Neutral Citation Number: [2020] EWHC 643 (Ch)

Case No. CH-2019-000072

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Thursday, 20th February 2020

Before:

THE HONOURABLE MR JUSTICE FANCOURT

Between:

ALAA ELDIN BARAKAT

- and -

GREYCOURT LIMITED

Mr Jonathan Hill appeared on behalf of the Applicant
Mr Uwem Utip (Solicitor) appeared on behalf of the Respondent

Hearing date: 20 February 2020

Approved Judgment

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MR JUSTICE FANCOURT:

1. This is an application made by the would-be appellant, Mr Alaa Eldin Barakat, to set aside an order made without notice by Mann J on 11 December 2019. Mann J struck out the appellant's application for permission to appeal, on the basis that he had not taken appropriate steps to file an appeal bundle and a transcript of the judgment. The judgment was given by His Honour Judge Gerald in the County Court at Central London on 28 February 2019 at the end of a trial concerning the ownership of a trademark and issues relating to the infringement of the trademark, and possibly passing off, relating to a restaurant in Kensington Church Street, London, known as Aladino's.

2. The Judge granted relief, largely in favour of the respondent, Greycourt Limited, but did not allow all of Greycourt Limited's claims; and injunctive relief was granted in relation to the trademark. There was an inquiry directed in relation to losses that had been caused to the respondent, orders for delivery up of certain goods, an order that the appellant pay the respondent two-thirds of its costs of the proceedings, and an order for payment of £30,000 on account. Both sides were represented by counsel at trial.

3. On 15 March 2019, the appellant issued and filed an appellant's notice seeking to appeal against the judgment. The appellant's notice named counsel who had appeared for him at the trial, Mr Berkin, as a legal representative, and gave his contact details but identified that he was only acting as a Direct Access barrister in connection with the hearings in the matter and was not generally retained to conduct the litigation.

4. In the appellant's notice, the appellant sought a stay of the orders that had been made by Judge Gerald. No application was made with the appellant's notice for a transcript at public expense, as should have been done if such an application was to be made at any time: see Part 52BPD, paragraph 4.3.

5. In view of the application for a stay, the papers came before Snowden J who, on 26 March 2019, ordered that for the Court to consider whether to grant a stay the appellant had to file an appeal bundle, a transcript of the judgment and his evidence in support of the application. None of those matters, in fact, has ever been done. Unusually, the Judge ordered that any such application should be heard on notice to the respondent at an *inter partes* hearing.

6. On 11 April 2019 the appellant signed and at least partially completed an application for a transcript to be provided at public expense. At about the same time he applied for an order that he should be entitled to pay the interim costs by instalments. The court office took the view that the appellant should also have issued an application notice in form N244 to support his application for a transcript at public expense.

7. It appears to me, from studying the CE-file, that the appellant did make his application in form N244 on about 20 April 2019. The application was signed in at least one place and, in my judgment, was sufficiently signed. 30 April 2019 was the date the Court had specified for the appeal bundle to be filed, but no application was made for an extension of time, which was contrary to the terms of the Court's letter of 15 March 2019 when the appeal had

been issued.

8. In due course, the application for payment of the costs in instalments was rejected and the appellant was ordered to pay the costs in full by 20 May 2019.

9. The Court office, for whatever reason, still did not appear to be satisfied with the documents that had been filed in connection with the transcript of the judgment. It seems to me, although matters are not entirely clear, that a further document was then sent out to the appellant, requiring a further signature. The Court also wrote to the appellant on 11 June 2019 saying that various pages of a transcript request form needed to be completed, or signed. Finally, on 28 June, once again a signed, completed form was returned on behalf of the appellant.

10. Thereafter, it appears that nothing was done to progress the application for a transcript at public expense. The matter came before Mann J on 11 December 2019 and he refused the application for a transcript at public expense. He struck out the whole of the appeal for want of prosecution and, in particular, for failure to lodge the appeal bundle. In giving reasons for that conclusions he said that he was assuming that the reason why the appeal bundle had not been lodged was because no transcript was obtained. However, looking at the file, it seemed to him that this was entirely the fault of the appellant: the file records a number of occasions on which the Court pointed out to him that he needed to submit a signed application for the transcript and he has only just done that; no explanation has been given for the delay. He had submitted a letter in June 2019 which refers to certain medical difficulties which are said to make it difficult for him to deal with this matter, but there is no explanation for any delay between then and now.

11. Having struck out the appeal for those reasons, Mann J then ordered as follows: 'The order in paragraph two having been made of the Court's own motion, the appellant is at liberty to apply to vary or discharge it, provided that any such application is made within seven days of the date of this order'.

12. The order of Mann J was sent out in due course and the appellant accepts that he received the order on 17 December 2019, which was a Tuesday. That was the day before the period of seven days that was specified. It is to be inferred that the appellant must have been considerably upset by the terms of the order, not just because it was striking out his appeal, but it was giving as reasons non-compliance with the Court's requirements, whereas he must have known that he had previously complied.

13. I cannot conceive that Mann J would have made the order that he did had he been aware that proper compliance with the requirement to apply for a transcript at public expense had been achieved no later than, and possibly significantly earlier than, the end of June 2019. The appellant was not at fault for the fact that a transcript had not been obtained; the Court was at fault because it had not processed his application. In those circumstances, as I said, it is clear that Mann J would not have made the order that he did had he realised that the fault was that of the Court and not of the appellant in that respect.

14. On 20 December 2019 – so by this time, after the period of seven days for applying to set aside the order had expired – the appellant emailed Mann J's clerk asking her what steps he should take. His evidence is that on the same day he emailed Mr Berkin, the counsel who had previously acted, asking for his assistance. The appellant got no reply from either; in

the case of Mann's J clerk because she was already away on vacation at the time.

15. Thereafter nothing appears to have been done by the appellant to progress the matter until 23 January 2020. However, on 13 January 2020 the appellant went to see a consultant psychiatrist to assess the state of his mental health. It is not clear by whom he was referred, but he must clearly have been referred to a consultant. The report prepared by the consultant says that Mr Barakat had told her, 'He had not been feeling well in his mental state because everything is going wrong in his life and he feels almost cursed. He described himself as a highly intelligent and well-educated man, unfortunately nothing is working well for him and he feels demoralised. He added that he had been going through a stressful legal battle with his previous business partner, and his lawyer, for the last few years, and he had lost his business which was a restaurant'.

16. The diagnosis of the psychiatrist was that there was no symptom that required any psychiatric intervention or any other medical intervention, other than possibly a change of the anti-depressant medication that the appellant had been on for some three years. Psychological counselling was offered to the appellant on that occasion, which he declined. The impression recorded by the psychiatrist was that Mr Barakat was a gentleman who had a long history of anxiety and depression that had been particularly triggered by his difficult financial position and long-term legal dispute.

17. On 18 January 2020 the appellant received a statutory demand served in relation to the costs that should long-since have been paid.

18. On 23 January 2020 the appellant tried again to call Mann J's clerk and then called and spoke to a listing officer in the court building, on which occasion he was advised to submit an application to set aside the order of Mann J. That application, which is the application before me, was issued on 31 January 2020.

19. It is common ground that in considering this application I must apply the *Denton v T H White Limited* [2014] EWCA Civ 906 approach to relief against sanctions. Rule 3.3(5) of the Civil Procedure Rules states that any application to set aside a judgment or order made without notice must be made within a period of seven days or such other period that the Court making the order specifies. In my judgment, therefore, the relief against sanctions approach is appropriate.

20. Approaching it in that way, I must consider in sequence the three questions that need to be considered, first of all the seriousness and significance of the breach. The striking out of the appellant's appeal was clearly a serious matter for him; it was also a serious matter for the respondent. The effect would be that, if nothing was done within seven days, the appeal would be at an end and there would be no further impediment to enforcing the terms of the judgment. The appellant knew just in time that he had to make an application within seven days, but he did not make that application to set it aside.

21. He is familiar with court litigation and he is aware, in general terms, how one goes about making applications in court. There is no evidence to suggest he was unable to get to the Rolls Building in order to deal with it in person, if necessary. In my judgment there was no proper attempt made by the appellant, promptly, to issue an appropriate application or, indeed, to seek a short extension of time, if necessary, to enable him to do so.

22. The breach is serious, not just because a significant period went by without any application having been issued, but because of the consequences for the respondent. The respondent was entitled to consider that the appeal had come to an end, and it was no doubt in those circumstances that the statutory demand was issued in January 2020, seeking to enforce the costs order. I therefore have no doubt that the breach was a serious breach.

23. The next question is whether there is any good explanation for the extent of the breach and the seriousness of the breach. Although there is some evidence that has been put before me that the appellant was in a depressed and anxious state of mind in December 2019 and January 2020, I am not persuaded that that is a complete explanation for his inaction. The appellant, in principle, had some access to lawyers, as was later demonstrated by the recourse that he had to lawyers in connection with the statutory demand, served in January 2020. The appellant himself says that he is an intelligent man, and I believe that he has the resources necessary to deal with the matter, even if he was suffering with a bout of depression over that period.

24. The diagnosis of the clinical psychiatrist does not suggest that the appellant was wholly incapable of taking steps to protect his interests at that time. There was no real attempt to deal with the matter until after the conversation with the court staff on 23 January, and even then it took the appellant a further eight days to make the application.

25. Given that the breach was serious, and there is no fully adequate explanation for the breach, I look to see whether there are any other circumstances of this case which, in the final analysis, could justify the grant of relief against sanctions and further the overriding objective of the Court, rather than merely having the effect of perpetuating breaches of the court rules.

26. I do not look at the merits of the possible underlying appeal, because it is so difficult to assess them, but what I am particularly concerned with is the merits of the application that has now belatedly been brought to set aside the order of Mann J.

27. Despite the serious breaches, I am left with the overwhelming feeling, given that that order would not have been made had Mann J had the full picture before him, that a serious injustice would have been committed, so far as the appellant is concerned, if, as a result of that order having been made and events subsequently, he were effectively debarred from pursuing the application for permission to appeal. I have considered whether other circumstances are such as to disentitle him to relief. It was suggested that he had failed to comply with other terms of the court order, but that was not a matter that was pressed particularly at the hearing, and I am now satisfied that there has been a transfer of the rights to the trademark pursuant to Judge Gerald's order. The costs have not been paid, but the reason for that I am told, on instructions, is that the appellant simply does not have the money with which to pay the costs.

28. In all the circumstances, notwithstanding that this was a serious breach which has not been adequately explained, I consider that it would be unjust and would not further the overriding objective if the appellant was to be debarred from pursuing his application. Given the length of the unexplained delay, this conclusion is reached only by a fine margin. I therefore propose to grant relief against sanctions. Once relief against sanctions is granted, then in

my judgment, the resolution of the application to set aside Mann's J order is straightforward; it is self-evident that that order must be set aside.

29. Various consequential matters may need to be dealt with now in terms of the progress of the application and I will deal separately, in due course, with the question of the costs of this application.

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