IN THE HIGH COURT OF JUSTICE

No. TLQ18/0145

No. QB-2017-000976

QUEEN'S BENCH DIVISION

NEUTRAL CITATION NO. [2019] EWHC 3722 (QB)

Royal Courts of Justice
Strand, London

Wednesday, 23 October 2019

Before:

MRS JUSTICE LAMBERT DBE

B E T W E E N :

KD — Claimant/Respondent

- and -

PHILIP GAISFORD — Defendant/Applicant

MS E. FENELON appeared on behalf of the Claimant/Respondent.

MR STANBURY appeared on behalf of the Defendant/Applicant.

Judgment: 23 October 2019

J U D G M E N T

MRS JUSTICE LAMBERT:

1 This an application by the defendant, Mr Philip Gaisford, for an order under CPR 39.3(3) setting aside my judgment of 20 February 2019, see *KD v Gaisford* [2019] EWHC 339 (QB). The judgment followed a trial which took place on 5 and 6 February 2019. I found that the defendant had sexually assaulted the claimant by causing him to engage in non-consensual masturbation at the defendant's home on 21 February 2000. The defendant who was, in February 2000, a high-ranking police officer, did not attend the trial on 5 and 6 February 2019. He was at the time imprisoned at HMP Rye Hill following his conviction at Lewes Crown Court in May 2013 for a number of sexual assaults and other sexual offences, including the assault upon the claimant which formed the subject matter of the trial before me.

2 At the beginning of the trial in February 2019 the claimant made an application that the hearing should proceed in the defendant's absence because, on the day before the hearing, on 4 February 2019, the court and the claimant's solicitor had received an email from Ms Claire Smout, the custodial lead at HMP Rye Hill, stating that Mr Gaisford had refused to attend court. I granted the claimant's application for the reasons set out in paragraph 5 of my judgment. In summary, my reasoning was that:

(1) it was clear from correspondence to and from the defendant that the defendant knew of the trial date, his right to be present for the purposes of cross-examination and submissions, and his right to be represented at trial.

(2) The defendant had taken no practical steps to arrange for his attendance at court.

(3) The defendant knew that it was his responsibility to take steps to arrange for his attendance at court not least because he had been informed of this on a number of occasions by the claimant's solicitor, Ms O'Connell.

(4) The claimant's solicitor had written to the defendant in the period leading to the trial trying to find out whether he was intending to attend court and, if so, how. She offered to speak to him personally by telephone and, later as the trial grew nearer, to speak with one of the defendant's named friends and family telephone contacts to discuss his plans and arrangements.

(5) The defendant knew that if he did not attend trial, the claimant would apply to the court that the trial should proceed in his absence. He had been told this in quite clear and emphatic terms in a letter dated 18 January 2019 written by the claimant's solicitor.

(6) On 14 November 2018 the defendant had made an application for the trial to be adjourned because of his pending application to the Criminal Cases Review Commission. The application was not served on Ms O'Connell, but she became aware of it in January 2019 when Mr David Nicholson of Nicholson's Investigations wrote to her on the defendant's behalf. The adjournment application was determined by Waksman J on 29 January 2019 who refused the application on the basis that the application was wholly speculative and uncertain, and that the trial date had by then been fixed for over a year.

(7) The defendant did not write to the court stating that he wished to attend but was for some reason unable to do so; nor did he write to the court and Ms O'Connell stating whether he intended to attend and if so how.

(8) The email from Ms Smout, stating that the defendant was refusing to attend, was consistent with the defendant's failure to take any practical steps to arrange for his attendance at court.

3 The trial therefore proceeded in the defendant's absence. I heard evidence from the claimant and from Dr Kennedy (a consultant psychiatrist) in support of the action for damages. I made a finding that the assault had taken place and quantified damages (general damages and special damages) in the sum of £53,152.

4 At the hearing before me today, the defendant/applicant is represented by Mr Stanbury and the claimant/respondent by Ms Fenelon. I am grateful to them both for their excellent submissions.

Legal Framework

5 The legal framework for this application is set out in CPR 39.3(3). It is not disputed that the applicant, who has failed to attend trial but then seeks an order under CPR 39.3, must satisfy the court that: first, he acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or to make an order against him; second, he had a good reason for not attending trial and, third, he had a reasonable prospect of success at trial. It is common ground before me that the applicant must satisfy all three criteria.

Evidence/Submissions

6 The defendant has served a witness statement in support of the application. He disputes ever having informed Ms Smout that he refused to attend court. He asserts that he had

always wanted to attend the trial but did not do so because, having filed an application for the trial to be adjourned in October 2018, this application was only determined (and refused) on 31 January 2019. By this stage, it was too late for him to arrange for his attendance in person or to arrange for representation, and he could not attend by video link because Rye Hill prison does not have a video link facility. He further asserts that it had been impossible for him to be transferred to a local prison because the local prison to which he would be transferred was HMP Pentonville. He did not wish to be transferred there - even for the duration of the trial - because that prison is, he asserts, known to be unsafe, and he would be doubly unsafe as a former high ranking police officer and a man convicted of child sexual offences.

7 He states that as a litigant in person, he had (wrongly) assumed that the application to adjourn the trial would be granted because the cheque which he had provided when making the application had been cashed. He denied failing to engage with the court, stating that he had written to the court on a number of occasions chasing the outcome of his application for an adjournment. Furthermore, he had written on Sunday 3 February explaining the situation and seeking an adjournment of the trial. I pause to note that that letter was not received at the Royal Courts of Justice until 6 February, by which time the trial was over.

8 On 5 February 2019 Mr Nicholson, on behalf of the defendant, sent an email at 18:27 in which he said he had contacted the court during the morning, explaining that the defendant had not refused to attend the court but that information concerning the trial had reached the defendant so late in the day that it had been impossible to arrange transport or legal representation. This email was received by me after the trial was over.

9 In his submissions today, Mr Stanbury emphasises that I should make appropriate allowances for the fact that the defendant was a litigant in person who was being held in a prison with no video link facilities; that the defendant had engaged with the claimant's solicitors and with the court throughout the court process; and that I should take particular note of the fact that Pentonville Prison would have been an unsafe location for the defendant - even for the short duration of the trial.

10 Notwithstanding his conviction by a jury in respect of the subject matter of the assault, the defendant denies that he assaulted the claimant. There are two central matters on which Mr Stanbury relies in support of CPR 39.3(5)(c). First, limitation: he submits that one of the

factors that I would have taken into account when determining the issue of limitation was the potentially inadequate explanation for the delay by the claimant in bringing the claim, particularly in the period following the defendant's criminal conviction in 2013. This is a matter that he would have wished to have explored with the claimant in cross-examination. There would, he submits, have been a reasonable prospect of my reaching a different view on limitation had the defendant been present. He also points to numerous inconsistencies in the evidence given by the claimant over the course of the years since the alleged assault in circumstances in which the claimant's credibility was seriously in dispute.

Discussion/Conclusions

10 This application has come before me today whilst sitting as the Judge in the Interim Applications Court. There has however been no pressure of time and I am satisfied that both Counsel have had the opportunity to address me fully on the points which they wished to make. I set out below my essential reasons for dismissing this application.

11 There is no dispute that the defendant made his application under CPR 39.3 promptly. I therefore address, first, the defendant's submission that there was a good reason for his not attending trial. I reject the submission: I do not accept that the defendant has demonstrated that there was a good reason for his non-attendance. I find that the defendant could and should have taken steps to arrange for his transfer to a prison which had a video link, or his transfer to a local prison, or for legal representation, long before the end of January 2019. He was urged repeatedly to do so by the claimant's solicitor in correspondence which (as is accepted) he received. He was informed that if for any reason he did not attend trial an application would be made for the hearing to proceed in his absence. If the defendant, for any reason, had decided that it was not safe for him to be transferred to HMP Pentonville for the reasons given in his witness statement, then he could have arranged a transfer to a different prison (either for the purpose of a video link or another local prison) or he could have arranged for legal representation at the trial just as he has arranged for legal representation for this hearing. He however took no steps to arrange for his attendance or representation at trial.

12 I do not accept that the defendant believed that his application for an adjournment had been or would be successful, either because the cheque had been cashed or for any other reason. As a former Chief Superintendent with the Metropolitan Police Force, the defendant is an experienced litigator, albeit his experience was confined to the criminal jurisdiction. It

defies common sense that he would have assumed, simply because the cheque was cashed, that his application had been successful. Furthermore after the cheque had been cashed, he wrote to Master Thornett (who was case managing the action) on 6 December 2018 stating that he wanted to appoint a legal representative to fight his case if the adjournment request was rejected (and that this was something which would take time), a statement which is not consistent with the assertion now advanced before me, that he assumed that the application had been or would be successful. Even if he did believe that the application would be successful, such a belief was not reasonable. If for any reason he had wondered what, if any, significance he should attach to the fact that the cheque accompanying the application had been cashed, there were a number of steps he could have taken. He could have telephoned or written to the claimant's solicitors. He could have telephoned the court to find out what he should read into the fact that the cheque had been cashed. He however took none of these steps.

13 Nor do I accept that the defendant engaged with the court. Engaging with the court means engaging practically with the court. Sending a letter dated 3 February 2019 seeking an adjournment of a hearing listed to start on the 4 or 5 February 2019 does not permit the court to respond in any practical way to the contents of the letter. Nor does an email sent after close of business on 5 February afford the court the opportunity to respond, Even if the email had reached me, the contents of the letter was no more than an invitation for the trial to be stopped in its tracks, an invitation which I would have been bound to refuse.

14 The defendant’s conduct as revealed in the correspondence and evidence before me today suggests strongly that the defendant was simply using every excuse available to put off the trial which, as Ms Fenelon notes, had been listed for many months. I am not satisfied that there was a good reason for the defendant not attending the trial and I refuse the application to set aside my judgment of February 2019. It has fallen at the second hurdle (CPR 39.3(5)(b)).

15 However, I also deal with the further points raised by the defendant today. First, the issue of limitation. The point made is that the claim was not issued until January 2016, three years after the defendant's conviction for the offence. It is submitted that, had the defendant been present, then the claimant would have been challenged in cross-examination upon the reason for this delay. The claimant gave evidence to me at trial on a range of issues, including his explanation for the delay in commencing proceedings. Even if I had permitted the

defendant to question the claimant (or if I had posed questions on the topic on the defendant's behalf), the submission ignores the point that the central question for me on limitation is whether it would be equitable for me under s 33(1) Limitation Act 1980 to set aside the time limits prescribed in the Act. Putting it broadly, the question is whether the lapse of time in commencing proceedings meant that a fair trial was no longer possible. I have no doubt that it was equitable to set aside the time limits set out in the Act. Whatever the cause of the delay in starting proceedings, this was a case in which the underlying facts had already been the subject of examination and cross-examination before the jury at Lewes Crown Court in April 2013 and the transcript of the claimant's evidence to the jury was available to me at trial in February 2019. Adopting the higher standard of proof, the jury had found the facts proven. Of equal importance, although the full suite of documents and tapes from the original police investigation were not retained, the claimant's interview with the police very shortly after the incident was available, both the transcript and the tape, together with the transcript of the defendant's interview. I therefore do not find that the point which is now raised in respect of limitation has any, let alone any real, prospect of success.

16 The further point which is made by Mr Stansbury is that there were inconsistencies in the claimant's evidence which were not explored in cross-examination, this being a case in which the claimant's credibility was in issue. I bear in mind that given the fact of the conviction, the burden of disproving the jury's verdict rested with the defendant. I note that the claimant's core evidence that there was an assault and that that assault was non-consensual has remained consistent over the course of the years. No doubt he would have been cross-examined at length (had I permitted it) as to the life events which have affected the claimant since the assault took place, but bearing in mind the material which existed from the original police investigation and the essential consistency in the claimant's account over the course of the years, I do not find that there was any reasonable prospect of the defendant discharging the evidential burden upon him that the assault did not take place. I also note in parenthesis, as I did in my judgment, that the defendant's response to the allegation changed significantly over time: initially he denied that any sexual event had taken place; ultimately his case was that there had been masturbation but it had been consensual.

17 For these reasons I dismiss the defendant's application.

CERTIFICATE

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