was wrong in law and/or erred procedurally in deciding that, where a party has failed to comply with directions to file and serve witness evidence (at all), he can nevertheless be permitted to give evidence on the day of trial by virtue of being witness summonsed at the request of a co-party;

(2) DJ Ranson was wrong in law and/or erred procedurally in deciding that the sanction in CPR 32.10 was not applicable and/or should not be applied to the First Defendant simply because a witness summons under CPR 34 had been issued;
(3) the learned judge failed to apply CPR 32.10 and did not consider nor apply the relief from sanctions criteria as would be necessary under a decision pursuant to that Rule;
(4) the decision to permit the First Defendant, who was a party, to give evidence in circumstances where the Claimant did not know what that evidence would be (due to the First Defendant's failure to file/serve any evidence), was a serious procedural irregularity, prejudicial to the Claimant and unjust.
Insofar as the learned judge was exercising a discretion, he exercised that discretion wrongly as he did so in a way that no reasonable judge would have done by allowing oral evidence from a witness in respect of whose evidence the First Defendant had provided neither a witness statement nor witness summary. Further or alternatively he took into account matters that he should not have taken into account and/or failed to take account of matters which he should have taken account."

(5) Relevant procedural law

30. In order to consider the above matters, it is first necessary to consider the matters from the Civil Procedure Rules relevant to the appeal

"Witness summaries
32.9
(1) A party who –
(a) is required to serve a witness statement for use at trial; but
(b) is unable to obtain one, may apply, without notice, for permission to serve a witness summary instead.
…
(4) Unless the court orders otherwise, a witness summary must be served within the period in which a witness statement would have had to be served.
…

Consequence of a failure to serve witness statement or summary

32.10 If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission.

Witness summonses
34.2
(1) A witness summons is a document issued by the court requiring a witness to –
(a) attend court to give evidence; or
(b) produce documents to the court.
(2) A witness summons must be in the relevant practice form.
(3) There must be a separate witness summons for each witness.
…

Hearing of appeals
52.21

(1) Every appeal will be limited to a review of the decision of the lower court unless—
(a) a practice direction makes different provision for a particular category of appeal; or
(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
…
(3) The appeal court will allow an appeal where the decision of the lower court was—
(a) wrong; or
(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

31. The first matter of procedural law is the nature of this appeal. It is one of review and not of rehearing. The threshold is that the decision must be shown to have been wrong or unjust because of a serious procedural or other irregularity. Even if there was a serious procedural irregularity, an appeal court should only allow the appeal and order a retrial on that basis if satisfied that the decision of the judge was 'unjust' because of the irregularity (see CPR 52.21(3)(b)) and this will ultimately depend on all the circumstances of the case.

32. It was a case management decision to allow evidence to be given by Mr Esqulant. There is a particular difficulty in obtaining permission to appeal against a case management decision: see Paragraph 4.6 of Practice Direction 52A. However, in the instant case, permission has been obtained so that is no longer a barrier. Nonetheless, a case management decision will not be interfered with or reversed by appellate courts unless it was per Lord Neuberger in ***Global Torch Ltd v Apex Global Management Ltd (No. 2)*** [2014] UKSC 64 at [13]: '*plainly wrong in the sense of being outside the generous ambit where reasonable decisions-makers may disagree'*.

(6) The Appellant's submissions

33. A way around these strictures is where the appeal seeks to raise a point of principle. In this case, the Appellant says that the appeal is about the inter-relationship between CPR 32.10 and CPR 34. If there is a principle which is engaged, then the resolution of the point of principle and/or its application to the particular circumstances may mean that the Court can be more interfering with the decision than if it were a case management decision or an exercise of discretion.

35. In this case, it was submitted on behalf of the Appellant that where CPR 32.10 and CPR 34 interface each other, CPR 32.10 ought to prevail. It is said that in this case, there was a requirement upon Mr Esqulant as First Defendant in court orders to file a witness statement. It appears that he failed to do so. He therefore could not do so without seeking relief from sanctions under CPR 3.9, but he has failed to make any such application and therefore should not be allowed to do so. It is submitted that this cannot be sidestepped by another defendant issuing a witness summons against that Defendant. In other words, CPR 34 is not a refuge to escape the consequences of CPR 32.10 and the need to obtain relief from sanctions under CPR 3.9.

36. The Appellant submits that the Judge misdirected himself in attempting to distinguish Mr Esqulant's appearance in his capacity as a 'party' from his appearance in his

capacity as a mere 'witness' for the Respondent. His evidence was the same irrespective of his capacity and was equally as pertinent to the decision about whether he had an interest in the Property. In drawing this distinction, the Judge permitted Mr Esqulant to give evidence without having to meet the relief from sanctions criteria specified in the case-law concerning CPR 32.10. However, he was not just a peripheral party but had central involvement (given that proceedings were brought by the Appellant against him). As such, he could not be labelled as a 'mere witness' for D2, as he was the main party - and the outcome was of consequence to him.

37. This was a serious procedural irregularity which was unjust in that it caused prejudice to the Appellant. The evidence of Mr Esqulant was, as the Judge acknowledged, of 'central importance'. It could only have been fairly considered if the Appellant had had a full opportunity to consider it after service. In a case requiring proof of a 'common intention' of the Respondent and Mr Esqulant, corroboration was very important. It was submitted that it was unjust to require the Appellant, who had prepared for trial on the basis of no evidence from Mr Esqulant having given no evidence, to deal with this evidence without the opportunity to prepare for it very carefully. There was no opportunity to examine the extent to which his evidence diverged from the other documents.

38. It was also unjust for him to be allowed to give oral evidence because he was then able to dovetail his evidence with the other evidence. It was put highly by the Appellant as follows:

"it is seriously procedurally irregular to allow a party to proceedings (whose evidence is crucial) to flout directions but ultimately be able to give the same evidence (as if he had complied with said directions) simply because he had been summonsed. It is tantamount to an evidential ambush on C, particularly where D2 had been served with (and had the chance to consider) D1's evidence.": see paragraph 18(4)(iv) of the Appellant's Updated Skeleton Argument.

(7) The Respondent's submissions

39. The Respondent simply says that the application was of the Respondent, and not of Mr Esqulant, about the giving of evidence by Mr Esqulant. The evidence was elicited for the case of the Respondent. It was pursuant to the witness summons which was issued by the Respondent. It was not done through the 'back door'.

40. It was also submitted that this was an exercise of discretion. The Judge referred to that in refusing permission to appeal. It would have been entirely artificial not to permit Mr Esqulant to be called. Otherwise, one would end up in the position where a case might fail for want of corroboration despite Mr Esqulant being in court and being able to provide such corroboration.

41. It was submitted that the Respondent had done nothing wrong. She was entitled to believe that the Respondent's statement had been served. Contrary to the suggestion that the Respondent had been involved in an ambush, that was not the case. She had specifically referred in correspondence to the statement of Mr Esqulant and the position was not hidden in the skeleton argument of the Respondent.

42. The Judge reached the decision applying the correct principles. This was an exercise of discretion with which an appellate court should not interfere.

(8) Discussion

43. In my judgment, each of these points is unjustified. As Snowden J reflected in his order herein, if there was collusion between the Respondent and Mr Esqulant with a view to ambush the Appellant, there might be something in these criticisms. However, there was patently no evidence of an ambush in this case. This is apparent for the following reasons:

(1) The Respondent and Mr Esqulant had been apart for many years;

(2) Mr Esqulant did not participate in the action after serving his witness statement on the Respondent;

(3) By contrast, the Respondent did participate in the action and was the only active defendant;

(4) Thus, when Mr Esqulant appeared at Court, it was not done so as to get round his breach of the Court orders for himself, but it was because he had been the subject of a witness summons at the instigation and for the benefit of the Respondent;

(5) It follows that he did not appear for himself and seeking relief from sanctions, but as someone required by the Respondent and under compulsion to attend because of a witness summons;

(6) The references to the witness statement of Mr Esqulant in the Respondent's skeleton argument for the hearing before the District Judge must have been on the premise that the Respondent believed that the Appellant had the statement. This belief was reflected in the Respondent's skeleton sent on 4th September 2019 referring to and quoting from the witness statement of Mr Esqulant. It is also apparent from the suggestion that the same should be part of the reading list. It was believed that Mr Esqulant had passed on his witness statement to both the Court and to the Appellant, but it had been sent to neither.

44. It then must follow from the fact that Mr Esqulant was not participating in the action, but the Respondent was, that he attended the hearing not for himself, but under the compulsion of the witness summons issued by the Respondent. Thus, he did attend for the Respondent and not in his own capacity or for himself. The Judge was therefore correct to treat his appearance as not being in his own cause but in the cause of the Respondent. It therefore engaged CPR 34 and not CPR 32.10, except in one respect to which I shall turn.

45. The one respect is that for the Respondent to call Mr Esqulant, it was necessary to serve a witness summary under the Rules, but there was a failure to do so. True it is that a letter had been sent, which contained the position from the perspective of Mr Esqulant. It was not in the form of a witness summary, nor did it contain all the information contained in the witness statement. In these circumstances, absent a witness statement,

permission was still required under CPR 32.10, but crucially, this required explanation from the perspective of the default of the Respondent in failing to serve a witness statement. It did not require permission from the perspective of the disobedience of Mr Esqulant in failing to serve witness statements in the face of at least one order requiring him to do so.

46. It is apparent from the judgment that the matter hinged entirely upon whether Mr Esqulant's evidence was to be seen as for himself or as a mere witness for the Respondent. Since the Judge found that it was the latter, that was regarded as dispositive.

47. Upon reviewing this, it is not accepted that there is a principle in this case. There may be a case where for some reason the adducing of the evidence of a person who has disobeyed an order of the Court, or worse has been barred from giving evidence, appears to be like getting in the evidence through the 'back door'. This might be where the two defendants are acting in concert and where one is in breach of the court order and the other has connived at this. That is why Mr Justice Snowden referred to a case where a witness summons was a device agreed between defendants to ambush the other party at trial.

48. This case is far removed from such a case. This was a case of genuine witness summons. The Respondent and Mr Esqulant had been apart for about 12 years. They were not cooperating. They were barely communicating. In this context, the witness summons was in the context of Mr Esqulant not being likely to attend, and so wishing to compel his attendance. As far as the Respondent knew, the witness statement of Mr Esqulant had already been served on the Appellant. Hence, the Respondent made the request in the email of 21st August 2018. Hence, the Respondent made the references to the witness summons and the witness statement in the skeleton argument of 4th September 2018. The repeated references to the conduct of the Respondent being in the nature of an ambush were therefore misplaced if it meant that there was an attempt to wrong-foot the Appellant. In fairness to Mr Ayoo, he withdrew from any suggestion that there was such an intent on the part of the Respondent.

49. In my judgment, the Judge was entirely correct in his judgment to view the evidence of Mr Esqulant as attending not to advance his case, but pursuant to a genuine witness summons, and called to assist the case of the Respondent. By the time of trial and for months before, this was a case which had changed its character. It started off as a case entirely between the Appellant and Mr Esqulant, albeit which would affect the Respondent. By the time of the hearing, it was a case between the Appellant and the Respondent, albeit which would affect Mr Esqulant. Once that had been resolved by the reasoning of the Judge at paragraphs 9-12 of his judgment, there was no more to be said. To the extent that a discretion was then exercised, the factors were overwhelming. In my judgment, the failure to enunciate this expressly in the judgment is a reflection as to how obvious this was to the Judge.

50. However, in the appeal, the exercise of discretion has formed a more central part of the case. It has been the second part of the grounds of appeal and the subject of the cross notice. It is to this which this judgment now turns.

(9) Discretion: the law

51. There is judicial guidance on the balancing exercising in respect of late service of evidence. In ***Nottinghamshire and City of Nottingham Fire Authority v Gladman Commercial Properties Ltd Practice Note*** Peter Smith J stated:

> "17.However the most important duty of a trial judge is to enable 'that all parties to a trial have the fullest opportunity to present their cases provided they are presented in a way which is not unfair to the other side': **Swain-Mason v Mills & Reeve LLP** [2010] EWHC 3198 (Ch) at [38]. It is necessary to weigh all the facts in making a decision as to whether to exercise a discretion to allow this late evidence to be produced."

49. In ***Robin Colin Foster, Coltish Aircraft Pty Limited v Action Aviation Limited*** [2013] EWHC 2930 (QB) Mr Justice Hamblen said in relation to an application to admit late evidence:

> "In considering how to exercise my discretion I would regard the following considerations being of particular relevance; (1) the reason why the evidence was not put forward before, (2) the significance of the evidence, (3) the prejudice to the applicant if the application is refused, (4) the prejudice to the other parties if the application is allowed and (5) the need to do justice to all the parties having regard to the overriding objective."

52.I shall now consider each of those five factors.

(1) The reason why the evidence was not put forward earlier

53. Although this was not put formally in Court, the reason for this was that it was apprehended that the statement of Mr Esqulant was with the Appellant. The reference to the witness statement in the letter of 21st August of the Respondent's solicitors to the Appellant's solicitors, the request for the index to include the witness statement are evidence of a belief that the statement had been received. The skeleton argument of the Respondent also indicates plainly that there was a belief that the Appellant knew about the statement. In this context, against the contingency that Mr Esqulant would not attend, the Respondent summoned him to attend. To that end, it would be necessary to call him.

54. Without in any way detracting from the conclusion that the Respondent was not seeking to create an ambush, it would have been better if the Respondent had done the following things, namely (a) stated in correspondence that she was intending to call Mr Esqulant if he did not attend and give evidence, and (b) stated in correspondence that she was serving a witness summons on Mr Esqulant for this possibility.

(2) The significance of the evidence

55. In the view of the Appellant, the evidence is so pivotal that the result of the case may turn upon it. It was so pivotal that a rehearing would be required so that the case would proceed either without the evidence of Mr Esqulant, or, if it is admitted, with a proper opportunity to prepare to cross-examine him. On any view, Mr Esqulant's evidence is important because it is corroborative and goes to the central issue of common intention. This factor can be spun both ways. In my judgment, the more significant the evidence,

the more artificial it would be to try the case without the evidence, subject to the question of prejudice on both sides.

(3) The prejudice to the applicant if the application is refused

56. On the basis that the evidence is on any view of importance (and to the Appellant of critical importance), the prejudice of excluding it is of not being able to adduce evidence of potentially decisive importance to the Respondent's case.

(4) The prejudice to the other party if the application is allowed

57. It cannot be a prejudice simply because the case was more likely to be proven with the evidence than without it. The prejudice must therefore be of the way in which the case would be tried with the evidence. It is said that it became necessary to have an ad hoc cross-examination. This is a real prejudice, but it is not so great in the circumstances. First, it is apparent from the transcript available of a part of the cross-examination that it was efficiently and effectively conducted. Secondly, there is no specific example which Mr Ayoo was able to give of how it would have been better conducted with more preparation time. Further, nothing is pointed to which might have affected the outcome of the case. Thirdly, the cross-examination was not of such complexity that it required considerable additional preparation time for that cross-examination once the cross-examination of the Respondent had been undertaken. Fourthly, if there was some time required, there could have been sought an adjournment of say an hour for the cross-examination to be prepared. None was required. That apparently was because so much had already elapsed in the argument as to whether the evidence should be admitted. However, it must have been in part because the preparation time was not so important in view particularly of the fact that the cross-examination was not especially difficult once the cross-examination of the Respondent had been undertaken.

(5) the need to do justice to all the parties having regard to the overriding objective.

58. If the evidence had not been admitted, in view of its importance, the Respondent would not have had a proper, let alone "the fullest", opportunity to present its case. In my judgment, the prejudice to the Respondent of exclusion of the evidence greatly exceeds any prejudice to the Appellant of admission of the evidence. This is based on an evaluation and balancing of the matters set out in respect of the third and fourth factors above. It would have been artificial on 9th September 2019, with Mr Esqulant at the hearing, if a decision had been made to exclude this evidence.

59. In addition to the foregoing, there should have been no surprise to the Appellant's legal team bearing in mind the communications of 21st August and 4th September referred to above. Without in any way being critical of the Appellant, it had a number of opportunities to apprehend the possibility that this would occur. There was the letter of 21st August, but instead of asking to what end the witness statement of Mr Esqulant was going to be deployed, the Appellant simply confused the witness statement for the unsigned statement. There was the skeleton argument of 4th September 2018, but this was not read until the day before the hearing and then not appreciated as to what was the intention of the Respondent. Having sent the letter of 21st August and served the skeleton argument on 4th September, the Respondent cannot be criticised for the fact

that the Appellant did not recognise at an earlier stage what the Respondent intended to do.

60. The position of the Appellant is not entirely clear as to what should have been done. Ultimately, it seems to be accepted that it might have been appropriate for the evidence to be admitted, but only after the Appellant had been given a full opportunity to prepare its cross-examination. Such is the lack of complexity of this cross-examination and the absence of any tangible example of how the cross-examination would have been improved with greater time, that a remitting of the case for a rehearing would be to do little more than to ask for a re-run without any real chance of a different result. In *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 4, Lewison LJ memorably stated that *"the trial is not a dress rehearsal. It is the first and last night of the show."* In my judgment, the request for a rehearing is without real cause, and its effect would be to turn the trial into a dress rehearsal in the vain attempt that the evidence may come out better for the Claimant. There is no justification for this.

(10) Cross-notice of the Respondent

61. Before the Judge, there was an assumption that in the event that Mr Esqulant's evidence was not to be considered as that of a major party to the action, but as a mere witness, then the application to call him should be allowed. However, the cross notice was served on the basis that permission should have been sought to adduce the evidence at an earlier stage, that is to say at the time when the witness statements were due to be served. That would be the case whether there had been served a witness statement or a witness summary. The need for relief from sanctions was mentioned per Arnold J in the case of *Whitby Specialist Vehicles Limited v Yorkshire Specialist Vehicles Limited & others* [2014] EWHC 3985 (Pat) at paragraphs 14-17.

62. On that basis, the case might have been approached as an application for relief from sanctions applying the threefold test in *Denton v TH White Ltd* [2014] EWCA Civ 906. Such an application would normally be upon a formal application supported by evidence, but the Court is able to dispense with the need for a formal application: see Civil Procedure 3.8.2 and 3.9.24 and the authorities there cited. The case is so clear that this could be done here. The first question is whether the default was serious or significant. In my judgment, it was serious or significant in that no witness statement of Mr Esqulant was served. Nor was there a witness statement. The unsigned letter may in retrospect serve the same purpose, but it would not have been apprehended as such. The first time when it could have been apprehended that there was an intention on the part of the Respondent to adduce this evidence was when the information about the service of the witness summons had been mentioned in the skeleton argument of 4th September 2019.

63. As to the second stage, in my judgment, there was a good reason for the non-service of the witness statement or witness summary, namely a belief that the witness statement had been served by Mr Esqulant. Having received it, the Respondent or her solicitors believed that it must have been served on the Court and on the Appellant, and that in due course, Mr Esqulant would give evidence. However, unknown to the Respondent, that was not the case.

64. That ought to suffice, but it might still be said that the Respondent could have signalled more clearly the intention to call Mr Esqulant if he did not attend to give evidence. In those circumstances, it might be said that it is necessary to consider the third stage of the Denton test, to evaluate all the circumstances of the case as a whole and to deal justly with the case. That involves looking at all the matters set out above in the analysis of the discretion, which I have undertaken above. If the Court had considered these matters in the context of a relief from sanctions application, it would and should have come to the conclusion that the relief from sanctions should be granted. I therefore reject the arguments which hark back to the notion which has been rejected, namely that there was something irregular about one party relying on the evidence of another which might have been excluded if the person seeking to adduce it was the other. I reject the notion that the greater prejudice was to the Appellant. Indeed, the far greater injustice would have been to the Respondent. It would have encouraged the Court to come to a conclusion upon a wholly artificial basis. As to the argument that the Appellant required an adjournment for a proper opportunity for cross-examination, this must be rejected. It ignores the fact that it was not sought, and the absence of any respect given in which the cross-examination may have been conducted more effectively. Mr Ayoo for the Appellant has conducted this appeal and the case as a whole with ability, and his mastery of his brief enabled him to conduct the cross-examination without any specific prejudice that he was able to identify.

65. It follows that if an application had been made by the Respondent for relief from sanctions, it would have been granted.

(11)Disposal of the appeal

66. For all these reasons, both the reasons of the Judge and the reasons which are relied in the cross notice, the appeal is dismissed.