Neutral Citation Number: [2023] EWHC 1442 (KB)

Case No: QA-2021-000230

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2023

Before :

THE HONOURABLE MR JUSTICE BOURNE

- -

Between :

SAFIRA AKRAM **Claimant**

- and -

(1) ACADEMY DOORS AND WINDOWS LIMITED

(2) CHANDER SHEKHAR LAL **Defendants**

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James Petts (instructed by **Bhogal Partners**) for the **Claimant**
Rosana Bailey (Direct Access) for the **Defendants**

Hearing date: 27 April 2023

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Approved Judgment

This judgment was handed down remotely at 10am on Wednesday 24 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE BOURNE

The Hon. Mr Justice Bourne :

1. This is an application by the Second Defendant ("D2") to vary an order made on 2.12.22 by Ritchie J, lifting a stay of execution on a judgment of the County Court in favour of the Claimant, Miss Akram. The application is to re-impose the stay.

2. The Defendants carried out building works at the Claimant's home in 2015 and 2016. The First Defendant ("D1") is a company that was owned and operated by D2 and is no longer trading.

3. On or around 1 July 2021, HHJ Hellman gave judgment in the claim. He awarded the Claimant £9,778.79 against D1 and £34,711.62 against D2. He dismissed a counterclaim against her. He also awarded her further sums under CPR Part 36 of £1,051 against D1 and £4,032 against D2. The Defendants were ordered to pay the costs of the proceedings, to be assessed on the standard basis until 10.11.20 and on the indemnity basis thereafter, plus interest on the costs. They were also ordered to make a payment on account of costs in the sum of £70,000. Judge Hellman's order was dated 9.9.21. It was subsequently amended twice, the final version being dated 29.9.21.

4. On 27.9.21 with a view to enforcement, the Claimant applied for an interim charging order over a property owned by D2, and this was granted on 21.10.21.

5. On 27 October 2021 the Defendants filed a Notice of Appeal. It seems that they tried to file it on 1 October 2021 but had technical difficulties.

6. The Defendants also applied for a stay of execution pending appeal. That was granted by Robin Knowles J on 15.12.21. He said:

> "On the evidence supplied the consequences of enforcement now may be irreversible for D2 should D2 ultimately succeed. The result as regards D2 is bound up in the result as regards D1. The balance of justice is in favour of a stay, but the stages of seeking permission and any hearing appeal [sic] should not be delayed."

7. On 18.1.22, Sir Stephen Stewart granted the Defendants permission to file their notice of appeal out of time, noting that it had arguably been filed in time. He also ordered them to file a full appeal bundle including transcript of judgment by 15.1.22. Under paragraph 6.3 of PD 52B, an appeal bundle should already have been filed within 35 days of the NOA, i.e. on or around 1 December 2021. Nearly 17 months have now elapsed since that date.

8. On 25.4.22, Sir Stephen Stewart repeated his previous order, now requiring the bundle to be filed by 31.5.22.

9. It seems that D2 emailed a transcript request form to the Court on 16 May 2022. I return to that below, but I note here that there is no satisfactory explanation for the fact that this had not previously been done at any time since the appeal was launched in October 2021. Transcripts of evidence are not required for most appeals. D2's counsel, Rosana Bailey, makes much of the fact that her client did not receive a sealed

Appellant's Notice until March 2022, and of an apparent failure by the Court to log the appeal on its online system, but that does not begin to explain why work was not being done during the preceding four or five months. She says that it was the order of 25.4.22 which directed when the bundle had to be filed, but that ignores both the requirement under PD 52B and the order made on 18.1.22. She then says that it was only when the bundle was belatedly being prepared that it was appreciated that, as she put it, the court would benefit from reading the transcript of evidence. That was a very substantial delay for which there is no good excuse.

10. On 20.6.22, Sir Stephen Stewart noted that no bundle had been filed. He now made an unless order providing that the appeal would be struck out if no bundle was filed by 29.6.22.

11. The Defendants applied for more time. In a witness statement dated 1.8.22, D2 said that he was awaiting the transcript of the evidence and that the transcribers were awaiting recordings from the Court. He said that the Court had a lengthy backlog and also was not accepting telephone calls.

12. On 4.8.22, Sir Stephen Stewart extended the deadline for the appeal bundle to 30.9.22.

13. On 10.8.22 the Claimant applied to set aside that order and/or to set aside the stay of execution, noting that there was no good explanation for a delay in obtaining a transcript of the judgment (rather than of the evidence). In a witness statement she noted that D2 had not identified the date when he first sought a transcript of the judgment, and that he was being assisted by direct access counsel. She referred to suffering serious financial hardship, having to borrow money to fund the litigation, and also complained of medical and emotional difficulties. She said that her home, where the disputed works took place, was still not safely habitable.

14. It seems that that application was not served on the Defendants.

15. Meanwhile, on 30.9.22 D2 filed a witness statement in which he requested a further extension to 14 November 2022 as the Court had still not sent recordings of the evidence.

16. By this time, it seems to me wholly inexplicable that the Defendants had not filed an appeal bundle without the evidence transcripts, with those transcripts to follow when available. Paragraph 6.6 of PD 52B makes express provision for late documents to be added.

17. The Claimant's solicitors wrote to the Court on 10.10.22 opposing the further extension request, and again on 20.10.22 sending evidence that her medical condition was deteriorating.

18. On 14.11.22 D2 filed a further witness statement, now requesting an extension to 16.1.23 for the bundle, for the same reasons as before. He said that on 2.1.22, he was told that the transcriber had received the recording for 1.7.21 (the judgment) but no other recordings yet.

19. On 2.12.22 the Claimant's application of 10.8.22 was considered by Ritchie J on paper. He made an order lifting the stay of execution. In his reasons he drew attention to a lack of written evidence of the Defendants' application for transcripts and of subsequent correspondence. He also noted that the transcript of the judgment appeared to be available, e.g. because the grounds of appeal refer to paragraph numbers of the judgment. Ritchie J considered that the delay had now shifted the balance of the risk of injustice in the Claimant's favour.

20. That order provided that any party could apply to have it set aside within 7 days of service and that such party must file and serve a "full chronological PDF bundle of all evidence relied upon and all court orders made to date which must be bookmarked for each document".

21. On 9.12.22, D2 applied for the order of 2.12.22 to be set aside and for an extension for the appeal bundle to 16.1.23, and for permission to file evidence and a bundle in support of the application by 19.12.22 in view of the "detailed nature of the bundle required". That shows that he and his counsel, Ms Bailey, knew that an application bundle would be needed.

22. In an accompanying witness statement D2 contended that the lifting of the stay "creates a travesty of justice". The delay, he reiterated, was the Court's fault. He said that the appeal bundle had now been prepared but was missing the transcripts of evidence, which he said are crucial to the appeal. The judgment transcript was available. The transcript request form had been emailed to the Court on 16 May 2022. Meanwhile, whilst the Claimant is protected by her interim charging order and a Restriction on the Land Register, greater injustice would be caused if he and his wife were to lose their home only then to find that they win their appeal.

23. By a letter dated 19 December 2022, D2's counsel Ms Bailey wrote to the Court, pointing out that the application of 10 August 2022 was not served until 12 December, after the order had been made. She added: "Upon receipt of the application on 12 December 2022, there is a need to take full instructions from the Defendants. Thereafter, another witness statement will need to be prepared and included in the bundle, the completion of which was anticipated today." This again shows an awareness that an application bundle would be needed. No such bundle was provided until the morning of 27 April 2023, the day of the hearing before me. The promised further witness statement also did not materialise until the last moment, the unsigned copy in the bundle being dated 26 April 2023.

24. In fact, the Claimant filed a further witness statement dated 26 December 2022. She continues to dispute the need for transcripts of the evidence. She pointed out a continuing lack of transparency about D2's communications with the transcribers and emphasised the 7 month delay in his applying for the transcript in the first place.

25. On 18 January 2023 Ms Bailey again wrote to the Court, stating that she had that day received an email from the County Court confirming that recordings had now been uploaded to the transcribers. She awaited confirmation of the time that would now be needed to provide the transcripts. D2's witness statement would now need to be amended and updated. She anticipated being back in contact with the Court on or before 9 February 2023.

26. Ms Bailey wrote again on 9 February 2023, stating that the appeal bundle would be filed on or before 7 March 2023 and that the transcripts were being prepared. She also said:

> "The application to vary the court order dated 2 December 2022 has been filed already. However, a supplementary witness statement needs to be filed in further support thereof together with the accompanying bundle. Again, the bundle needs to be altered to include the new material."

27. That is a third document showing that Ms Bailey knew that an application bundle was needed.

28. On 22 February 2023 the Claimant's solicitors emailed the Court with what they described as a "complaint and request to strike out appeal", reiterating her position and inviting the Court to consider striking out the appeal for abuse of process. However, no strike-out application has been made and I am not willing to consider that step without a formal application.

29. As a general observation, parties should communicate with the Court by filing applications, any other pleadings, evidence and skeleton arguments by the relevant deadlines. Both parties in this case have formed the habit of writing letters or emails to the Court instead of taking the steps for which the CPR provide. They would be well advised to discontinue that practice.

30. D2's application to vary Ritchie J's order of 2.12.22 was listed for hearing before me on 27 April 2023. Despite the requirement in that order, no application bundle containing the relevant evidence and orders was provided until the morning of the hearing.

31. Instead, D2 finally filed the appeal bundle on 25 April, two days before the hearing, complete with the hundreds of pages of evidence transcripts. To my mind it has always been highly questionable whether those transcripts were needed at all. The appeal bundle is accompanied by Ms Bailey's skeleton argument for D2's application for permission to appeal, and that skeleton argument refers to precisely one page of those transcripts.

32. Nevertheless, now that the appeal bundle has been filed, the question of whether it should be further delayed to await the transcripts has become academic.

33. Returning to the application to vary the order of Ritchie J lifting the stay, Ms Bailey finally provided a skeleton argument in support of it on the morning of the hearing. Perhaps that was prompted by the skeleton argument by the Claimant's counsel, James Petts, opposing the application, which was appropriately filed on 25 April 2023.

34. In the absence of an application bundle or a skeleton argument filed at an appropriate time, I spent several hours reading the Court file in order to understand what had happened so far.

35. From that unpromising beginning, I turn to what the parties say about the application.

36. Ms Bailey in her skeleton argument says that this in-person hearing takes place at the request of the Respondent, and that she believed that this would be a hearing of the Claimant's "complaint" of 22.2.23. In my judgment that belief was incomprehensible. The Claimant's solicitors' email of 22.2.23 does not mention listing a hearing at all. However, Ms Bailey's client had made an application which was awaiting a hearing. On that application the "telephone hearing" box was ticked, but D2 and Ms Bailey could not be certain what sort of hearing would take place. The Claimant meanwhile had not made any application. So when a notice of this hearing was sent out on 1 March 2023, it should have been obvious that this would be the hearing of D2's application to vary.

37. Ms Bailey says that because she thought this was the hearing of the Claimant's complaint, she thought it would be for the Claimant to provide a bundle. That ignores the fact that Ritchie J's order required a bundle to be prepared for that application and the fact that, as the documents show, she and her client were aware of this requirement.

38. Ms Bailey submits that the delay in requesting transcripts was because of a delay by the Court in giving directions for the appeal. As I have said, I reject that. At all times the CPR applied to this appeal and required an appeal bundle to be prepared, and it was not prepared.

39. She further submits that the delay from May 2022 until the transcripts arrived on 15 February 2023 was the Court's fault. I accept that, and I accept that D2 did chase the transcripts from time to time, but I do not accept that it was reasonable not to file a timely appeal bundle to which the transcripts, if needed at all, could be added later. Nor is there any good excuse for the further delay between 15 February and the filing of the appeal bundle on 25 April 2023.

40. Ms Bailey's skeleton argument does not set out the test for granting or refusing a stay, or address the relevant factors other than delay, save by observing that the litigation remains vigorously contested.

41. The Claimant resists the application. In his skeleton argument Mr Petts emphasises that nearly 2 years have elapsed since the judgment in which no payment has been made by either Defendant and the Claimant, through want of funds, has been unable to have remedial works done to her home. Mr Petts robustly challenges the need to include the evidence transcripts in the appeal bundle and highlights the delay of nearly 17 months in providing that bundle. He contends that even if the evidence transcripts proved necessary for a final appeal hearing, it is highly improbable that they would be needed for a grant or refusal of permission to appeal. He reminds me that when Robin Knowles J granted the stay on 15.12.21, he said in the same breath that the onward permission and appeal stages should not be delayed. Mr Petts submits that the very long delay which has ensued has shifted the balance of justice away from a stay, as Ritchie J said. He also emphasises that there is very little contemporaneous documentation to show that D2 made diligent efforts to obtain the delayed transcripts.

42. In addition, Mr Petts submits that the grounds of appeal do not appear strong. Many of the 18 grounds are couched in very general terms, e.g. "*the Learned Judge took into account matters which were irrelevant and disregarded and/or failed to take into account matters which were highly relevant*". Many of the grounds challenge the trial judge's findings of primary fact which, as Mr Petts says, requires any appellant to surmount a high hurdle.

43. As Mr Petts says, the Court has a wide discretion under CPR 52.16(a) to grant or refuse a stay of execution pending an appeal. The Court must consider all of the circumstances and decide whether granting or refusing a stay would be less likely to lead to injustice to a party. See, for example, *Hammond Suddards v. Agrichem* [2001] EWCA Civ 2065, where Clarke LJ said at [22]:

> "It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"

44. In *Leicester Circuits Ltd v Coates Bros Plc* [2002] EWCA Civ 474 the CA added that if the justice of letting the general rule, that is no stay, take effect, the answer may well depend on the perceived strength of the appeal.

45. Mr Petts says that a continuing stay will cause serious injustice to the Claimant because she will still not be able to begin to remedy the damage which the Defendants have been found to have done to her home, and the situation has already forced her to borrow money to finance these proceedings. If she did enforce the judgment and if the appeal succeeded, she has the substantial asset of her house in London against which any judgment could be enforced in turn.

46. In this case, Robin Knowles J was persuaded to depart from the general rule while saying that there must not be delay. In my judgment, the subsequent lengthy delay is a very significant change of circumstances. I bear in mind that the long wait for transcripts of evidence was not D2's fault, but the long delay in first requesting those transcripts was his responsibility. And, as I have said, I am far from convinced that those transcripts were needed. Moreover, another 2 month delay then followed the provision of the transcripts.

47. Meanwhile I am not satisfied that either granting or refusing a stay would stifle either party's participation in the appeal, and nobody has suggested that it would.

48. Nor am I satisfied that irremediable harm will be caused if the Claimant enforces her judgment and then has to repay D2 if he wins his appeal. It will be for her to decide whether to run the risk of that happening.

49. However, I am satisfied that the delay has inflicted and is inflicting real hardship on the Claimant. She has endured serious defects in her home for around 7 years and still is not in a position to remedy them.

50. It is then necessary to consider the apparent strength or weakness of the appeal.

51. In a case of a building contract which was not in writing, D2 is attempting to overturn findings of fact which were based to a significant degree on the judgment of the witnesses' credibility. That is always a high hurdle for any appellant.

52. The main point which is forcefully made and repeated in Ms Bailey's appeal skeleton argument is that the parties had a discussion about VAT, whereas VAT would not have applied to the contract which, as the judge found, was made with D2 (who was not registered for VAT) rather than his company D1. But those facts are set out in paragraphs 20-21 and the judge acknowledged that this was "the strongest evidence that D1 was the contractor for all the building works". The judge was, however, persuaded by other evidence that D2 entered the contract in his personal capacity.

53. At the conclusion of the hearing on 27 April 2023, I announced that I would await the decision by a Single Judge, on paper, of D2's application for permission to appeal, because the outcome of that application would plainly be a factor relevant to the question of whether there should be a continuing stay of execution. Enquiries to the List Office had revealed that the decision on paper could be made within a week or two, avoiding any unreasonable delay in my decision on this application.

54. On 12 May 2023, Sir Stephen Stewart (sitting as a Deputy High Court Judge) considered the application for permission to appeal on paper and dismissed it. He gave relatively full reasons for his decision, finding that the appeal had no real prospect of success on any of the grounds. In respect of the VAT issue he said:

> "A. The Identity of the contracting parties: Skeleton paras 18-49
>
> (1) On the VAT issue [§20-21], the Judge accepted that this was the strongest evidence that D1 was the contractor for the building works. At §22 he says that if D2 was the contractor there would have been no need for them to discuss VAT as he was not VAT registered. However the Judge went on to say that C would not necessarily have known that D2 was not VAT registered; in other words, if it was unknown to C that D2 was not VAT registered, in circumstances where objectively construed the contract for the building works would otherwise have been between C and D2, the fact that D2 was not VAT registered would not alter this finding.
>
> (2) Once this finding of the Judge is appreciated, many of the submissions in the skeleton do not assist D2 on the challenge to the finding that the building contract was between C and D2. These reasons will briefly address some of the submissions."

55. Sir Stephen went on to address a number of the submissions made in the appeal skeleton argument, explaining why they had no real prospect of success.

56. For the reasons given by Sir Stephen, in addition to my observations above, the proposed appeal appears weak. That weakens the case for a stay of execution.

57. For those reasons I am not persuaded to vary the order of Ritchie J, which I consider was and is the right order in the circumstances.

58. I have not overlooked the fact that D2 has the right to renew his application for permission to appeal at an oral hearing. If he does so, it may be some time before the oral hearing can take place. As I said to the parties at the conclusion of the hearing, I do not consider it appropriate to delay my decision further pending the possibility of that step being taken. If permission is granted at an oral hearing and if the issue of execution of the judgment below is still live at that time, there might be a further stay application. I cannot and do not predict what the outcome of such an application would be.

59. Accordingly D2's application is dismissed.

60. The parties were shown the judgment (up to this point) in draft and were invited to make written submissions in relation to costs. I am grateful to both counsel for their written submissions.

61. Mr Petts submitted that costs should follow the event and therefore that the Defendants should pay the Claimant's costs of and occasioned by the application to vary, together with the costs reserved by Ritchie J in his order of 2.12.22, and that these should be assessed (if not agreed) on the indemnity basis because of the various delays to which I have referred. The Claimant's solicitors filed a statement of costs totalling £11,939.05. This is for work done on the appeal as a whole but Mr Petts suggests that 95% of this was attributable to the stay issue. He therefore requests summary assessment in the sum of £11,342.10.

62. Ms Bailey submitted that there should be no order as to costs. She says that costs could have been avoided if the Claimant had not failed to serve her application of 10.8.22, a failure which the Court has not investigated. Instead she says that the Defendants had to respond to Ritchie J's order of 2.12.22 without having had full sight of that application. Further, she submits that the Claimant's solicitors complicated matters by their email of 22.2.23 referring to a strike-out, giving rise to the Court's letter of 1.3.23 notifying the listing of the hearing on 27.4.23. Ms Bailey further submits that the application was listed prematurely. Her client's application for permission to appeal against the judgment below is now listed for an oral hearing on 30 June 2023. She maintains that irremediable harm could be caused by enforcement of the judgment, bearing in mind that the Claimant has had to borrow money to fund this litigation.

63. In my judgment, there is no reason to depart from the usual position of costs following the event. The Claimant applied to lift the stay, succeeded before Ritchie J and succeeded again before me. The Defendants have always argued, and continue to argue, that the stay should be maintained. I therefore consider that any failure to serve the application of 10.8.22 has not caused costs to be incurred. As I have said, I do not consider that the Claimant's solicitors' email of 22.2.23 had any particular significance in relation to the stay issue. Meanwhile the Claimant's application to lift

the stay was amply justified by the very long delays in the prosecution of the appeal. I have explained why the balance has shifted since the stay was first granted, and it remains the case that the Claimant has property against which any later judgment could be enforced, notwithstanding the cashflow issues of which she has complained.

64. I will therefore order the Defendants to pay the costs reserved by Ritchie J at paragraph 5 of his order of 2.12.22 and the costs of and occasioned by the application to set that order aside. I note that the application to lift the stay was directed against both Defendants, though it is only D2 that issued the application of 9.12.22.

65. Those costs will be summarily assessed on the standard basis, though in fact I have not encountered any doubt as to the reasonableness or proportionality of items claimed which would have been resolved by the choice of standard or indemnity basis.

66. From the Statement of Costs I have no comment to make on counsel's fees or on the hourly rate charged by his instructing solicitors. I will make a reduction to the number of hours' work claimed by the solicitors, particularly for outgoing letters and emails and for telephone attendances. Deducting 10 hours at £265 reduces the amount claimed by £2,650, to £9,290.05.

67. Ms Bailey also objects to the Claimant's solicitor attending the hearing, but I note that the Statement of Costs contains no charge for that. I do however bear in mind that the Statement does cover the appeal generally and I make a further small reduction in that regard.

68. On that basis I will assess the Claimant's costs in the sum of £8,500.