Neutral Citation Number: [2019] EWHC 341 (QB)

Case Nos: HQ13M03735
HQ14M02898

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2019

Before :

MR JUSTICE WARBY

- -

Between :

Frank Kofi Otuo	**Claimant**
- and -	
The Watch Tower Bible and Tract Society of Britain	**Defendant**

And between:-

Frank Kofi Otuo	**Claimant**
- and -	
(1) Jonathan David Morley	
(2) The Watch Tower Bible and Tract Society of Britain	**Defendants**

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- -

The Claimant in person
Shane H Brady (instructed by **Legal Department, Watch Tower Bible and Tract Society of Britain**) for the **Defendants**

Hearing dates: 11 and 15 February 2019

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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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THE HONOURABLE MR JUSTICE WARBY– Relief from sanctions (Ds)

MR JUSTICE WARBY :

Introduction

1. This short judgment deals with the defendants' application pursuant to CPR 3.9 for relief from sanctions, in respect of their non-compliance with paragraph 19(b) of the Order of HHJ Parkes QC dated 17 September 2018 ("the Parkes Order"). The defendants had made an application raising the question of whether the entirety of these slander claims, or aspects of them, should be stayed or struck out on the grounds that the issues raised are not justiciable ("the Justiciability Issue"). Judge Parkes had declined to determine the issue raised by the application on the grounds that it was not then ripe for resolution. The Parkes Order provided that if the defendants chose to renew their application "that application must be made at the pre-trial review" and that they "must file and serve notice of the application together with a skeleton argument in support, and a revised time estimate of the pre-trial review at least 14 days before the pre-trial review".

2. As explained in a previous ruling, the notice and skeleton argument were served on 1 February 2019, which was four days late, with the consequence that, when the matter came before me at the Pre-Trial Review on Monday 11 February 2019, I vacated the hearing of the application. No application had been made for an extension of time for service of the notice and skeleton.

3. My order of 11 February 2019 provided that:

> "5. The application will not be determined unless the defendants first apply for and obtain relief from sanctions.
>
> 6. If the defendants wish the application to be determined as an interim application they must, by no later than 4pm on Tuesday 12 February 2019, file and serve…"

an application notice seeking relief from sanctions, supported by evidence; and various other documentary materials, required if the application was to be manageable. The order went on to state that if these requirements were met, the application was to be listed for hearing not before Friday 15 February 2019, along with the substantive application to dismiss for non-justiciability, and various other applications.

4. All of that was done. On Friday 15 February 2019 I granted relief from sanctions, for reasons to be given later. These are those reasons.

Principles

5. The application for relief from sanctions was required for two reasons. First, because in my judgment the Parkes Order contained within it a sanction, which is not expressed but is a necessary implication of the words used. The sanction was that if the specified conditions were not met, the application would not be heard. That, after all, was the clear intention and effect of Judge Parkes' Order. If the defendants wanted to renew the application they had to comply with his directions. Failure to do so would not mean that the Justiciability Issue could not be raised at all. Non-

justiciability is a pleaded defence. But non-compliance would mean that it could not be raised before trial, on an interim application, as a ground for striking out. The defendants would be left to rely at trial on their pleaded defence of non-justiciability.

6. There is another analysis. In substance what the defendants are now seeking is the variation of a time limit, after the deadline has expired. A party making an application of that kind must show that they satisfy the criteria for relief from sanctions, as the Court of Appeal has made clear in *R (Hysaj) v SSHD* [2014] EWCA Civ 1633 [2015] 1 WLR 2472.

7. Upon examining the chronology, with the help of the evidence now filed by the defendants, it became apparent – for reasons I shall explain - that there was a further reason why relief from sanctions was required by both parties.

8. The relevant principles, known colloquially as the *Mitchell/Denton* principles, are too well-known to require extensive citation. The decision-making process involves three steps. First, the Court must decide whether the breach, for which relief from sanctions is sought, was serious or significant. If not, that is likely to be the end of the enquiry. If, however the breach is serious or significant, the Court must enquire into the reasons for it. If there are good reasons, again that may be the end of the matter. But if there is not a good reason, the Court must consider whether in all the circumstances relief ought to be granted. Matters which must be given particular weight at this stage are the two factors specifically highlighted in CPR 3.9: the need (a) for litigation to be conducted efficiently and at proportionate cost; (b) to enforce compliance with rules, practice directions and orders.

Evidence/Submissions

9. The witness statement of Mr Achonu, filed in support of the defendants' application, explains the sequence of events, and exhibits the relevant correspondence. The key features, to my mind, are these:

   (1) The deadline for exchange of statements, which was 14 January 2019, came and went without any extension having been agreed between the parties or sought from the Court. There had been discussions and agreement in principle, but no firm agreement. At that point, both parties were in default.

   (2) On Monday 21 January 2019, a week after the deadline for exchanging statements, the Court fixed the date for the Pre-trial review. It was then possible to calculate that the Parkes Order required service of the specified documents by no later than the following Monday, 28 January 2019.

   (3) The exchanges between the parties seem to have overlooked this, or paid it insufficient attention. Nothing was filed or served on 28 January, nor was any application made before the deadline set by the order to abridge the 14-day minimum period for serving documents, or to vary the Parkes Order by deferring the PTR so that the minimum period could be complied with. The defendants did write to the Court to inform it of what was going on. But that is no way to manage timetabling.

(4) On 1 February the necessary documents were served, as the defendants concede, 9 days before the hearing not the 14 provided for by the Parkes' Order. There was no application to delay the PTR, and the issue was not even raised with the Court in correspondence.

(5) The defendants appear to have taken the view that the important thing was for Mr Otuo to have 7 days' notice of what the defendants were going to say on the application. But that is an entirely misconceived approach. The Parkes Order gave Mr Otuo 7 days to formulate his written argument in response. But it also gave both parties and the Court 7 days to consider the various arguments and prepare for the PTR. Those 7 days were, in the event, almost entirely lost.

(6) The submissions in the witness statement of Mr Achonu reflect this mistaken focus. It is argued that the claimant has not been prejudiced but has gained by the defendants' conduct. He has indeed gained time for serving his statement, but it is untenable to say that he has benefited when it comes to the Justiciability Issue. The late service of the application documents deprived him of 5 days' preparation time when, as a litigant in person, he was facing a complex legal issue.

(7) More than that, the defendants' evidence continues to ignore the inconvenience to the Court. The defendants' failures have made a significant contribution to the fact that the Court has, in the event, been required to devote over 1 day's additional Court time to this PTR, at short notice.

Decision & reasons

10. This was unquestionably a serious and significant default on the part of the defendants. The Parkes Order laid down a crystal clear, and carefully crafted regime with deadlines that needed to be adhered to.

11. The default came about in part because the defendants were prepared to agree extensions of time for service of claimant's witness statements, to accommodate personal difficulties of his. To some extent, that is to the defendants' credit. But they failed adequately to think through the consequences of this indulgence, for the claimant and for the Court, and they failed to raise the issue with the Court at any stage. As for the claimant, the defendants tried to secure agreement from him on a revised timetable for the application documents. But they failed.

12. They seem to have overlooked entirely that the consequence of their own delay was that the deadline for his skeleton argument was the very day of the hearing. That was not just inconvenient for the claimant. It would have given the Court no help at all. Pre-reading, as should be obvious, is a vital part of litigation. On an application of this kind it is absolutely essential. Without it, the Court is unlikely to be adequately prepared to deal with matters efficiently on the day of hearing.

13. When they came to the hearing on 11 February the defendants had made no application to delay the hearing, nor had they taken any step to secure an order abridging time for giving notice of their application. The issue of non-compliance was not addressed at all in the defendants' skeleton argument. I can only conclude that the

reason for the default was that the defendants did not take seriously enough the need to comply with all the directions contained in the Parkes Order, or to seek a variation from the Court in the absence of agreement with the claimant.

14. When it comes to consideration of all the circumstances, the need to enforce compliance with the orders of the Court would lend strong support to the refusal of relief from sanctions. But the more powerful factor consideration in the particular circumstances of this case is factor (a). What would be the effect of refusing relief on the overall efficiency of the litigation? The issue will need to be resolved to some extent at some stage in this litigation - if not at an adjourned PTR, then at trial. As I will explain when dealing with the justiciability issue, the points raised in the interim application and those pleaded in the Defence are not the same. But, importantly, put at its highest the interim application calls into question the Court's power and competence to adjudicate on the claims. Those are issues which, once raised, require resolution. It is far better, if possible, to do so before a trial. In addition, to the extent that the application sought to cut down the scope of the issues for trial, that is manifestly a process better undertaken before trial begins. In the end, my conclusion was that relief from sanctions should be granted, on the footing that the resolution of the issue, or at least full argument upon it in advance of trial was far more likely to serve the overriding objective. I therefore proceeded to hear argument on the Justiciability Issue.

15. I should also address the default involved in the failure to exchange statements on 14 January, without a written agreement in place for an extension of time. That in my judgment was in itself a minor and inconsequential default, for which there is an acceptable reason. Looking at all the circumstances it is right to consider and deal with the issue of relief from sanctions of the Court's own motion, and to grant both parties relief from sanctions in that respect.