Case 63
Michael and Another

v

Middleton and Another

[2013] 6 Costs LR 899

High Court of Justice, Chancery Division,
Birmingham District Registry
19 August 2013

Before:
HHJ David Cooke (sitting as a High Court judge)

Headnote

Application for relief from sanctions under CPR 3.9 following an order striking out the claim for failure to comply with an unless order to serve witness statements and give disclosure. Although it was accepted that the conduct of the claimants' solicitor had been appalling, and that a second firm had delayed for six months before issuing the application for relief, at the date of the hearing the claimants had still not corrected the defaults which had led to the striking out order. The original trial date had passed but there was no limitation difficulty so that if the claimants maintained their position, they could issue fresh proceedings and focus on the litigation with a clean start. Application refused.

Judgment

1. **Judge Cooke:** This is the claimants' application for relief from sanctions, the sanctions being in the form of an order that I made

striking out their claim for failure to comply with an unless order to serve witness statements and give disclosure. The claimants also seek permission to amend their particulars of claim and directions to allow the matter to proceed to trial.

2. There is quite a long history to the background facts and to the litigation which I will attempt to summarise in a fairly extreme form. It shows, if the claimants' case is correct and as Mr Khangure submits, that they not only have an arguable case against the defendants for having been very badly treated by the defendants – I make no comment of course as to whether that case would be established – but also the circumstances in which the sanction came to be imposed and the claimants were dealt with by their solicitor thereafter show appalling conduct on behalf of the solicitor concerned. I should say in that respect that I am told that the account of those circumstances which the claimants have given me is accepted by the solicitor concerned.

3. As to the background to this claim, the first defendant has over the course of a number of years purchased various properties for use as fish and chip and other food establishments. His case is that for a time from about 1985 the first defendant acted for him as his solicitor and up until about February 2000 he was remunerated as solicitor on a conventional basis, that is to say fees were paid to his firm. On the claimants' case in early 2000 he agreed with the first defendant that in future in lieu of fees the first defendant would be given a 10% interest in any properties that the first claimant acquired and that from that time onwards the first defendant continued to act through his firm as solicitor in connection with further purchases.

4. The first claimant alleges that two documents were signed in 2000 and 2003 which he was told reflected the arrangement they had made for a 10% interest to be granted to the first defendant. In fact those two documents, which were very brief and in apparently clear terms that ought to have been intelligible to the claimants, stated that the two properties were purchased to be held on trust in equal shares for the claimant and his wife and the first defendant and his wife so that the defendants between them would have a 50% interest in those properties. Accordingly it is not a question of any interest being given to the first defendant's firm, nor of a 10% interest being held by the defendant in whatever capacity but a 50% interest.

5. Subsequently, it has emerged as being the first defendant's case that as well as a 50% interest in the properties he had a 50% interest

in any business carried on from them. The defendants' case as advanced in the proceedings is that the arrangement made between them was made not in 2000 but earlier in about 1995 or 1996 and it was that he and the first claimant would go into partnership in the acquisition of properties and the conduct of business from them and that all the properties that were acquired subsequently and all the businesses run from them were run on those partnership terms. At some point thereafter it was agreed to admit their respective wives as partners and, on the defendant's case, the two documents that were executed showing the properties concerned to be held on trust for the four of them were in pursuance of that partnership arrangement.

6. The immediate trigger of the litigation was the discovery by the claimants that the first defendant had sought planning permission in his own name for a car park at one of the properties which the claimant considered was owned by him, potentially subject to the 10% interest of the first defendant's firm, and appeared to be attempting to secure for himself the benefits of that development. That was in 2005. In December of 2005 a fish and chip restaurant business carried on at one of the properties on the claimant's account by himself and his wife and their son in partnership was sold. This was a sale which did not include a transfer of the property but the proceeds of £135,000 were retained by the first defendant or his firm and the first defendant alleged that he was a partner in the business and entitled to 50% of those proceeds.

7. The claimants instructed a firm called Roskell Davies, who made a complaint to the Law Society about the first defendant's behaviour and in due course with the assistance of counsel issued the present claim. That sought the setting aside of the two deeds of trust on the grounds of fraudulent misrepresentation and an order for payment of the £135,000 proceeds of sale in respect of the business to the claimant. It was a claim made against the first defendant, Mr Middleton, and his wife but not in terms against the solicitors' firm, although there are other partners in that firm and the funds appear to be held in the client account of the firm and not personally by Mr Middleton.

8. The first defendant puts forward a defence in the terms that I have summarised. Although it was alleged that there was a partnership no relief was sought by way of counterclaim and the point is made in particular that there is no declaration sought of the existence of any

partnership, nor is there any order sought for the winding-up of the partnership and distribution of its remaining assets. A point is also made that, although the case advanced by the defendant is that his partnership extended to the business carried on at the premises concerned, one such business having been sold, there is no documentary evidence of any such partnership and, indeed, the deeds of trust do not refer to any such partnership as distinct from a trust of the beneficial ownership of the two properties that they relate to.

9. The proceedings were issued in March 2011. A directions order was made by the district judge on September 28 and in December the case was listed for trial as a second fixture in the week beginning 21 February 2012, alternatively if the first fixture listed for that week stood up the case was given a first fixture itself beginning on 11 April 2012. It came on before me for a pre-trial review on 18 January 2012. At that date the claimants had not served their witness statements, nor had they served a disclosure list. I made orders timetabling those events which, since it was by then shortly before the first of the two trial dates, required a disclosure list to be served by January 25 and also gave a date for exchange of witness statements. Roskell Davies did not serve any list of documents by January 25. The defendants applied for an unless order to enforce the order that I had made at the pre-trial review and I made an order without a hearing on January 30 in terms that, unless a disclosure list verified by a statement of truth was served by February 2, the claim would be struck out.

10. A list of documents was served on January 31, so before the date stipulated, but the defendants took the view that it did not comply with the rules and, furthermore, that the claimants had not exchanged witness statements in accordance with the directions given at the pre-trial review. Their application to strike out the claim for those breaches was made on February 2 and it came on for hearing before me on February 14. At that hearing it emerged that the claimants had not exchanged their witness statements and that Mr Davies, although he had a number of witness statements in his possession that he could have exchanged, said that he was holding them back until he had received signed copies of two other witness statements that he was awaiting.

11. I was extremely critical at that hearing of that as a tactic, Mr Davies having apparently held back the witness statements that could have been served as some form of tactic to a point which by then was

only some seven days before the anticipated start of the trial. I was also satisfied, on submissions from the defendants' solicitor, that the list of documents that had been served in order to meet the date that I had stipulated in the unless order was very seriously deficient and, indeed, could not have been properly prepared. Mr Davies appeared to accept at that hearing that this was the case and gave me a very unsatisfactory account of how that list came to be prepared and the consideration that had gone into compiling it. The result was that I found that the claimants had not complied with the unless order and I made an order which struck out their claim. The position then at that point was that the trial was potentially a week away, the claimants had no case in that they had no evidence that could be presented at trial without an application for relief from sanctions because they had not served their witness statements by the due date and were subject to an order debarring them from giving evidence at trial unless they did so, and they had also failed to comply with the unless order relating to service of a list of documents.

12. The claimants' account of what happened then, which I am told Mr Davies accepts, shows, in my view, what is correctly described by Mr Khangure as appalling conduct on Mr Davies's part. The claimants' evidence is that, first of all, they were not told of the terms of the district judge's directions order made in September 2011 and that they were not told of the hearing on February 14 at which the strike-out order was made. They were not told thereafter that such an order had been made and, indeed, when it emerged that there had been a striking out order, they were not told of the costs order that was made against them in consequence of it. When they found out that a costs order had been made they were told, untruthfully, by Mr Davies that it had been set aside. What has emerged is that not only had the order not been set aside but a default costs certificate had been obtained in respect of the costs claimed in the sum of £8,212 and that Mr Davies had paid that amount, without consultation with the claimants, from funds held by his firm on client account which arguably at least on the defendants' case were owned as to 50% by the defendants. Needless to say, the defendants have not consented to payment from those funds either.

13. Subsequently Mr Davies told the claimants, untruthfully, that he had instructed two named counsel to consider amendments to the pleadings and applications in relation to further directions. Neither

such counsel had been instructed at all and there was no consideration of any further application to be made to the court. It was not until 2 October 2012 that Mr Davies admitted to his clients that the claim had been struck out in February and that no subsequent steps have been taken which might have the effect of reinstating it.

14. The claimants have been receiving assistance from Mr Fourcade, who is the second claimant Mrs Michael's brother-in-law. He is a retired solicitor without a practising certificate in this country but he had prepared draft witness statements for submission to Mr Davies for use in the litigation and in November he sought to make an application on the claimants' behalf to have the case reinstated. That application came before me on paper and I refused it by an order that was drawn at the beginning of December 2012 on two principal grounds, firstly that Mr Fourcade had no standing to present it; he was not a legal representative of the parties and it was not an application stated to be made by the claimants themselves. That of course could have been cured relatively easily if the claimants had simply lent their name to that application and made it themselves. But the substantive ground for refusing it was that there was no evidence in support of it to show that the claimants were even then in a position to remedy the defects that had led to the striking out order in the first place; and I pointed out in the reasons attached to that order that, even if the claimants were in a position to remedy their breaches, it would still be necessary to show that it was just in all the circumstances to reinstate the case, bearing in mind what were then the other specific principles set out in CPR 3.9 applying to an application for relief from sanctions.

15. The claimants in January of 2013 instructed their present solicitors and this application was made in July of this year. It is pointed out that there has been a further delay of not quite six months since the instruction of the present solicitors.

16. The evidence filed in support of this application does not go into detail as to what had happened in the period. There is reference to attempts to obtain further disclosure from the first defendant and his firm but not to any other events which have led to the delay in making the application. Mr Khangure has made points in his skeleton against which the point is taken that they are not supported by evidence, but they are given on instructions and for present purposes I accept that they represent the facts; and those are that there was a period of delay in obtaining any files from Mr Davies, that when received the files

were in considerable disarray and had to be sorted out to find out what had gone on in the litigation, and in parallel there had been attempts to obtain further documentation without success from his firm and there has been some liaison with Mr Davies and, as would be understandable in the circumstances, his professional indemnity insurers. Be that as it may, this application was not made, as I say, until the middle of July.

17. It comes before me now in circumstances in which the relevant provisions of the CPR in rule 3.9 have been changed in pursuance of the Jackson reforms, coupled with amendments to the overriding objective. The new CPR 3.9 is in force from 1 April 2013. Mr Khangure submitted, rather faintly I thought, that the circumstances of this case left it unclear as to whether the new CPR new rule 3.9 was to be applied or the old in circumstances where the breach concerned and the sanctions in respect of that breach were imposed before April 1. In my view, Mr de Waal is right to say that it is clear that the new rule applies in respect of any application made on or after 1 April 2013, which is the date on which the amended rule comes into force which applies in its opening words "on any application for relief from any sanction imposed". The new rule was in force from that day and there is no qualification in the terms in which it was introduced relating to the date upon which the sanction was imposed, still less the date on which the breach occurred and, in my view, it would be bizarre indeed if committing a breach leading to the imposition of a sanction attracted some sort of accrued right to treatment of an application for a relief from sanction on the basis of the terms of the rule in force when the breach took place.

18. The new rule requires that the court considers all the circumstances of the case so as to enable it to deal justly with the application, including the need (a) for litigation to be conducted efficiently and at proportionate cost and (b) to enforce compliance with the Rules, Practice Directions and orders of the court.

19. There is a limited amount of authority since the introduction of the new rule but it is accepted that the intention of changing the rules and, indeed, the intention behind this part of the Jackson reforms, was to introduce a more restrictive regime for the grant of sanctions and a closer focus on the requirement for the parties to comply with the rules of court and conduct their litigation efficiently not only for the benefit of the parties to the immediate litigation but also for the benefit of

other parties using the court's resources. I have been referred, as courts have been on a number of other occasions, to the indications of the likely approach given by the Court of Appeal in *Fred Perry (Holdings) Ltd* v *Brands Plaza Trading Ltd* in February 2012. Since the rules were changed I have been referred to two cases which have come before judges of the High Court and one before His Honour Judge Pelling. The most relevant one for present purposes seems to me to be the decision of Hildyard J, in *Tavataba Teveraja and Others* v *Riordan and Others*. In that case Hildyard J said that, although the checklist of relevant considerations in the old 3.9 had been removed, they nonetheless represented matters which continued to be relevant as considerations for the court in making the overall assessment required by the terms of the new role. I respectfully agree with that. The effect of the change in the language seems to me that it is not necessary for the court to deal *seriatim* with all of those matters and, indeed, the trend of authority prior to the change in the rules had moved away from the requirement to deal one by one with each of those separate items, but it does not mean that the matters previously referred to are not potentially relevant. Hildyard J went on to say that he rejected the contention that the effect of the new rule was a less rigorous regime and, rather, that the court should be less ready to grant relief under the new rule and that in order to do so the court should be fully satisfied that relief from sanctions was appropriate and just in the particular case and that the court would be slow to draw such a conclusion. In a case of non-compliance with an unless order a party would be required to show a material change of circumstances in order to obtain relief from sanctions. He referred to *Tarn Insurance Services Ltd (in administration)* v *Kirby and Others* [2009] EWCA Civ 19. The Court of Appeal held that the judge had been wrong to grant relief from sanctions in a case where a material change of circumstances had not been shown, notwithstanding that the sanction had the effect of denying to a party the ability to conduct a case which was accepted to have reasonable prospects of success. The imposition of the sanction in those circumstances was found to be justified and the grant of relief from that sanction could not, therefore, be justified simply on the basis that the case, if it were allowed to proceed, would be one which had arguable prospects of success.

20. In the present case a number of points are made in support of the application for relief. Mr Khangure submits – and, indeed, it is

accepted – that the issues between these parties as to their ownership interests in the properties concerned and the businesses that are carried on from them need to be determined. If they are not resolved in the present proceedings it is highly likely that there will need to be litigation at the instance of either the claimant or the defendant in the future. Furthermore, that such litigation is not going to be statute barred, or at least there is no submission to the effect that it is statute barred, and to that extent all the issues that are sought to be raised in the present litigation are likely to come before the courts at some point in the future. He submits, as I say, that the circumstances of the claim show as against the defendants significant misconduct on the part of Mr Middleton at least if the claimants' case is correct and that the circumstances in which the default occurred show very serious, poor conduct by the claimants' solicitor. It was a specific consideration under the old rules, whether the default concerned was owing to the default of the party himself or herself or a legal adviser. So far as the defendant is concerned of course, the effect of a failure to comply with the rules is the same whether the lay client was aware of it or participated in it or not, and in the present case that effect was that the claimant was not in a position to proceed with the trial which was then due to take place potentially a week from the date of the hearing at which the order was made.

21. Other relevant circumstances are, it seems to me, that, although the claimant seeks to amend the proceedings, I have not been provided with a proposed amendment. Mr Khangure told me that it consisted of a one sentence amendment but I am bound to say that it seems to me that, given the way in which the potential issues have been canvassed between the parties in correspondence and considering the submissions before me, it is highly likely that the proceedings will have to be amended very much more extensively if the claimants were to pursue all of the claims which they have indicated that they may wish to do, and particularly if the defendants are to pursue all of the consequences of the position that they have sought to establish.

22. It also seems to me to be highly relevant that the claimants are not yet in a position at which they are saying that they are able to correct the default that led to the striking out order. As far as witness statements are concerned, first of all, I have nothing in the evidence itself to say that the claimants are ready to serve their witness statements. Mr Khangure said in submission that the claimants would

comply with any order that the court made, even if it were to serve witness statements within a day or so. That seems to be on the basis that the claimants are still in the position that they have the witness statements that Mr Davies was sitting on in January and February of this year but I have no information that they have obtained the witness statements that he was still seeking to obtain and I do not have any indication that those witness statements that are available constitute all the evidence that the claimants would now wish to rely on. The impression I have is that there is a significant possibility that they might not do so. Furthermore, the claimants are not in a position at the moment to serve an amended disclosure list and, indeed, if the pleadings change it may be that, even if they had considered the disclosure that was necessary to be served on the basis of the present pleadings, there might be further amendments required to serve their list now.

23. It seems to me that there is a very significant possibility, therefore, that if I acceded to the request to grant relief from sanctions and impose a very short timetable for service of witness statements and a list, the claimants would then be in a position, again, that, although they would serve something before that date, they might have to seek to amend or supplement it before the matter could proceed to trial.

24. Focusing as I must now on the overall justice of the application and the two specific factors mentioned in the rule in terms of conducting the litigation efficiently and saving costs and enforcing compliance with the orders of the court, it seems to me that this is a case in which the conduct of the case by the claimants' solicitors was very seriously inefficient. They failed to comply with the district judge's order, they failed to seek an extension of time themselves, although it appears that Mr Fourcade asked Mr Davies specifically to do that, they got themselves in a position, both at the pre-trial review and subsequently, that the trial listed either could not proceed at all or would be ineffective so far as the claimants' case was concerned because they were unable to lead any witness evidence and had not made proper disclosure of documents such as would allow the trial to be conducted fairly as between themselves and the defendants. It seems to me that the present position is that there has in fact been no progress in terms of the actual conduct of the litigation as at today's date. The claimants are no doubt in a better position to proceed with the litigation in that they now have solicitors and counsel instructed

who may be able to do so efficiently on their behalf, but I am being asked essentially to impose a timetable which allows the action to start again in the hands of the new legal advisers and in circumstances in which there is at best only a promise to comply with a short timetable, the length of which has not been explored and which seems to me to be substantially in doubt.

25. I recognise the force of the submissions both that, insofar as there has been delay since January, that may continue to be due to the default of the previous solicitors and, further, that, if the claimants were left to an alternative remedy in terms of an action against their solicitors for losses arising from the striking out of the claim, if a claim in damages were limited to what is recoverable from the solicitors there may be a disadvantage to the claimants in that such a claim would be likely to be based on a loss of a chance and so could not amount to the full value of the claim potentially recoverable from the defendants. I am bound to say that that is not, in my view, invariably to be regarded as a disadvantage. It is true that the maximum claim would be reduced because it must be based on loss of a chance. One might also recognise that there are circumstances in which there can be recovery against a solicitor allowing for the possibility of success in an original action in circumstances in which, on the balance of probability, the original action might have failed; so there can be circumstances in which an action against the solicitor is more valuable than the result would in fact have been in the original action. Nevertheless, certainly the maximum amount of the claim is reduced.

26. Standing back it seems to me that the justification for imposing this sanction, which has not been appealed against, is that the original trial date could not be met by reason of the default in the conduct of the action by the claimants' solicitors. It is right, it seems to me, to consider also that the effect of granting relief from sanctions now that the original trial date has gone past would be not only significantly to extend time but also, it seems to me, to give the wrong impression that a failure to comply with a timetable leading to a sanction imposed because the case cannot be dealt with within the timetable set by the court may be overcome once that timetable is out of the way simply by setting a new timetable and effectively granting a very great extension of time for the matter to be put back on track. A court, in my view, should be slow to accept that the effects of timetabling and the

discipline imposed on the parties that are sought to be achieved can be effectively sidestepped in that way.

27. The result of course may well be that actions which have a reasonable prospect of success cannot be brought and that parties are left to such alternatives as may be available to them in the circumstances. In many cases that may be an action against the legal advisers. In this case it appears that the claimants are not in fact limited to an action against the legal advisers because, as seems to be accepted on both sides, the issues remaining between the parties can and are likely still to be litigated and are not, as it appears at the moment, likely to be subject to any limitation defence, nor any argument about abuse of process. That, it seems to me, substantially [works] to cut the force of the argument that the claimants will be disadvantaged if they are unable to obtain relief from sanctions.

28. Given that I am not satisfied that there is anything wrong with the order imposing the sanction in the first place, that it would send the wrong message effectively to allow the timetable to be extended once the pinch point of the trial date has gone past and, further, that the claimants will not be prejudiced in terms of loss of relief available to them and are likely in pursuing that relief to require substantially to amend their claim, in all the circumstances it seems to me that the right order here is to refuse the claimants relief from sanctions and that, if they are to maintain the position that they sought to advance in this claim, they should start again having paid, as they already have, the costs of the action and, as they accept they must, the costs of this application with fresh proceedings based on the form of relief that they seek to pursue to trial and in circumstances where they will be freshly advised and able to focus on that litigation with a clean start.