Appeal Ref.: CH-2019-000321

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
[2020] EWHC 2841 (Ch)

Rolls Building
7 Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 05/10/2020

Before:

THE HON. MR. JUSTICE FANCOURT

Between:

(1) MR ADELEKE DESALU
(2) MRS TOKUNBO DESALU
Intended Appellants (the "Appellants")
Defendants on the proceedings below

- and -

MR BENJAMIN HOLMES BY L/F MARGARET HOLMES
Intended Respondent (the "Respondent")
Claimant in the proceedings below

Miss S. Dzwig (instructed by **Eaton Smith Solicitors LLP**) appeared on behalf of the **Respondent/Claimant**.

The Appellants/Defendants did not attend and were not represented.

Hearing date: 5 October 2020

Approved Judgment

(v i a S k y p e)

MR JUSTICE FANCOURT:

1 This is an application heard on Monday, 5 October 2020, conducted by Skype for Business, for a civil restraint order ("CRO") to be made against both Defendants. I will call them 'Mr and Mrs Desalu'. The application for a limited civil restraint order was issued as long ago as February 2020 by the Claimant in the original proceedings in Bromley County Court. The matter came before this court in the first instance because of an application by the First Defendant, Mr Desalu, to seek to appeal a refusal by the County Court to give permission to appeal against an order of District Judge Cridge made on 30 May 2018.

2 The application for a CRO was listed for today on 10 July 2020. Neither the court nor the Claimant's representatives have been able to identify an express notification of the hearing date to the Defendants at or about that time or subsequently. However, with today's hearing approaching, the Claimant's solicitors made contact with the Defendants by email on Thursday 1 October, and sent to them on Friday 2 October, all the relevant papers for the application. That elicited responses from both Defendants, on the Friday in the case of the Second Defendant, who she said she was not concerned with the application because she was not a party to the proceedings, and from the First Defendant on Saturday, who complained that he had not been given adequate notice of the proceedings.

3 The content of that complaint was, first, to suggest that seven days' notice of the application should have been given; secondly, that the First Defendant's solicitor had not adequate time in which to prepare for the hearing; thirdly, that the First Defendant had a meeting on 5 October that it might not be convenient to rearrange. No further particulars of any of those matters were given. It is fair to both Defendants to work on the basis that neither of them was notified of the hearing date before the morning of Friday, 2 October.

4 In substance, the Second Defendant Mrs Desalu is waiving her right to participate by maintaining, wrongly, that she is not a party to these proceedings. So far as Mr Desalu is concerned, he is fully aware now of the application. The reasons given by him for being unable to participate in the hearing today do not stand up to proper analysis. First, there has been communication between the solicitors, AA Solicitors, who are on the record for both Defendants in the County Court proceedings, in which the solicitors say that as of relatively recently they are no longer acting for and have no instructions from the Defendants in connection with this matter. As a point of form, no proper notice of change of representation has yet been filed. So technically, AA Solicitors remain on the record in the County Court proceedings. However, what they say undermines Mr Desalu's suggestion that his solicitors have not had enough time to prepare for the hearing.

5 So far as Mr Desalu's alternative engagement is concerned, there was further communication between Mr Desalu and my clerk over the weekend seeking to facilitate his participation in this Skype hearing. Mr Desalu was provided with a telephone number by which he could dial into the remote hearing if he was unable to access by Skype for Business. No further communication in that regard has been received from Mr Desalu, who did not attempt to join the hearing this morning.

6 In my judgment, in the absence of proper particulars of a meeting so urgent that it must have priority in any reasonable person's mind over a court hearing in the High Court, Mr Desalu's case that he is unable to participate in this hearing is not substantiated. In the light of his previous conduct in this matter over many years, going back to 2014, I am satisfied that he has chosen to waive the opportunity to participate even in a limited way in this hearing and I am not satisfied that he is unable either to join the hearing by telephone, if necessary, or to advance any case that he may have as to why a civil restraint order should not be made. In those circumstances, and for the reasons I have given, I reject Mr Desalu's application to adjourn this hearing.

L A T E R

7 I have explained in my short judgment given a little earlier on the application to adjourn this application the circumstances in which an application for a civil restraint order ("CRO") against both Defendants came to be made. The matter came to my attention when dealing with an application on paper for permission to appeal to the Chancery Division of the High Court in May 2020. Having seen the background and the fact that an application for a CRO had been issued by the Claimant, in dismissing the application for permission to appeal as being totally without merit, I directed that the application for a CRO ought to be heard on notice to the Defendants by the High Court. That was because I was concerned at the long pattern of meritless applications that have been made by the Defendants and also the wholly wrong and spurious grounds on which such applications, including the one I dealt with, have been made.

8 It is clear to me, in view of the application that I dealt with on paper and the history of these proceedings, that a limited civil restraint order, which is what the Claimant seeks, is needed in order to stop both these Defendants from wasting the resources and money of the Claimant and the court's resources by making further totally without merit applications. If there were any doubt about that, the doubt was allayed by a further informal application made by the First Defendant after my order dismissing the application for permission to appeal as totally without merit and excluding expressly any right to apply to renew the application or seek to set my order aside. Notwithstanding that, on 19 May 2020, the First Defendant made a written application seeking to do precisely that, by reference to the underlying facts of the original proceedings in the County Court that have been determined as far back as 2014.

9 The original proceedings related to a personal injury matter. A judgment in default for about £26,000 was entered against the Defendants in the Bromley County Court. There was then belatedly an attempt by the Defendants to set aside that judgment. The attempt was dismissed by further order and all attempts to set aside and to appeal from it were dismissed after a series of hearings by the court. That did not in the event culminate until an order of HH Judge Roberts on 1 November 2019, in which he also dismissed two further new applications by both Defendants dated 18 November 2017 and 3 May 2018 to set aside the original judgment in the County Court.

10 Before that time, the Claimant, who is owed in excess of £100,000 on the judgment, not a penny of which has been paid, applied in new County Court proceedings for an order for sale of the Defendants' residential property. That order was made by District Judge Cridge on 30 May 2018. At the same time, he dismissed an application made by the Second Defendant dated 14 April 2018 as being totally without merit.

11 There were then a series of applications made by the Defendants to seek to set aside or appeal the order of District Judge Cridge. The first application for permission to appeal was refused by the district judge and was then renewed on paper and considered by His Honour Judge Dight on 6 July 2018. Judge Dight dismissed the application. The Second Defendant then applied to set aside the order for sale. Both Defendants applied to renew their application for permission to appeal at an oral hearing. That application was made on 21 June 2018 and it was that application that was eventually heard by Judge Roberts on 1 November 2019. Judge Roberts first gave permission to the Defendants to amend their grounds of appeal and rely on a new skeleton argument and further documents. However, having given that permission, he then dismissed the application for permission to appeal as being totally without merit. It was that order that the First Defendant then sought to appeal to the High Court and which prompted the application for a civil restraint order.

12 The position is therefore that there have been two applications by the Second Defendant that have been dismissed as being totally without merit: the application that Judge Cridge dismissed on 30 May 2018 and the application for permission to appeal that Judge Roberts dismissed on 1 November 2019. There have been two applications dismissed totally without merit that were made by the First Defendant: the same application for permission to appeal dismissed by Judge Roberts and the further application for permission from the High Court to appeal Judge Roberts's order, which I dismissed as totally without merit on 12 May 2020. The threshold criterion in Practice Direction 3C for making a limited civil restraint order against each of the Defendants is therefore satisfied.

13 Apart from the applications that I have listed that were dismissed as being totally without merit, there have been, in my judgment, other hopeless applications made, including applications by both Defendants dated 18 November 2017 and 23 May 2018 to set aside the original judgment to which I have already referred, and the original application for permission to appeal against District Judge Cridge's order, which was dismissed on the papers by Judge Dight. Indeed, there has now been the informal application of the First Defendant dated 19 May 2020 to set aside my own order.

14 I am told by Miss Dzwig, who appears on behalf of the Claimant, that in total, in these proceedings, there have been eleven applications issued by the Defendants, three of them by both Defendants, three by the First Defendant, three by the Second Defendant, and two where it is not possible to be certain exactly who issued them. In those circumstances, it seems to me that both Defendants are equally culpable in bringing applications that are totally without merit and I am satisfied that a limited civil restraint order in both the County Court enforcement proceedings and the High Court appeal proceedings are necessary and appropriate in order to protect the Claimant and the court from having their valuable resources wasted by further applications of this nature.

15 The original application for a limited CRO was issued in the County Court proceedings although it appears to me that I have power, notwithstanding that fact, under paragraph 2.1 of Practice Direction 3C to make a limited CRO in the County Court proceedings. For the avoidance of any doubt, if necessary, I make that order sitting as a County Court judge today in relation to the County Court enforcement proceedings and also as a High Court judge in relation to the High Court appeal proceedings.

16 At this stage, only a limited CRO and not an extended CRO has been made. The Defendants are entitled, without seeking the permission of the court, to seek to set aside the order for a limited CRO or, indeed, to obtain permission to appeal it if they see fit. The restrictions in Part 3C do not catch any such application but they do catch any other application that may be made within a period of two years from today's date by either Defendant in the enforcement proceedings or in the appeal proceedings. The Defendants should be in no doubt that if, in other proceedings, applications that are totally without merit are made then it is very likely that the limited civil restraint order will be converted into an extended civil restraint order so as to provide further protection. However, as things stand today, I am satisfied that orders for limited civil restraint orders are appropriate and sufficient.

L A T E R

17 On summary assessment of costs, the global sum of costs claimed for this application is £4,015 exclusive of VAT but £752 of VAT in addition. As a global sum, that strikes me as being a reasonable and proportionate amount of legal fees to incur to pursue this application, which is of considerable importance to the Claimant. I ask myself, therefore, whether any individual items of costs appear to be unreasonable in amount, or unreasonably incurred, or disproportionate.

18 The only issue that arises is that the two solicitors/fee earners have charged at rates in excess of the guideline rates for their grades for a firm of solicitors in Huddersfield, the grade B fee earner by an amount which is quite inconsequential bearing in mind the lapse of time between when those rates were fixed and today, and bearing in mind that the court always has a discretion to allow a higher rate than shown in the guideline. So far as the grade A fee earner is concerned, he has been charged for relatively little work on this application at a rate of £250 an hour, whereas the guideline rate is £201 an hour. In other circumstances, I might have adjusted the rate of £250 an hour downwards but it is explained to me, and I accept, that the need for a grade A fee earner to be involved in doing some of the work in preparation for this hearing was because of the unfortunate need for the grade B fee earner to quarantine during the COVID pandemic. In those circumstances, it seems to me to be reasonable that a grade A fee earner, who does not charge significantly more than the grade B fee earner in any event, was used in order to cover the work that needed to be done during that period of two weeks.

19 In those circumstances, I am satisfied that the total amount of costs in the sum of £4,767, including VAT, is reasonable and proportionate and should be paid by the Defendants to the Claimant.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

**** This transcript is approved by the Judge****