[2021] EWHC 449 (QB)

Case No: QB-2019-003254

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:1 March 2021

Before:

DEPUTY MASTER HILL QC

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Between:

FARHAN AHMED JUNEJO

Claimant

-and-

NEW VISION TV LIMITED

Defendant

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David Lemer (instructed by Stone White solicitors) for the **Claimant**
Jonathan Barnes (instructed by Gresham Legal) for the **Defendant**

Hearing date: 11 February 2021

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Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10.30 am on 1 March 2021.

DEPUTY MASTER HILL QC:

Introduction

1. By an application notice sealed on 19 November 2020 the Defendant seeks an order striking out the Claimant's libel claim pursuant to CPR 3.4(2)(c) and the court's inherent jurisdiction. The libel claim arises from statements broadcast by the Defendant to the effect that the Claimant, a successful businessperson, was guilty of fraud and theft of money from the Development Authority of Pakistan ("TDAP") in 2013 and laundering funds stolen from the TDAP to Dubai, America and Switzerland; and that there were grounds to investigate whether he was guilty of further money laundering of the proceeds of this crime in London. The Claimant's position is that these serious statements were untrue and have caused him significant reputational damage.

2. The basis for the application is that the Claimant has failed to comply with an order of Nicklin J dated 23 October 2020, to the effect that he must make an interim payment to the Defendant of £15,000 in respect of costs, by 4.30 pm on 6 November 2020. The costs arose because, in the context of a preliminary issues trial, in which the Claimant was partly successful, the Defendant succeeded on some elements, namely a strike out application relating to part of the claim and in resisting the Claimant's application to re-amend his Particulars of Claim.

3. The application notice has appended to it a series of letters between the parties from early November 2020 in which the Claimant made clear that he was struggling financially and required additional time to pay. An offer to pay by instalments was made. However the Defendant did not accept the offer and the Claimant did not make the payments. Shortly before the 11 February 2021 hearing the Claimant paid the Defendant £2,000 of the monies due.

4. The Claimant provided a witness statement dated 5 February 2021 for the hearing of the application, setting out his financial difficulties in further detail. He also provided bank statements and other evidence about his finances.

The legal framework

5. In seeking to strike out the claim by reason of the Claimant's failure to pay the costs order made by Nicklin J, counsel for the Defendant relied on the approach to such applications set out by Patten J in *Crystal Decisions (UK) Ltd v Vedatech Corp* [2006] EWHC 3500 (Ch) and considered by Sir Richard Field (sitting as a Deputy Judge of the High Court) in *Michael Wilson and Partners Ltd v Sinclair and others* [2017] EWHC 2424 (Comm).

6. At [29] of *Wilson*, Sir Richard Field summarised the applicable principles thus:

> "(1) The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion pursuant to the Court's inherent jurisdiction.
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> (2) The Court should keep carefully in mind the policy behind the imposition of costs orders made payable within a specified period of time before the end

> of the litigation, namely, that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.
>
> (3) Consideration must be given to all the relevant circumstances including: (a) the potential applicability of Article 6 ECHR; (b) the availability of alternative means of enforcing the costs order through the different mechanisms of execution; (c) whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings in question; and where no such submission was made whether it ought to have been made or there is no good reason for it not having been made.
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> (4) A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice and/or in breach of Article 6 of ECHR should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.
>
> (5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.
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> (6) If the court decides that a debarring order should be made, the order ought to be an unless order except where there are strong reasons for imposing an immediate order".

7. Counsel for the Claimant relied on *Walsham Chalet Park Ltd v Tallington Lakes Ltd* [2014] EWCA Civ 1607 for the proposition that the general principles set out in *Denton v TH White Ltd* [2014] EWCA Civ 906 are applicable to strike out applications. He therefore argued that the Court should (i) identify and assess the seriousness and significance of the failure to comply with the Court order; (ii) consider why the default occurred; and (iii) evaluate all the circumstances of the case to enable the court to deal with the application justly. Ultimately, though, in a strike out application, the central question is whether the sanction of strike out is proportionate.

8. Counsel for the Claimant also emphasised that striking out a statement of case because of a litigant's failure to comply with a court order for the payment of money which is beyond their means may amount to a breach of the right to access to a court derived from Article 6(1) of the European Convention of Human Rights. A party should not be ordered to pay a sum of money that they are unlikely to be able to raise; and a court should not impose a condition upon a party which has the effect of stifling their continued participation in the proceedings. A party can prove such a stifling effect by establishing, on the balance of probabilities, that he does not have the means to comply with the condition and cannot raise the necessary sums from friends, relatives or business associates willing to help him in his hour of need (see *Ford v Labrador* [2003] UKPC 4 and *Goldrail Travel Ltd v Aydin* [2017] UKSC 57).

The Defendant's submissions

9. The Defendant made four overarching points.

10. First, it was argued that the ordinary Civil Procedure Rules policy of "pay-as-you-go" in terms of costs applies. Nicklin J had accepted that significant costs were payable by the Claimant to the Defendant and that a payment on account should be made. The Defendant has been left out of pocket in respect of its legal costs arising from the hearing of 23 October 2020 and is entitled not to have its cashflow impacted as it has been by the Claimant's default.

11. Second, while accepting that if this was a case of a "lack of means", Article 6 would mean the Court should proceed to a strike out with particular caution, the Defendant submitted that this was not such a case: rather, the Claimant did have the means to pay, but had simply chosen not to pay. The financial information provided by the Claimant was "*highly unsatisfactory*", not least because he had chosen not to disclose his tax return, which might have given a true audited picture of his income. However such financial information as had been made available suggested that the Claimant had chosen to prioritise different financial commitments at the cost of his non-compliance with Nicklin J's order.

12. The Defendant's counsel took me to (i) the description of the Claimant in the Particulars of Claim as a "*successful and established businessman*"; (ii) various recent personal and business bank statements for the Claimant from the last few months, indicating several significant deposits of sums such as £9,049 and £5,982, and outgoings which remain unclear; (iii) the Claimant's witness evidence to the effect that he achieves annual rental income from three properties in London of £140,000 which appears to be part of a property portfolio worth millions of pounds; (iv) the Claimant's witness evidence that he had invested at least £160,000 into his 'Mezban' business less than a year ago; (v) the lack of clarity as to the value of either the Mezban business or the Claimant's other business, 'Mirch Masala'; and (vii) the Claimant's witness evidence which indicated that he owns land worth around £9 million in Pakistan.

13. Overall the Defendant submitted that the evidence provided by the Claimant did not meet the requirements of "*detailed, cogent and proper*" evidence of his financial position; and that given the choices he had made, it would not be principled to treat him in the same way as someone who did not have the means to pay at all.

14. Third, the Defendant accepted the legal framework to the effect that if the Court decides that a debarring order should be made, this should be in the form of an unless order except there are strong reasons for imposing an immediate order, but argued that such strong reasons were present here, namely (i) the fact that the Claimant's non-compliance is voluntary and deliberate; (ii) a further preliminary issue trial to address the issue of publication is listed for 25 March 2021 and the Defendant should not be required to incur significant costs in preparing for that trial which may not be recovered; and (iii) on his own evidence the Claimant could not comply with an unless order.

15. Fourth, the Defendant argued that the Court should not be persuaded to defer matters in light of the recent payment by the Claimant of £2,000 and offer to pay the balance in instalments.

The Claimant's submissions

16. In early November 2020 the Claimant had made an offer to pay by instalments. This would have resulted in payment of the full £15,000 by 25 March 2021. The instalments amounted to £9,000 being paid in various instalments up to and including one on 5 February 2021 and a final instalment of £6,000 on 25 March 2021. These payments were not made. The Claimant's position was that the further lockdown restrictions in late 2020 had adversely impacted on his restaurant businesses such that he could not make the instalment payments offered. Instead he made one payment of £2,000 shortly before the 11 February 2021 hearing.

17. The Claimant relied on his witness evidence indicating that (i) he cannot sell his UK-based properties in the current climate; (ii) of the £140,000 rental yield from his properties, £108,000 is needed for the mortgage and £7,800 for service charges; (iii) he is in arrears with two of his mortgages and his service charges; (iv) the Mirch Masala restaurant in which he is only a shareholder closed down as a restaurant in March 2020 and the Mezban business closed in December 2020; (v) the restaurant businesses have debts including in relation to rent and suppliers; (vi) the Claimant is having to use any remaining funds from his personal rental income to 'prop up' his businesses; (vii) he has been unable to pay the tax due to HMRC; (viii) the land he owns in Pakistan does not generate income and he cannot sell it without travelling to Pakistan which would not be permissible given the pandemic; (ix) the only other asset he has is a car valued at £3,000 which he uses to take his children to school and for work purposes; and (x) he has had a range of difficulties in accessing formal or informal credit, re-financing or loan arrangements, partly as a result of the statements broadcast by the Defendant which have impugned his creditworthiness. He also referenced the impact his financial worries are having on his health.

18. In his witness statement the Claimant proposed an instalment plan of £2,000 a month, or that the Court defer payment of the costs to the conclusion of the case (although the latter option was not advanced with any force by his counsel).

19. The Claimant advanced four key arguments based on this evidence.

20. First, the Claimant recognised his default and the general importance of complying with court orders. However he argued this was not a case where he would never be able to pay the Defendant's costs: rather, this was a case where his ability to pay within the prescribed time scale was the issue. He referred to his two offers to pay by instalments. The Claimant submitted that the Article 6 considerations are the same whether the means issue is that someone does not have means *per se*, or does not (as here), have access to means at a particular time.

21. Second, it was said that the reasons for the default were (i) the impact of the Covid pandemic on the Claimant's restaurant businesses; and (ii) the fact that the impugned defamatory statements at the heart of the claim have led to the Claimant being denied banking services and being required to rely on borrowing from friends and family, as set out in his witness evidence prepared for the hearing before Nicklin J and his witness evidence for this hearing. The fact that these issues were raised in the witness evidence prepared for the hearing before Nicklin J put paid to any suggestion that the evidence of impecuniosity had been fabricated once Nicklin J had made the costs order.

22. Third, the Claimant submitted that he had demonstrated on the balance of probabilities that he does not have the current means to discharge the entirety of the extant costs order and a strike out plainly would have the effect of stifling the proceedings.

23. Fourth, the Claimant argued that it would not be proportionate in all the circumstances to strike out what was a meritorious claim in light of his failure to comply with the extant costs order, especially bearing in mind his offers to pay by instalments. An unless order could be made and there were other options open to the court. This distinguished the case on its facts to *Wilson* where because the defaulting parties were not resident in the UK, alternatives to a strike out such as proceedings for contempt or seeking a charging order against any known assets were likely to be of limited value.

Analysis and decision

24. *Wilson* makes clear that the policy behind the imposition of costs orders made payable within a specified period of time before the end of the litigation must be borne in mind. The Claimant is in breach of that order and the issue for me to determine is whether the response to that breach should be a strike out of the Claimant's claim or some other sanction. I do not accept the Defendant's argument that I should not even consider the making of an unless order as the Claimant had not sought that in terms: an unless order is plainly open to me in the exercise of the Court's discretion and indeed *Wilson* posits that an unless order is to be expected before a strike out is ordered. In any event counsel for the Claimant did rely on this option in his oral submissions.

25. *Wilson* also emphasises that in deciding what order to make, consideration must be given to all the relevant circumstances, including (a) the potential applicability of Article 6 ECHR; (b) the availability of alternative means of enforcing the costs order through the different mechanisms of execution; (c) whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings in question. A similar approach is required by application of the *Denton v TH White Ltd* [2014] EWCA Civ 906 principles.

26. As to factor (a) above, I accept the Claimant's submission that a person who generally has means, but has specific cashflow problems such that they do not have access to funds at a particular time, is entitled to invoke their Article 6 rights. To hold otherwise would preclude a court from taking a realistic view of a person's finances at the particular time an order impacting on them was being sought. The Claimant rightly accepted that there were further documents which he could have provided relevant to his means. However on balance I am satisfied that the witness and documentary evidence he has provided constitutes sufficient evidence to the *Wilson* standard to prove the difficulties he has in raising the remaining £13,000 at the present time. I accept that I should not make an order which will effectively stifle his ability to litigate what may be a meritorious claim due to these issues with his means.

27. As to (b), there are alternative means of enforcing the costs order through the different mechanisms of execution, including an unless order.

28. As to (c), the Claimant was represented before Nicklin J, and his decision was that a costs order payable on an interim basis was appropriate.

29. Taking all those factors together, I am satisfied that striking out the Claimant's claim now would be disproportionate. However to make no further order to mark the Claimant's breach would not be proportionate, or fair to the Defendant, either. I consider that an order debarring the Claimant from further pursuing his claim should be made, but that this should be on an unless order basis. I do not accept that the reasons advanced by the Defendant against this course are sufficiently strong to displace the *Wilson* principle that an unless order should be the first form of debarring order.

30. I have noted that despite the November 2020 offer of payment in instalments, no payment was actually made to the Defendant until early February 2021. It seems to me likely that notwithstanding the further 'lockdown' restrictions in late 2020 the Claimant could have raised some funds in that intervening period and should have made some payments other than the one £2,000 paid shortly before the hearing. I am also conscious of the upcoming hearing commencing on 25 March 2021 and the risk to the Defendant of incurring further potentially unrecoverable costs.

31. Taking into account all these circumstances and aiming to balance all the competing considerations, I consider it appropriate to make an order debarring the Claimant from further pursuing his claim unless he pays (i) £4,000 to the Defendant by 4.30 pm on 5 March 2021; (ii) a further £3,000 by 4.30 pm on 19 March 2021; and (iii) the remaining £6,000 in two instalments of £3,000 each due by, respectively, 4.30 pm on 16 April 2021 and 14 May 2021.

Costs

32. Both parties seek their costs from the other, arguing that they were the successful party and thus the usual rule under CPR 44.2(4) should apply.

33. The Defendant succeeded, but only to the extent that the unless order I made will either result in costs recovery to the Defendant or strike out, albeit in slower time than an immediate strike out. The Defendant failed to obtain the immediate strike out sought on the application, and expressly disavowed the option of an unless order. The Defendant had also declined to engage in discussion about payment by instalments, conduct which I take into account in the exercise of my discretion as to what costs order to make, if any, under CPR 44.2(4)(a) and/or (c).

34. The Claimant succeeded, but only to the extent that he defended the immediate strike out application. The order I made will have the same effect if at any point he fails to comply with the payment schedule set out in the unless order. The Claimant failed to obtain the primary remedy he sought, that I make no order on the application. The Claimant also failed to make any payments towards the costs ordered by Nicklin J until shortly before the hearing, despite having indicated in November 2020 that he could do so. This is conduct by the Claimant which I also take into account under CPR 44.2(4)(a).

35. In light of the factors set out above, I categorise this application as one where there was "*no real winner or no real loser*" such that "*No order for costs [is] the only way to do overall justice in this case*" (*R (Scott) v London Borough of Hackney* [2009] EWCA (Civ) 217, [2009] 1 WLUK 264 at [49]). I therefore make no order for costs on this application.