Neutral Citation Number: [2023] EWHC 659 (SCCO)

Case No: SC-2016-DAT-002450

**IN THE HIGH COURT OF JUSTICE**
**SENIOR COURTS COSTS OFFICE**

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 20/03/2023

**Before** :

**SENIOR COSTS JUDGE GORDON-SAKER**

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**Between :**

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|---|---|
| **JOHN RIORDAN (1)** | **Claimants** |
| **BARRINGTON BURKE (2)** | |
| **PRESTIGE PROPERTY DEVELOPER UK (LTD) (3)** | |
| **EUGENE BURKE (4)** | |
| **- and -** | |
| **MOON BEEVER SOLICITORS (A FIRM)** | **Defendants** |

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**Ms Ayesha Smart** (instructed by **direct access**) for the **Claimants**
**Mr Joshua Munro** (instructed by **Wedlake Bell LLP**) for the **Defendants**

Hearing date: 4th January 2023

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SENIOR COSTS JUDGE GORDON-SAKER

## Senior Costs Judge Gordon-Saker :

1. This is an application by the First Claimant, Mr John Riordan, for an order setting aside certain paragraphs of a consent order dated 17th October 2017 and setting aside the order that I made on 20th April 2022.

The background

2. The Defendants, a firm of solicitors, acted for the Claimants between 2013 and 2015 in a claim brought against them by Mr Thavetha Thevarajah. Those proceedings became better known as an early case about relief from sanctions,[1] than for the underlying dispute which arose from the alleged breach of a share purchase agreement.

3. The Defendants terminated their retainer on 30th March 2015 and the following day rendered a bill to the Claimants for a little over £1.2m in respect of the work they had done.

4. In March 2016 the Claimants commenced these proceedings for an order that the Defendants' bill be assessed under s.70 Solicitors' Act 1974. As with their dispute with Mr Thevarajah, the Claimants' dispute with the Defendants did not follow a straightforward procedural course. In August 2017 the claim was struck out because the Claimants had failed to serve any evidence in support of it or do anything else to prosecute it. The Claimants applied for relief from sanctions. That application was resolved by the consent order dated 17th October 2017 which provided that the strike out order be set aside and that there be a detailed assessment of the Defendants' bill provided that the Claimants pay the Defendants the sum of £650,000 in cleared funds by 2nd February 2018. The order provided that, in the event that the payment was not made, the claim should be dismissed:

> "IT IS ORDERED BY CONSENT:
>
> 1. The Strike Out Order is set aside.
>
> 2. There be a detailed assessment of the Bill, provided that the Claimants do pay the sum of £650,000 in cleared funds without set-off or deduction, on account of the Bill by 4.00pm on 02 February 2018.
>
> 3. In the event that the payment provided for in the previous paragraph is not made, this claim shall be dismissed with costs to be subject to detailed assessment if not agreed without further order.
>
> 4. In the event that the Claimants comply with the proviso in paragraph 2 … the directions in CPR 46.10 shall be modified [in the respects indicated].
>
> …

[1] Thevarajah v Riordan [2015] UKSC 78

> 6. Save as provided for above, the claim is dismissed.
>
> 7. Permission to apply in respect of the date in paragraph 2 above but such application must be on notice to the [Defendants] and served on them and a copy of the application and evidence in support sent by email to [a named partner in the Defendants] by 4pm on 5 January 2018, unless the parties reach agreement in that respect. Such hearing shall not be listed for hearing on or between 5 January and 12 January 2018.
>
> 8. [Costs]

5. As Foskett J observed:[2]

> The agreement embodied in the order is tolerably clear: if the Claimants wanted to proceed with the detailed assessment, they were required to pay £650,000 "in cleared funds without set-off or deduction" by 4 pm on 2 February 2018 unless they made an application for an extension of time by no later than 4 pm on 5 January 2018 (subject to any alternative agreement), the application to be emailed to the named partner in the Defendant. If the time for payment (whether the time specified in paragraph 2 of the order or such other time as may have been agreed or ordered by the court pursuant to paragraph 7 of the order) passed without payment being made, the claim for a detailed assessment would be dismissed. … to complete the narrative it should be noted that on 4 January 2018 the Claimants (through Mr Riordan) issued an application seeking an extension of time for compliance with paragraph 2 and he signed a witness statement that day in support of the application. The application was sealed on 9 January 2018 and a hearing before Master Haworth set for 1 hour on 5 March 2018.

6. On 26th February 2018 the Claimants issued a further application seeking a variation, revocation or stay of the consent order pursuant either to the Court's case management powers under CPR 3.1(7) or (in the case of a stay) CPR 3.1(2)(f), the purpose of the application being expressed to be to obtain a stay of the costs proceedings "pending the outcome of the [Claimants'] professional negligence claim against the [Defendants]".

7. At the hearing on 5th March 2018, Master Haworth ordered an indefinite stay of the detailed assessment proceedings "pending resolution of the Claimants' proposed claim for professional negligence against the Defendant". He explained:

> I am satisfied that, on the evidence, that represents a material change in circumstances. I am also satisfied that I have the case management powers to amend, alter or vary the Consent Order in such manner as I consider appropriate in view of changed circumstances.

[2] [2018] EWHC 1452 (QB) para 11

8. The Defendants appealed that order. On appeal, Foskett J concluded that the order was well within the Master's powers and, given the proposed professional negligence claim, was the correct order to make:[3]

> 28. Whilst the master addressed the issue of a material change in circumstances in the way indicated above (see paragraph 17), he also said that, having regard to the part of the White Book to which he was referred, he had "all the powers [he needed] in relation to varying the consent order". In one sense, the order he made (simply staying the consent order) does not constitute a variation at all. But I have no doubt (as is confirmed in *Safin*) (i) that the court does retain a jurisdiction to intervene (to use a more neutral expression than "vary") with the implementation of an order notwithstanding that it was made by consent and (ii) that the grounds for such intervention are not confined to the court being satisfied that there has been a material change of circumstances since the order was agreed although the fact of the prior agreement is relevant. As Tomlinson LJ said in *Pannone*, and as confirmed by Sir Terence Etherton in *Safin*, the weight to be attributed to the prior agreement will depend on the circumstances and where the consent order embodies the final resolution of a substantive dispute, it is likely that "ordinarily decisive weight" will be given to it, whereas the weight to be attached to an agreed procedural accommodation would "ordinarily… be correspondingly less, and rarely decisive."
>
> 29. It might be said that there was a discrete substantive dispute in this case about the need for a detailed assessment which was resolved finally by the consent order. However, I think it would be very difficult to characterise the agreement reflected in the consent order as other than a "procedural accommodation" and, accordingly, the jurisdiction to intervene in appropriate circumstances could arise. Here, as the Master said, there is now (which there was not before) a fully articulated claim for professional negligence which, he said, "raises serious allegations in substantial litigation." Whilst it is quite possible to see that the assertion of such a case now is very late in the day and arguably simply a tactical move, that is not a conclusion to which the Master, or I, could come at this stage and indeed we are not called upon to do so. At face value there are issues to be tried which go to the conduct of the litigation for which the Defendant is seeking to charge.
>
> 30. The Master, who is very experienced in these matters, was of the clear view that, given the assertion of this professional negligence case, it would not be appropriate at this stage to shut out a detailed assessment of the Defendant's bill of costs: it is possible that the issues raised in the forthcoming litigation may have a bearing on the detailed assessment in due course. In my

[3] [2018] EWHC 1452 (QB) para 31

> view, it was not strictly necessary to look for a "material change in circumstances" since the consent order was made to justify such a decision. It was sufficient to say that the order should not be implemented in the situation prevailing at the time the court was invited to consider the issue. However, if it was necessary to look for a "material change in circumstances", on the material before him, the Master was certainly entitled to come to that decision. He did not have the letter of 9 October 2015 before him and so it is impossible to know what influence that might have had on his decision. For my part, had I been considering the issue, I might have been less persuaded that there was such a change of circumstances (in the sense of a supervening event) for the reasons mentioned by Mr Munro, although, at the end of the day, the difference between the position taken in the 9 October 2015 letter and the most recent letter is stark: in the former, there is a wholly unspecific and general allegation of negligence; in the latter there is a fully particularised case. That could well be seen as a significantly changed position.

9. The Claimants' claim against the Defendants for damages for professional negligence was not pursued with alacrity. Proceedings were issued in the Chancery Division in June 2020, but were struck out in July 2021 as a result of the failure to serve the claim form.

10. In July 2021 the Defendants applied to lift the stay of these proceedings and "to reinstate the Consent Order dated 19 October 2017 with dates for compliance with the directions in that Order amended".

11. The Claimants filed an appellant's notice in respect of the order striking out the professional negligence claim and, in view of that, the parties agreed that the Defendant's application be adjourned to the first open date after 4th April 2022. Accordingly the application was then listed on 20th April 2022.

12. On 4th April 2022 the Claimants' appeal was dismissed by Mr Philip Marshall QC, sitting as a Deputy Judge of the High Court. However, at the hearing (before me) on 20th, Mr Riordan indicated an intention to pursue a second appeal against the strike out of the professional negligence claim. I decided to extend the stay of the detailed assessment proceedings pending the outcome of that appeal. At Mr Riordan's request, the order was made without prejudice to an intention he then intimated to apply to set aside or vary the consent order. The order of 20th April 2022 therefore provided:

> 1) This order is made without prejudice to any potential application by the Claimants to set aside or vary the consent order dated 19th October 2017 ("the 2017 order").
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> 2) The stay of the claim for detailed assessment imposed by paragraph 1 of the order dated 5th March 2018 is extended until the earliest of:
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> a. 4pm on 25th April 2022 unless the Claimants have by then filed an appellants' notice against the order of Mr Philip

> Marshall QC sitting as a Deputy High Court Judge, dated 4th April 2022 ("the April 2022 order");
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> b. the refusal by the Court of Appeal of permission to the Claimants to appeal the April 2022 order; and
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> c. the determination of that appeal if permission is granted.
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> 3) The sum of £254,587.17 held by the Defendants and received by the LPA Receiver from the proceeds of sale of The Jester Public House, Mount Pleasant, Cockfosters, Barnet EN4 9HG and The Blarney Stone Public House, 472 Hornsey Road, London N19 4EF shall be released to the Defendants to count as part payment of the sum of £650,000 referred to in paragraph 2 of the 2017 order.
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> 4) The time for the Claimants to pay the balance of the said sum of £650,000 referred to in paragraph 2 of the 2017 order is extended to the expiry of 42 days after the lifting of the stay as extended by paragraph 2 hereof.
>
> 5) [costs]

13. Permission to appeal the order of Mr Marshall QC was refused by Newey LJ on 27th September 2022. Being a second appeal, that refusal was final.

14. The consequences of that are: (1) the stay of these proceedings extended by the order dated 22nd April 2022 has been lifted; (2) the time for payment of the balance of the £650,000, required as a condition of the order for assessment, expired on 8th November 2022; and (3) by virtue of paragraph 3 of the order dated 17th October 2017, these proceedings have been dismissed with costs.

This application

15. This application, to set aside the orders dated 17th October 2017 and 20th April 2022, was filed by Mr Riordan on 8th November 2022. It is supported by his witness statements dated 8th November 2022 and 1st January 2023 and opposed by the statement of Mr Latham, the Defendants' solicitor, dated 23rd December 2022.

16. CPR 3.1(7) provides that the court may vary or revoke orders that it has made. However, as a general rule, that power may be exercised only either (a) where there has been a material change of circumstances since the order was made or (b) where the facts on which the order was made were misstated: *Tibbles v SIG Plc* [2012] 1 W.L.R. 2591. The application is made only on the basis of a change in circumstances.

17. In the course of submissions, as an alternative to setting aside, Ms Smart suggested that it would be appropriate to vary the orders to enable the Claimants to pay the sum of £650,000 in instalments.

18. The Claimants' case, in short, is that the Defendants have prevented them from raising the money to make the payment on which the order for detailed assessment is

conditional. Accordingly, the Claimants say, they have been deprived of the ability to challenge the Defendants' fees by the obstruction of the Defendants.

19. As security for their fees, various properties owned by the Third Claimant were charged to the Defendants. While there is significant disagreement between the parties as to the value of the properties charged, which clearly I am not in a position to determine, the present position is this:

    i) The Jester and The Blarney Stone public houses have been sold by the LPA Receiver appointed by a prior chargee (PBF Investments Ltd) and the balance of the proceeds after payment of the prior charges (£254,584.17) has been paid to the Defendants.

    ii) LPA Receivers were appointed by the Defendants on 21st October 2015 over the remaining properties charged to them, namely: The King's Head public house, The Cock Tavern public house, land west of Yasme in Rickmansworth and 7 Plantagenet Road, Barnet. If these properties were sold for the sums suggested by the valuation evidence exhibited to Mr Latham's statement, there would still be a shortfall of about £100,000 on the sum due as a condition of detailed assessment. Mr Riordan asserts that the properties are significantly more valuable.

20. Mr Riordan's evidence as to what the Defendants did to obstruct the Claimants' access to funding is set out from paragraph 100 of his statement dated 8th November 2022 (although the earlier paragraphs set out many other criticisms of the Defendants). In short, he contends that the Defendants failed to cooperate with the Claimants in their attempts to arrange funding in December 2017 first from Mayfair Development Finance and subsequently from Investpek Limited. He also contends that The Jester and The Blarney Stone public houses were sold at a significant undervalue.

21. The difficulty with the Claimants' argument, it seems to me, is that, for the purposes of this application, there has been no material change in circumstances since the orders were made. The Defendants held charges over the Third Claimant's properties in respect of all sums due to them, not just the £650,000. The Defendants could not realistically be expected to give up their security in respect of the balance of their fees over that sum. Realistically, the Claimants would either have to pay the Defendants' fees in full or raise £650,000 by loans secured by charges which ranked after the Defendants.

22. As evidence of a change in circumstances, Ms Smart referred to the Defendants' earlier willingness to release their charge over the Jester public house in return for a first charge over the Blarney Stone public house.[4] However, to my mind that is more an indication of the Defendants' concern to maintain adequate security for the amount of their bill: releasing a second charge and obtaining a first charge.

23. The Defendants' position, set out in Mr Latham's email to Mr Riordan at page 92 of exhibit JR1, that "we are not prepared to release charges without retaining charges over property to secure the balance you will be required to pay" was, in my judgment,

[4] JR1 p.41 [bundle p.118]

perfectly reasonable. It may not have been what the Claimants wished to hear, but it should have been anticipated.

24. Although, in his witness statements, Mr Riordan asserted that the Defendants had prevented the Claimants from obtaining funding, as I suggested to Ms Smart in the course of her submissions, there was no evidence in the exhibits to support that.

25. The impression given by the documents exhibited to Mr Riordan's statements is that the attempts to raise funds to pay the sum agreed in the consent order never advanced beyond an outline proposal. In all likelihood, at the time that the consent order was agreed, the Claimants had no real plan as to how the money would be raised.

26. Mr Riordan has done his best to keep these detailed assessment proceedings alive. Unfortunately what was needed was either a route to be able to comply with the condition for payment in the consent order or the proactive pursuit of the professional negligence claim.

27. In my judgment there is no good reason for setting aside or varying the consent order. There has been no material change in circumstances since the order was made. Had the consent order not been agreed, it would seem unlikely that the Claimants would have been granted relief from sanctions without being ordered to pay a substantial sum as a condition. There was a significant sum outstanding and they had done nothing to pursue the assessment proceedings. The order that was agreed was probably little different to the best order that the Claimants could have hoped for.

28. There was some uncertainty as to whether the Claimants had the benefit of legal advice at the time that the consent order was made. Mr Riordan's email to the Defendant at page 71 of the exhibit to his first statement would suggest that they had assistance from counsel instructed through direct access; as did the draft order at page 29. Ms Smart's instructions were that he was not instructed in relation to this matter. However the wording of the consent order is clear and it is not suggested that Mr Riordan did not understand its terms or effect.

29. As to the suggestion, raised for the first time at the hearing, that the consent order should be varied to permit the Claimants to pay the £650,000 in instalments, no evidence was produced to show that this was any more realistic than the original condition.

30. Accordingly the application is dismissed. At the end of the hearing I heard submissions on costs, to avoid a further hearing.

31. The costs should follow the event and the Claimants should pay the Defendants' costs of the application. Ms Smart suggested that there should be some reduction in the amount allowed, given that all of the work, bar preparation of the bundle, was carried out by Mr Latham. There is obvious force in the counter-argument that he did the work because of his personal involvement. However some work could have been delegated such as putting together the exhibit and drafting the statement of costs. I would allow 3 hours at the Grade D rate, giving a total of £11,978.