IN THE HIGH COURT OF JUSTICE - QUEEN'S BENCH DIVISION

Neutral Citation Number: [2019] EWHC 2150 (QB)

Case No: QA-2019-000068

Courtroom No. 16

Royal Courts of Justice
Strand
London
WC2A 2LL

1.15pm – 1.35pm
Wednesday, 19th June 2019

Before:
THE HONOURABLE MR JUSTICE MARTIN SPENCER

B E T W E E N:

MS RAFAELA EVANS

and

PINSENT MASONS LLP

MR A F HUTTON QC (instructed by Silver Shemmings Ash LLP) appeared on behalf of the Claimant
MR P J KIRBY QC (instructed by Pinsent Masons LLP) appeared on behalf of the Defendant

JUDGMENT
(Approved)

MR JUSTICE SPENCER:

1. This is an application by the defendant for the court to give oral reconsideration to an order of Nicol J dated 11 June 2019 whereby Nicol J granted relief from sanction and an extension of time to the claimant to request oral consideration of an order that had been made by Jay J on 21 May 2019 refusing permission to appeal against an order of a Costs Judge, Judge James made on 19 February 2019.
2. The background is as follows. The defendant, Pinsent Masons LLP, acted for the claimant, Rafaela Evans, over a significant period of time, 2016-2017 and in the course of that time, the defendant rendered costs bills, some of which were paid.
3. The costs bills fall into three categories;
   i) Bills which were paid and are not disputed;
   ii) Bills which were paid in respect of which a detailed assessment was sought before Judge James;
   iii) Bills which were not paid.

   This matter only concerns the second category, namely, the bills that were paid but in respect of which detailed assessment and consideration were sought.
4. It is accepted that within Section 70(1)(3) of the Solicitors Act 1974 in order to have a detailed consideration of those bills, special circumstances would need to apply. Judge James found there were no such special circumstances and it is that decision which the claimant seeks to appeal.
5. The timing of events is as follows. Judge James having made her order on 19 February 2019, a Notice of Appeal supported by grounds of appeal was submitted on 12 March 2019. On 4 April 2019, having had sight of a transcript, the claimant sought to rely on amended grounds of appeal and a skeleton argument in support was submitted. That came before Mr Justice Edis on 16 April 2019 when he granted permission for amended grounds of appeal.
6. The application was then considered on the papers by Jay J on 13 May 2019 and he dismissed the application for permission to appeal stating, 'Reasons: regardless of the technical pleading points, I do not consider it is arguable that there were any special circumstances in this case'.
7. That order was received by the claimant's solicitors on 21 May 2019. The order made provision for the claimant to apply for a hearing to renew his application for permission to appeal within seven days of receipt of this order. Given that it is accepted and agreed that the order was received on 21 May, time for renewing the application expired on 28 May.
8. On 30 May, the claimant's solicitors sent a letter to the court in the following terms:

   > "We write further to the above matter and the order dated 18 May 2019 which was served on 21 May 2019. We understand that today is the final day to request for an oral hearing taking into account the Bank Holiday dated 27 May. Therefore, we respectfully request the court that the decision of Justice Jay be reconsidered at an oral hearing and a date be fixed to the parties to submit their evidence".

9. On the same day that that letter was submitted, the court issued a notice that the appellant's renewed application for permission to appeal would be listed on 19 June 2019. That notice stated in the usual terms, 'The attendance of the appellant is required. The respondent may attend or submit written representations before the hearing, but will not usually be awarded the costs of doing so'.

10. Thus, the court appears, administratively, to have accepted the letter of 30 May which led the court to believe that the application was in time. The application was not, at that stage, placed before a judge for consideration. The claimant's solicitors did not, at the same time, serve a copy of the letter of 30 May on the defendant as they were obliged to do.

11. The court's notice of 30 May was, according to a stamp on the copy with which I have been provided, received by the claimant's solicitors, Silver Shemmings Ash on 3 June 2019. On that date, 3 June, Ms Sabra Farmand, a trainee at Silver Shemmings Ash sent an email to Pinsent Masons attaching the court's order and attaching the claimant's request for an oral hearing. That email is at page 674R in the bundle.

12. The following day, 4 June 2019, Pinsent Masons wrote to the court and, in particular, to the Administrative Officer who had sent the notice of hearing on 30 May, referring to the letter of 30 May from Silver Shemmings Ash and asserting that the claimant's assertion that 30 May was the final day to request an oral hearing was wrong. They wrote:

> "The appellant's application to renew her application for permission was made out of time and it is thus invalid. We have today spoken to the appellant's solicitors seeking clarification, but did not receive an explanation of the appellant's position".

13. Pinsent Mason made reference to the Rules in the Civil Procedure Rules for calculation of time periods and pointed out that by Rule 2.8, the period of seven days should be calculated as expiring on 28 May. They said:

> "The appellant's letter mentions the Bank Holiday, but even if this day is added, the application remains a day late. In any event, Rule 2.8(4) provides that the Bank Holiday is only excluded from the computation where the specified period is five days or less. As a result, the appellant's application is two days late".

14. This prompted the claimant to make an application on 6 June 2019 for relief from sanction and an extension of two days to apply for oral permission to appeal. That application was supported by a witness statement from Mr Henry Hathaway of Silver Shemmings Ash, he being the partner with conduct of the case, in which Mr Hathaway set out his grounds for asking the court to exercise its discretion to give relief from sanction and extend the time for making the application for an oral hearing. The grounds are set out on paragraph 13 of the statement.

15. Paragraph 14 reads as follows:

> 'As stated under paragraph nine, the order was served on the appellant on 21 May 2019. This can be seen by the received stamp on the letter. Seven days from the date of service falls on 28 May 2019. On reflection, it is accepted that the appellant was two days late to file and request for an oral hearing. However, it is the appellant's case that such delay/breach was not serious nor significant. The delay was only by two days and as soon as this was brought to my attention, my firm wrote to the court requesting an oral hearing. Furthermore, such request did not disrupt any other hearing date as there was none at the time in relation to these proceedings, nor did it disrupt the administration of justice and it has not prejudiced the respondent's rights whatsoever'. [emphasis added]

16. The application together with Mr Hathaway's witness statement in support came before Nicol J on 11 June 2019 when he made his order granting the extension of time. The reasons he gave were as follows:

> "The request for the extension is very short and does not disrupt the litigation. It requires relief from sanctions, but the default is not serious or significant. In all the circumstances, it would be just to grant the request for extension".

17. As with the order of Jay J, so too the order of Nicol J, the order made provision for any party to apply within seven days for the matter to be reconsidered at a hearing. Pinsent Mason did not miscalculate the date for doing that but made their application on 17 June 2019.

18. That application was supported by a witness statement of Mr James Ladner and in that witness statement, Mr Ladner drew specific attention to the inconsistency between what was stated in the letter of 30 May written to the court and what was stated by Mr Hathaway in paragraph 14 of the witness statement.

19. At paragraph 21 of that witness statement, Mr Ladner said:

> "Had this application for relief been concerned with simply a delay of two days, the defendant would not have sought to set aside the order of Nicol J. But, unfortunately, the evidence of Mr Hathaway raises far more serious issues that should be taken into account".

This was a reference to paragraph 12 in the statement earlier where Mr Ladner says this:

> "In relation to the request, Mr Hathaway states that "The delay was only by two days and as soon as this was brought to my attention, my firm wrote to the court requesting an oral hearing" that was the letter dated 30 May 2019. The central paragraph of that letter states, "We understand that today is the final day to request for an oral hearing taking into account the Bank Holiday dated 27 May". If Mr Hathaway's attention was drawn to the two-day delay, he does not now say how it was drawn to his attention. But, I do not understand how the request could then be made in the terms in which it was written. The request for an oral hearing asserted that it was the author's understanding that it was the last day to make the same. Yet, Mr Hathaway's evidence was that by that time, he was aware that they were two days late".

20. Thus, in my judgment, Pinsent Mason, through Mr Ladner, were bringing the inconsistency to the attention not only of the court but also the claimant's solicitors, in the clearest possible terms. By what Mr Ladner was saying at paragraph 21, it was or should have been clear to the claimant's solicitors that the suggestion was that the court had been seriously misled when the letter of 30 May was written.

21. On 18 June, that is yesterday, Mr Hutton QC, on behalf of the claimant, submitted a skeleton argument to the court in which he said at paragraph 13:

> "So, what is the defendant's argument to the contrary on this application? Mr Ladner argues that while the delay has been relatively short "My main concern is the terms in which the claimant's solicitors then made the request which on the face of Mr Hathaway's evidence was misleading". This point is simply

> not understood. The position is clear on the face of the evidence. Mr Hathaway wrongly calculated the seven days and what to count in those seven days. When this was pointed out to his trainee, Ms Farmand on the telephone, she apparently acknowledged on 4 June 2019 that her, "calculation might be incorrect". That it had been incorrect and the claimant was two days out of time was then fully acknowledged by the claimant in making the application for an extension and relief from sanctions very quickly on 6 June 2019".

22. It is not clear to the court why the point being made by Mr Ladner was not understood. It seems to me that the point was very clear because it drew attention to the very bald inconsistency between what was being stated in the letter of 30 May and what was now being stated by Mr Hathaway in paragraph 14 of his witness statement.

23. Be that as it may, by the time this matter came before me this morning, the penny had dropped with Mr Hutton and the point was fully understood. Mr Hutton indicated to me that Mr Hathaway had, in fact, given wrong information in his witness statement of 6 June and that it was not the realisation that the application was two days out of time which had prompted the application on 30 May, but rather his genuine belief, at the time, that the application remained in time. He had only come to realise and accept that the application was, in fact, two days out of time since then, hence his use of the expression, 'on reflection'.

24. Given that Mr Hathaway, through counsel, was indicating that he wished to change his witness statement and given the implications for him were he not to do so, namely, a potential finding by the court that in his application of 30 May, the claimant's solicitors had deliberately and falsely misled the court by suggesting that the application was in time when they knew perfectly well that it was out of time, I granted an adjournment to allow Mr Hathaway to put in a further witness statement setting out what he considered to be the accurate position as I wished to decide this application on a correct evidential basis. The ramifications for Mr Hathaway would otherwise have been potentially serious, that is, a finding by this court that he had deliberately misled the court in the application of 30 May.

25. Having adjourned for just over an hour, I was then presented with a further witness statement from Mr Hathaway in which he said that he would never deliberately have misled any court or tribunal and that at the time that the letter of 30 May was drafted, he thought that the application was still in time. He said:

> "On 30 May 2019, the letter was drafted to the court. On the face of it, time was an issue. However, I immediately was not concerned as I had at the time considered the Bank Holiday as a day of reckoning when I calculated the days. I did ask for it to be mentioned in the letter that the Bank Holiday was relevant".

Then from paragraph 11, he dealt with the witness statement of 6 June. He said:

> "In the witness statement, I did acknowledge and make it clear that on reflection of how I calculated dates were not correct. I felt I was very open about my mistake. The wording is terrible at paragraph 14. I accept the drafting is unclear and is written retrospectively knowing that we are, at the time, making an application. What para 14 should have said is that Sabra and I spoke to each other. A question was raised about the seven days, but I calculated that the 30th was okay taking into account the Bank Holiday, so the letter was sent. There was never any

> attempt nor would I ever consider to attempt to mislead either in my witness statement or in the letter of the 30th".

26. I was additionally given a witness statement by the trainee, Ms Sabra Farmand who states:

> "After receiving the notice refusing permission to appeal, I sent the order to Mr Hutton and our Costs Lawyer asking if we should request for an oral hearing. Counsel responded to go for an oral hearing, but I thought counsel needed to draft the request. On 30 May 2019, I chased counsel upon Henry [Hathaway] chasing me. Mr Hutton said, we, Silver Shemmings Ash, needed to write a letter to the court and request a hearing. When I wrote to counsel, I did think 28 May was the last day i.e. deadline. Counsel suggested we may need to make an application if the court refused our letter. However, I orally had a discussion with Henry Hathaway on the same date. We calculated the days taking into account the Bank Holiday and believed 30 May was the deadline and we were still within time. Then, I drafted the letter of 30 May to the court further to our discussion taking into account the Bank Holiday and miscalculations. The discussion was that it was okay to send the letter to the court on 30 May because we were still in time".

27. Neither Mr Hathaway nor Ms Farmand explain how taking the Bank Holiday into account successfully got them to 30 May 2019. The Bank Holiday being a single day, even if taken into account, would only add one day to the time and that would result in time having expired on 29 May, not the 30th. Nor, in my judgment, does Mr Hathaway's further statement adequately explain how he came to draft paragraph 14 of his witness statement of 6 June in the terms that he did. I go back to that witness statement.

28. It is well accepted in the knowledge of solicitors that where an application is made for relief from sanction, not only is the period of delay relevant for the court to consider but also, whether the solicitor reacted promptly once the need for a relief from sanction was apparent. Where then Mr Hathaway said, 'The delay was only to be two days and as soon as this was brought to my attention, my firm wrote to the court requesting an oral hearing', it seems to me quite clear that what Mr Hathaway was doing was saying not only was the delay short, but that he had acted promptly in requesting an oral hearing once the delay had been brought to his attention. This is not mere poor drafting, but putting before the court an assertion which Mr Hathaway now acknowledges was simply untrue. There is no question on his new evidence of the firm writing to the court requesting an oral hearing as soon as the need for relief from sanction had been brought to his attention.

29. The result is that the position is evidentially extremely unsatisfactory even after the further evidence submitted by Mr Hathaway and Ms Farmand. I take the view that I have no adequate explanation for why the court was, on one view, seriously misled by the witness statement of 6 June at paragraph 14. The alternative is even worse, namely, that Mr Hathaway knew perfectly well on 30 May that the application was two days out of time, but attempted to pull the wool over the court's eyes by asserting that the application was in time, thereby, hoping to induce the court to issue a notice of hearing without querying the matter as, in fact, the court did.

30. That matter was compounded and, in my view, seriously compounded, by the failure to serve the letter on the defendant's solicitors at the same time so that they had an opportunity to make representations both to the court and to the claimant that the application was, in

fact, not in time and the court should not list the oral hearing at least until there had been an application for relief from sanction.

31. In those circumstances and given that relief from sanction is a matter which is within the discretion of the court, I consider that had Nicol J known the position fully as it is known to me and had he considered the matters which I have had an opportunity to consider, he would not have exercised his discretion to grant relief from sanction.

32. I, therefore, overturn Nicol J's decision. I refuse relief from sanction and I allow the defendant's application.

End of Judgment.

Transcript from a recording by Ubiqus
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This transcript has been approved by the judge.