Case No: E8QZ2Z4T

IN THE CAMBRIDGE COUNTY COURT
ON APPEAL FROM THE COUNTY COURT IN NORWICH

7 October 2021

Before:

HHJ KAREN WALDEN-SMITH

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Between:

DR SUMAN NAGPAL	**Claimant**
- and -	
DR SUNIL KUMAR	**Defendant**

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- -

MR NICHOLAS MICHEAL (instructed by **NR LEGAL SOLICITORS LIMITED**) for the **Claimant/Respondent**
MISS GRACE CHENG (instructed by **MEARS HOBBS LIMITED**) for the **Defendant/Applicant**

Hearing date: 5 October 2021

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Approved Judgment

HHJ Karen Walden-Smith:

1. This is an application brought by the Defendant/Applicant, Dr Sunil Kumar, for an extension of time for bringing an application for permission to appeal and a renewed oral application for permission to appeal. I refused permission to appeal on the papers on 16 June 2021 ordering that, if Dr Kumar were to renew his application, he also needed to make an application for permission to appeal out of time and needed to provide evidence to support that application together with evidence as to the basis upon which he contends that he should be given permission to adduce new evidence at this appeal.

2. I heard this matter on 5 October 2021 and refused the application. I indicated that I would give full reasons in writing as the application gave rise to a number of issues with respect to the basis for extending time in applications for permission to appeal and when it is appropriate to allow new evidence to be adduced.

3. I was grateful to both Miss Cheng and Mr Michael, counsel respectively for the Defendant/Applicant and the Claimant/Respondent, for their focused submissions on the matters that arose.

The Background

4. Dr Kumar was in partnership with the Claimant/Respondent, Dr Suman Nagpal, together with his wife Dr Sunita Nagpal and a third partner, Dr Abivardi. Dr Kumar joined the GP Surgery partnership on 1 April 2006. The partnership was dissolved on 8 June 2012.

5. A claim was brought by Dr Nagpal against Dr Kumar on 8 October 2018 on the grounds that monies were outstanding from Dr Kumar as the accounts were overdrawn when he left the partnership. On 8 November 2018, Dr Kumar filed a defence. DJ Reeves heard the matter on 27 July 2020 and directed that the court would determine as preliminary issues the contention by Dr Kumar that Dr Nagpal (the claimant) was time-barred and the contention by Dr Nagpal that Dr Kumar (the defendant) was also time-barred.

6. On 1 March 2021, Deputy DJ Wahiwala determined those preliminary issues by finding that:

    (i) The claim brought by Dr Nagpal was not time-barred; but

    (ii) Dr Kumar was time-barred, by reason of the Limitation Act 1980, from seeking a formal account or any further profits from the partnership.

    It is the second of those determinations which Dr Kumar seeks to appeal.

7. The order of the court is confusingly dated 9 April 2021 and the order is drawn on 20 April 2021. However, there was no dispute between the parties that the hearing took place on 1 March 2021 and that the determination was made in the presence of counsel for both Dr Nagpal and Dr Kumar.

Application for permission to appeal out of time

8. The application for permission to appeal was not made until 7 May 2021. The decision of the Deputy District Judge was made in the presence of the parties, through their respective Counsel, on 1 March 2021. The provisions of CPR 52.12(2)(b) are clear: where a court does not make another direction either extending or shortening the time limit, an appellant must file the appellant's notice at the appeal court within 21 days after the date of the decision of the lower court which the appellant wishes to appeal.

9. In the circumstances of this case, the appellants notice ought to have been filed on or before 22 March 2021. The appeal is based upon what Dr Kumar says is a fortuitous finding of signed copy of the Partnership Agreement on 29 March 2021. No explanation was provided by Dr Kumar as to why there was further delay after 29 March 2021 to issue the application, as it took a further 6 ½ weeks until 7 May 2021, to file the application. In his witness statement of 7 May 2021, Dr Kumar said that he

did not know the significance of the signed Partnership Agreement until he brought it to the attention of his new solicitors.

10. In determining whether the court should grant an extension of time for filing the appellant's notice of appeal pursuant to the provisions of CPR 52.15, the court is to apply the same principles as apply to the general power to vary time limits pursuant to the provisions of CPR 3.1(2)(a) (see *R (Hysaj) v SSHD (Practice Note)* [2014] EWCA Civ 1633. It is not an application for relief from sanction to which the provisions of CPR 3.9 apply, but nevertheless is equated with such an application, so that an application to extend time is to be determined in accordance with the stricter approach applied to extensions of procedural time limits.

11. By applying, without the rigour applied to an application for relief from sanction pursuant to the provisions of CPR 3.9, the familiar three-stage test set out in *Denton v TH White Ltd* [2014] EWCA 906, the court is able to determine whether there should properly be an extension of time within an appropriate and easily understandable structure. The first stage is to assess the seriousness and significance of the delay; the second stage is to assess why the delay occurred; and the third stage is to consider all the circumstances of the case so as to deal justly with the application.

12. In this matter, the delay in making the application for permission to appeal is both serious and significant. It is not a trivial breach, it taking 73 days to file the application, 52 days beyond the period stipulated in the rules. That delay is significant as it interferes with the court's good management of the claim, particularly in circumstances such as these where the determination being challenged is with respect to a preliminary matter. While there is no certainty with respect to that preliminary ruling, the parties cannot progress the case. A delay in such circumstances has a highly adverse impact upon the parties and the court in being able to proceed with cases which need determination. The default in this case has not been adequately explained by the applicant and his representatives. In his witness statement dated 7 May 2021, Dr Kuma gives a lengthy explanation of his house moving and that he left personal belongings and paperwork in storage in a former landlord's garage and that he did not have those documents, including the signed Partnership Agreement, returned to him until 29 March 2021. He provides no explanation for the delay between 29 March 2021 until 7 May 2021, save for the unlikely explanation that he did not understand the significance of the signed Partnership Agreement before his solicitors' explained it to him, but he does not say when that explanation was given. Further, it is clear from the documentation submitted by Dr Kumar prior to the hearing before DDJ Wahiwala on 1 March 2021 that he was aware of the Partnership Agreement (albeit in an unsigned form) and that he was expressly not relying upon its terms. In these circumstances, neither stage one nor two has been met by Dr Kumar and it is necessary to consider all the circumstances of the case.

13. In considering all the circumstances of the case so as to deal justly with the application for an extension of time, it is appropriate to consider the matters raised on behalf of Dr Kumar that (aside from the issue of being out of time) permission to appeal ought to be granted. For the reasons set out herein, the circumstances of the case do not justify the granting of permission to appeal out of time.

Permission to appeal

14. Permission to appeal is required by virtue of the provisions set out in CPR 52.3(1)(a), and CPR 52.6 provides that permission to appeal may only be given where: (a) the court considers that an appeal would have a real prospect of success; or (b) there is some other compelling reason for hearing the appeal. Dr Kumar relies upon the first limb and therefore needs to show that there is realistic as opposed to fanciful prospect of success (see Lord Woolf MR in *Swain v* Hillman [2001] 1 All ER 91). There is no requirement to demonstrate that success is probable or more likely than not.

15. An appeal court will allow an appeal pursuant to the provisions of CPR 52.21(3) where the decision of the lower court was wrong, or unjust as a consequence of a serious procedural or other irregularity in the proceedings in the lower court. There is no complaint that there were a serious procedural or other irregularity in the proceedings. In order to obtain permission to appeal Dr Kumar needs to establish that he has a more than fanciful prospect of establishing DDJ Wahiwala was wrong in his determination that Dr Kumar was time-barred by virtue of the Limitation Act 1980.

Point not raised at trial

16. Dr Kumar relies upon fresh evidence, in the form of the signed Partnership Agreement, for bringing the appeal. However, neither in the Defence dated 8 November 2018, nor in the Amended Defence dated 8 March 2019, nor in the hearing before DDJ Wahiwala on 1 March 2021, did Dr Kumar seek to contend that the time limit for asking for an account was extended by reason of the terms of the Partnership Agreement. This was a point that could have been made by Dr Kumar before being in possession of a signed copy of the Partnership Agreement. He was aware of the existence of the Partnership Agreement and had expressly decided not to rely upon it. In the skeleton argument on behalf of Dr Kumal dated 13 July 2020 it was expressly stated:

> "There is no signed agreement between the parties. A written partnership agreement appears to have been drafted on or around 23 July 20210, but this was not signed. Neither party's statement of case relies on this agreement."

17. As the issue was not raised before DDJ Wahiwala, he cannot be criticised for determining the preliminary issue before him without reference to the Partnership Agreement or the clause now relied upon by Dr Kumar. The discretion to allow a point to be raised on appeal, which was not raised at first instance, *"ought to be most jealously guarded"* (per Lord Herschell in *The Tasmania* (1890) 15 App Cas 223). In *Singh v Dass* [2019] EWCA Civ 360, Haddon-Cave LJ set out the following principles to be followed:

> "First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below it

> would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2)
>
> Third, even where the point might be considered a "pure point of law", the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs *(R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24)."

18. The point that Dr Kumar now seeks to run, which relates to the provisions contained in clause 23 of the Partnership Agreement, is a new point and therefore the court must be cautious about allowing him to run that point. It is a point which he could properly have raised before as he knew about the existence of the Partnership Agreement, albeit that he did not know that there was a signed copy in existence until (on his case) 29 March 2021. However, he seeks to run the point on the basis of the signed Partnership Agreement which would be new evidence before the court. In those circumstances, the court will not generally allow the point to be run on appeal. The reason for that is simply that the parties have had the opportunity to put forward their respective cases, costs have been incurred, and a decision made on the basis of the submissions made.

19. The principle that a party in civil litigation only has one "bite of the cherry" was most powerfully set out by May LJ in *Jones v MBNA International Ltd* [2000] 6 WLUK 831 (not referred to in submissions):

> "52. Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally each party should bring before the court the whole relevant case that he wishes to advance. He may choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised. Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in

> the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed. But in my view this is not such a case."

20. In this case, it was open to Dr Kumar to rely upon the Partnership Agreement, albeit not signed, but he expressly stated he was not doing so. He made an election not to advance his case on the basis that he is now seeking to raise before the court. The fact that this is a new point and that he seeks to rely upon new evidence to raise that new point are clear reasons as to why permission ought not to be granted. This is, as I indicated in my truncated oral reasons for refusing permission, a classic case of trying to have a second "bite of the cherry".

Fresh Evidence

21. By virtue of CPR 52.20(1) the appellate court has all the powers of a lower court in relation to an appeal, but CPR 52.21(1) expressly prohibits the appeal court from receiving evidence which was not before the lower court unless it orders otherwise. As was noted in *Hertfordshire Investments Ltd v Bobb* [2000] 1 WLR 2318, approved by the Court of Appeal in *Hamilton v Al-Fayed (Joined Party)* [2001] EMLR 51, CPR 52.21(2) does not retain the requirement contained in the RSC that fresh evidence could only be permitted on "special grounds":

> "We consider that under the new, as under the old, procedure special grounds must be shown to justify the introduction of fresh evidence on appeal. In a case such as this, which is governed by the transitional provisions, we do not consider that we are placed in the straitjacketed of previous authority when considering whether such special grounds have been demonstrated. That question must be considered in light of the overriding objective of the new CPR. The old cases will, nonetheless remain power persuasive authority, for they illustrate the attempts of the courts to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result. That task is one which accords with the overriding objective. (per Lord Phillips MR)"

22. In *Terluk v Berezovsky* [2011] EWCA Civ 1534, the Court of Appeal set out that the combination of the discretion contained in CPR 52.21(1), coupled with the duty to exercise that discretion in accordance with the overriding objective, meant that the principles in *Ladd v Marshall* were not the primary rules for determining whether fresh evidence ought to be admitted, but that those same criteria were the relevant considerations to which the appeal court must have regard in deciding whether the

discretion should be exercised to admit the new evidence. In *Singh v Habib* [2011] EWCA Civ 599, Sir Anthony May again emphasised the need to strike the balance between finality and ensuring that the right result is reached.

23. The three criteria of *Ladd v Marshall* are, in summary, that the evidence could not have been obtained with reasonable diligence; that the evidence would have had an important influence on the trial; and that the evidence is credible.

24. Dr Kumar has set out in detail in his witness statement dated 7 May 2021 in support of this application his general difficulties with being able to produce the signed Partnership Agreement. Dr Kumar says that he was moving between properties during the period 2012 to 2017 and that he had unknowingly left documents behind at his old landlord's address. He says that various events from 2017, including a robbery in 2017, looking after his parents in 2019 and 2020, and his own ill-health from Covid-19, all affected his ability to obtain the documents that had been left at his former landlord's address which he says did not come to light until March 2021 and therefore after the hearing before DDJ Wahiwala.

25. Dr Kumar was, throughout, aware of the existence of a Partnership Agreement and he says that he simply forgot that the Partnership Agreement had been signed as it was signed until 2010, when he had joined the partnership in 2006. The various "life events" that he refers to as occurring from 2017 would not have prohibited him from carrying out a search of any belongings that he had retained and Dr Kumar is, in essence, relying upon lack of recall as justification for not finding the signed Partnership Agreement until after the hearing. It does not seem to me that he satisfies the test of reasonable diligence but, leaving that issue to one side, far more significant is that the signed Partnership Agreement would not have an important influence on the outcome. In my judgment it is this issue, of the three criteria, which is of the greatest importance when considering whether fresh evidence should be permitted. The court is concerned with reaching the right result and exercises its discretion in accordance with the overriding objective. Consequently, if the fresh evidence was such that it would lead the court to an entirely different result then that may be a good reason for the discretion to be exercised in favour of allowing fresh evidence to be adduced. That proposition is supported by the remarks of Judge Hacon in *Absolute Lofts South West London Ltd v Artisan Home Improvements Ltd and anr* [2015] EWHC 2632.

26. It is accepted between the parties that any claim Dr Kumar wished to make for an independent account to establish that the sums due from him were inaccurate needed to be made within 6 years of the alleged breach. The position of Dr Nagpal, accepted by DDJ Wahiwala, was that the latest date upon which time began to run was the date of the dissolution of the partnership, namely 8 June 2012. Section 43 of the Partnership Act 1890 provides that:

> "Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death"

Dr Kumar contends that as the Partnership Agreement provides that *"the aggregate of the sums payable to a former partner under clause 23.1 above shall be paid within 6 months of the year end (cl.23.2)"* and *"a withdrawing partner … shall have the right to examine the books and records of the partnership for a period of 6 months after the effective date of their withdrawal, and until they are paid in full, for the purpose of verifying the amount they are due to receive for their interest in the partnership under this clause (cl 23.5)"* that there is an agreement between the parties that the time-limit for bringing a claim would be 6 years from either 31 October 2012 or 31 December 2012 (dependant on the definition of "year-end") so that the claim contained within paragraphs 10 and 11 of the defence for an account would be within time, as the defence was filed on 8 November 2018.

27. The fatal flaw in this argument on behalf of Dr Kumar is that he is neither claiming that he was not paid monies from the partnership that were owed to him, nor is he claiming that he did not have the right to examine the books and records in the six month period after his withdrawal from the partnership on 8 June 2012. Clause 23 of the Partnership Agreement does not in fact assist Dr Kumar with the matter he was raising in the defence.

28. The fresh evidence that Dr Kumar therefore seeks to adduce does not put the limitation issue before DDJ Wahiwala in a compelling new light and the balance, between finality of decision making and ensuring that the judicial process has reached the right result, has not shifted in favour of exercising the discretion to allow fresh evidence.

Refusal of Permission

29. By reason of the matters set out above, Dr Kumar is not able to establish that he has a realistic, rather than fanciful, prospect of succeeding in showing that the determination of DDJ Wahiwala was wrong.

30. In all the circumstances, permission to appeal is refused.