Neutral Citation Number: [2006] EWCA Civ 1575

Case No: A2/2006/0605

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Queen's Bench Division
Mr Justice Eady
Master Eyre
HQ05X00542

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/11/2006

Before :

LORD JUSTICE WALLER
Vice President of the Court of Appeal, Civil Division

LORD JUSTICE KEENE
and
LORD JUSTICE CARNWATH

- -

Between :

Radu	**Appellant**
- and -	
Houston & Anr	**Respondent**

- -
- -

Patrick Moloney QC and **William Bennett** (instructed by **Carter-Ruck, Solicitors**) for the **Appellant**
Stephen Cogley (instructed by **Tarlo Lyons, Solicitors**) for the **Respondent**

Hearing date : 30th October 2006

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Approved Judgment

Lord Justice Waller :

Introduction

1. The appellant is a Romanian citizen. He commenced a libel action against the defendants in relation to an article published in a magazine which accused him of fraud in relation to his title. The defendants by their defence sought to justify the allegations. This appeal concerns the application made by the defendants for security for costs, and in particular is an appeal from the judgment of Eady J by which he indicated that he would have varied in the appellant's favour the Senior Master's order for security, but refused to set aside the judgment dismissing the appellant's action entered in default by virtue of the "unless" provision of the Senior Master's Order.

The chronology

2. The defendants applied for security for costs on the grounds that the appellant resided outside the jurisdiction, recognising in their application that following *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556 what they had to establish was that there were extra costs involved in enforcing in Romania any judgment they might ultimately obtain. The appellant did not accept that there were extra costs involved, and sought to argue that, in any event, since Romania was likely to become a member of the EU by the time any costs order could be made in the defendants' favour, any order was inappropriate. He furthermore put in evidence to the effect that an order for security in any significant sum would stifle the action, and thus argued that on that ground also it was inappropriate to make any order for security.

3. The defendants did not serve with their application any evidence as to Romanian law and practice relevant to the enforcement there of UK judgments. On 11th and 12th July (the hearing being on 14th July) the defendants served evidence on that topic. A request was made on behalf of the appellant for an adjournment so that he could deal with the fresh evidence. That request was refused. By order dated 14th July 2005 the Senior Master made an order for security for costs. The order required the appellant to provide security in the sum of £125,000 by 4 pm on 25th August 2005. That sum had been assessed by reference to the evidence relating to the costs of recovering judgments in Romania, and by reference to the Senior Master's own experience. The Senior Master rejected the appellant's argument that the effect of any order would be to stifle the action. His view (as ultimately expressed in reasons given on 1st August 2005) was that the appellant's family, and in particular the appellant's father in law, King Michael of Romania, were in a position to fund the appellant. He however granted permission to appeal, confined to two issues identified by the Master in these terms:-

> "a. If this claimant is to be believed he has virtually no assets; yet his relations and friends and others with whom he works appear to be in receipt of substantial funds. Is he therefore a candidate for *Yorke Motors*?
>
> b. If so ought he to give security for the bulk of the additional costs of execution?"

4. At the conclusion of the hearing Mr Cogley for the defendants submitted that the Master should make an "unless" order. The Master accepted that submission (without giving any specific reasons) and it was made a term of the order that "unless security is given as ordered (i.e. by 25th August):

   i) The claim is struck out without further order; and

   ii) On production by the defendants of evidence of default, there be judgment for the defendants without further order together with costs of the claim to be the subject of detailed assessment."

5. The Senior Master furthermore refused a stay of his order pending appeal. On 25th July 2005 it seems that he confirmed the terms of his order but he extended time for the appellant to appeal to 14 September 2005. Thus before a notice of appeal had even to be filed, the action would be struck out if security as ordered had not been supplied.

6. The appellant applied to the vacation judge on 24th August for a stay pending appeal. The matter came on before Treacy J. Mr Moloney QC set out in his short skeleton points of benefit and detriment to the respective parties. Although the decision of Treacy J as to whether to grant a stay seems to me (contrary to the view of Eady J) to be irrelevant to the question that ultimately came before Eady J, the points themselves are relevant to an overview of what occurred in this case. The points were these. He submitted that the only real benefit to the defendants, if they were allowed to take a judgment on the basis of the unless order, was that they could start the assessment of costs and possibly obtain an interim payment, all of which would be rendered nugatory if the appeal ultimately succeeded.

7. The detriment to the appellant he put in this way:-

> "a. Limitation A special feature of this case is that, it being a libel claim, the 12-month limitation period applies. This expires at the beginning of autumn (probably 21 September), i.e. before the appeal can be heard. So, if judgment is entered before then, and the appeal fails, the Claimant will be permanently shut out of his claim, even if by then he has managed to raise the security (as is a realistic possibility; see AP WS p.15).
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> b. Related to this is the possible situation in which the money becomes available between entry of judgment and appeal, and the Claimant decides to pay the security rather than incur further cost and delay pursuing the appeal. If judgment has been entered, he will either be debarred from reinstating the action without pursuing the appeal, or at least he will have to meet the higher standard applicable to relief against sanction under CPR 3.9. Granting the stay now sought would eliminate the need for this further procedural step and remove an unnecessary obstacle to the just determination of the libel claim on its merits.

> c. Costs This is the corollary of the point at (3) above. If, as the Master's grant of permission implies, this was a controversial decision which the Claimant has a realistic prospect of overturning, why should he be exposed to the risk of a costs assessment and interim payment meanwhile?
>
> d. Adverse Publicity A final judgment of an English court against the Claimant is likely to be misreported in Romania by the Claimant's "political" rivals as if it were a defeat on the merits of this very serious libel. The nuances of security for costs are likely to be overlooked. As long as it remains possible that the Master's order will be set aside, or security given following its confirmation on appeal, it would be an unnecessary and unfair burden on the Claimant to expose him to that risk."

8. Treacy J refused a stay. He was influenced in so doing by the fact that the Senior Master must have appreciated the effect of his order and had not granted a stay, and, on the view he took of the evidence put in by the appellant, that with some little further time the money might be forthcoming from King Michael. Treacy J thought that evidence was unsatisfactory. He was of the view that the evidence did not go as far as to say the "appellant cannot pay the sum due on 25th August" but was saying "the sum will not be paid, although it could be". That was the judge's interpretation of the evidence when taken with Mr Moloney's submission. Examination of the evidence, and indeed of the way Mr Moloney put the matter in his skeleton, makes that interpretation a harsh one.

9. In the event security was not provided and judgment was accordingly entered dismissing the appellant's claim on 26th August 2005.

10. The notice of appeal was lodged on 14 September 2005. It sought to rely on grounds additional to those on which permission had been granted and fresh evidence.

11. In December 2005 King Michael, according to the appellant's evidence, was then able to assist the appellant and provide the £125,000 ordered by the Master. Indeed on 12 January 2006 Carter-Ruck, solicitors for the appellant, wrote a letter in these terms:-

> "We write further to our letter dated 21 December. Our client is now in a position to provide security for your clients' costs in the sum of £125,000.
>
> While it is not accepted that the provision of any security in this case is appropriate and whilst reserving our client's full rights and without prejudice to his arguments in this respect, our client is prepared to provide security in the sum of £125,000 to avoid a contested appeal and to enable him to advance this action to trial without further delay. This is on the basis that your clients agree:

> 1 To the order dismissing the action with costs being set aside (so that the action can proceed in the normal course); and
>
> 2 For the hearing in January to be used for the purposes of obtaining directions for the future conduct of the action, which directions we would propose to try to agree with you.
>
> 3 The costs before Master Turner and of the Appeal (excluding the costs before Mr Justice Treacy), being "in the case". Our client is prepared to agree this because with this all argument will be avoided about these costs, which will save substantial further costs, in an already unnecessarily costly action. It will also save the usage of court time. In this regard we assume that you and your clients are confident about the merits of the Defence. If this is correct, you and your clients should be prepared to agree to this proposal.
>
> 4 The costs before Mr Justice Treacy, being the "Defendants' in any event" on the basis that there is no further summary assessment of these.
>
> If the above is agreed, our client is prepared to agree to your clients retaining the payments on account in respect of the costs before Master Turner and Mr Justice Treacy until the conclusion of the action, with them then to be brought into account at that point.
>
> Kindly revert to us with your urgent instructions."

12. The defendants did not accept the above offer and the appeal came on before Eady J on 31st January 2006. By virtue of the fact that King Michael was prepared to assist the appellant and provide £125,000, the ground on which the Master had given permission to appeal was no longer pursued as a substantive ground, albeit the ability of the appellant to meet an order for security as at the date it was ordered remained relevant. The appellant sought permission to appeal on certain additional grounds which, in summary, were that the Master should have adjourned the hearing to allow the appellant an opportunity to deal with the evidence as to the cost of enforcement in Romania; that, if he had done, he would have had before him the evidence by then before the judge of Dr Bazil Oglinda; that evidence called into question the objectivity of the respondents' Romanian lawyer Mr Nicolau, whose evidence had been put in at the last moment; and that Dr Oglinda's evidence demonstrated that the order made by the Master was wrong in that either no order should have been made at all, on the basis that in reality there was no distinction between the position in Romania and in countries which are members of the EU, or at least that the order made by the Master was excessive.

13. So far as this latter point was concerned Mr Moloney in his skeleton argument before the judge was prepared to accept that, if his further evidence was admitted on appeal, further evidence from the defendants in response should also be admitted. The skeleton however suggested that, weighing up all the evidence, the result ought to be that no security should be ordered or, in the alternative, a lesser sum than that ordered by the judge.

14. The judge handed down a draft judgment on 10th February 2006. By that judgment he indicated (a) that the appellant should be entitled to argue his additional grounds; (b) that there had been unfairness in the Senior Master not granting the adjournment; (c) that on the evidence now before him on Romanian law his assessment would be that £80,000 would have been the right figure to award. The draft then indicated that, despite his view that £80,000 as opposed to £125,000 was the appropriate figure, none of that could assist the appellant unless he was prepared to set aside the default judgment. For the reasons given in paragraphs 46 to 54 of the draft the indication was that he would refuse to set aside that judgment.

15. Mr Moloney went back before the judge seeking to persuade him that he should not reach the conclusion indicated in paragraphs 46 to 54 of the draft. The judge, by a further judgment of 7th March 2006, carefully considered Mr Moloney's arguments but rejected them. In doing so he said this:-

> "14. Mr Moloney advanced two further propositions, in fact at sub-paras. 3(e) and (f) of his skeleton argument. He submitted that the Appellant's notice appeals against the orders of both Master Turner and Master Eyre and states that:
>
> > "If the Appellant succeeds in his appeal against Master Turner's decision it will follow that the consequent decision of Master Eyre granting judgment against the Appellant for default in providing the security ordered by Master Turner will fall. Whilst it was not felt on the part of the Claimant that this proposition needed to be amplified at the appeal hearing, it is also notable that the Defendant did not seek to rebut the proposition set out in s.5 of the Appellant's notice."
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> 15. Also he submitted:
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> > "In colloquial terms, to allow Master Eyre to save the day is to permit Master Turner to pull himself up by his own bootstraps. In terms of formal logic it is to beg the question in the proper sense of that phrase to assume the validity of that which it is sought to prove."
>
> 16. With respect, it seems to me that the reasoning is flawed since it appears to be asserting no more than that the well-established rule of law (namely, as Treacy J acknowledged, that an appeal does not automatically operate as a stay) will sometimes lead to harsh or unjust results and therefore ought

> not to be adhered to. I cannot therefore accede to that proposition.
>
> 17. He also argues that Treacy J's refusal on 24th August to grant a stay is irrelevant; yet the very fact that the application had been made would appear to be an acknowledgement that a stay was necessary in order to prevent judgment being entered in default. Had it been granted it would have made a huge difference. I cannot, however, ignore the order of Treacy J and proceed as though he had, in fact, done precisely the opposite and ordered a stay. That is why I considered that the failed attempt to obtain a stay was critical to the Claimant's current position.
>
> 18. When Mr Moloney argues not only that it was not critical but actually totally irrelevant, I am afraid I cannot follow the logic. It seems to me that the appropriate course to have taken for the Claimant, confronted with Treacy J's decision of 24th August, would either be to apply, as the learned judge put it, "elsewhere" for permission to appeal and/or in the meantime to serve a fresh claim form on a protective basis to guard against the limitation period expiring. Neither of those steps was taken. Therefore, I am afraid that it is not possible for the Claimant to overcome what Mr Moloney described as the "boulder on the railway track", or words to that effect, of the judgment entered on 25th August."

Grounds of Appeal

16. The grounds of appeal are lengthy and I shall summarise the key points. They also summarise Mr Moloney's submissions to us. It is asserted first that the judge was wrong not to have set aside the judgment of 26th August on the simple basis that, now that the appellant had raised £80,000, his libel action should have been allowed to continue; second, that the judge was wrong to treat the judgment of Master Turner with "respect", given his findings as to the unfair basis on which it had been obtained; third, the judge was wrong to give "critical" weight to the judgment of Treacy J, which should have been treated as irrelevant to Eady J's decision; fourth, the question whether the appellant would have paid £80,000 on 26th August if that was the figure the Master had ordered was not a relevant question, since no proper consideration had been given to the correct figure until February 2006, by which time the £80,000 could be raised; fifth, to uphold the default judgment a judge would have had to have been exercising a penal jurisdiction based on a finding that the appellant had deliberately flouted a court order despite being able to comply, and the judge did not so find and there was no evidence on which he could so find; sixth, the exercise of discretion was on the basis of the above grounds exercised on wrong principles.

17. It will be noted that there is no direct challenge to the Master making an unless order, and no challenge to the Master's refusal to grant a stay of execution or to Treacy J's refusal to grant a stay. This lack of challenge is emphasised by Mr Cogley for the respondents. His arguments both before the judge and before us start from the basis that there was nothing wrong with making an unless order in this case, and nothing

wrong in refusing a stay. The Master had been scathing and sceptical of the appellant's evidence as to his inability to raise the security. Treacy J was equally sceptical and scathing of that evidence. The evidence, so Mr Cogley submits, simply did not establish the appellant's inability to comply with the order of 14th July. From that position he argues that since an appeal does not itself produce a stay, the judgment entered on 26th August was a valid judgment. He submitted that the appellant's attitude to security before the Master and before Eady J was always on an all or nothing basis, and once the judge had concluded that a sum was due for security it was a perfectly proper exercise of his discretion to refuse to set aside the judgment.

Discussion

18. Although the making of an unless order and the refusal of a stay is not expressly criticised by Mr Moloney, it seems to me, with the greatest respect to the Senior Master, that it is very doubtful whether it was an appropriate order, at least where permission to appeal had been granted on the "*Yorke Motors"* point. The obtaining of an order for security for costs is a rather special form of order. It is intended, if it is right to make an order at all, to give a claimant a choice as to whether he puts up security and continues with his action or withdraws his claim. That choice is meant to be a proper choice. I actually find it somewhat strange that, whereas with most forms of interlocutory order it would be unlikely that a court would make an unless order as its first order, it seems to be quite common to make an unless order in relation to security for costs. I note from the Annual Practice that there seems to be a difference between the practice in the Masters' corridor and in the commercial court as to the making of an unless order at all as a term of the first order for security [see CPR 25.12.10]. The reason for that difference, I suspect, is the attitude in the commercial court that an order for very large sums should not be made subject to the "unless" sanction until a real opportunity has been given to the claimant to find the money. I would have thought that, even if an unless order is made as part of the first order, the period for complying should on any view be generous. The making of an order for security is not intended to be a weapon by which a defendant can obtain a speedy summary judgment without a trial.

19. One of the most difficult circumstances, I recognise, that courts have to deal with is the assertion by a claimant that if security would otherwise be due, it should not be ordered because there will be a stifling of the claim. Evidence is often suspect and it is unusual to have a trial with cross examination or anything of that kind. Courts have to take a view on the material before them, remembering the onus is on the person resisting security to demonstrate that the claim will be stifled. In this case the Master was sceptical of the evidence provided, but he granted permission to appeal against his ruling on the "stifling point". Despite granting permission to appeal he still made an unless order without any stay, with the effect that if the security were not put up the action would be struck out before any appeal came on for hearing. That, I confess, strikes me as inappropriate. But whether or not it was right to make an unless order in this case, to bring the sanction into play before the appeal could be heard seems to me unfair to the appellant.

20. I would also say this. In my experience, if a court has ultimately made an unless order, and even if judgment has been entered pursuant to it the security not having been paid, if a claimant within a short period of time has come to the court with the right sum, the court is and indeed should be willing to consider granting relief and

setting the judgment so obtained aside. Of course each case will depend on its own circumstances and there is no rule as to when relief will be granted or as to the terms, but in the case of security for costs a judgment following an unless order does not have the character of judgments given on the merits after a trial. Nor, as it seems to me, should the attitude of the court to staying such a judgment be the same as a judgment on the merits following a trial.

21. In the instant case by the time the matter came before Eady J the sum of £125,000 was available. Prima facie on that fact alone the court should be contemplating the possibility of allowing the action to continue rather than punishing a claimant for failing to meet a deadline. In fact Eady J would have varied the Master's order and had found that the appellant had not had a fair hearing because it should have been adjourned. That would have provided an even more cogent basis for setting aside the unless order. As far as I can see what most influenced Eady J not to set the judgment aside was the judgment of Treacy J refusing a stay. But, with the greatest respect to Eady J, I cannot see the relevance of Treacy J's attitude to varying the Master's order on a last minute application in the vacation to the task on which Eady J was engaged. If no application had been made to Treacy J the position would have been the same; Eady J would have varied the Master's order and then had to consider why it was not appropriate to allow the claimant to continue with his proceedings on payment of the sum now properly assessed.

22. I can only think of one circumstance in which it might have been appropriate not to set aside the judgment of 26th August once Eady J had decided (a) that there had been a procedural unfairness, (b) had varied the sum payable, and (c) knew that the sum of £80,000 was available as security. That circumstance would be if some conduct of the appellant required punitive action. An example would be if it could be demonstrated by the respondents that the appellant had deliberately, despite being able to do so, refused to obey the court's order. However sceptical the Master had been of the appellant's evidence, he had granted permission to appeal. The hearing before Treacy J was not a hearing properly set up for it to be argued out and decided whether or not the appellant was deliberately failing to obey an order. It was an application in the vacation to extend time heard with the speed that such hearings require. At the hearing before Eady J, because the money was now available, no proper issue was joined as to whether there was a deliberate flouting of a court order. Before us some attempt was made by Mr Cogley to argue that there had been a deliberate failure. Without a finding to that effect by the judge, it was difficult for Mr Cogley to develop the point before us, but in any event it was an argument that it was always going to be difficult to sustain, however critical one could be of the evidence produced by the appellant.

23. This was a case where the court had taken the view that the appellant could raise the money from his wife's family, not a case where it could be shown incontrovertibly that he personally had the money. It is difficult to think that, if King Michael had been prepared to make available £125,000 before 26th August 2005, the appellant would not have taken advantage of that offer rather than have his action struck out. His attitude in January 2006 as demonstrated by the solicitor's letter to which I have referred would support that point of view.

24. I would accordingly allow the appeal. In my view the judge went wrong in principle, or seriously misdirected himself, first in his approach to the Master's order. Once he

had decided that it was made at a hearing which the Master should have adjourned, and was an order that the defendant had no right to in terms of quantum, it was not an order that he should have treated as a proper foundation for the judgment that the respondents had obtained. Second it was wrong in principle or a misdirection to place reliance on the judgment of Treacy J. That judgment had no relevance to what he had to decide.

25. In so far as Mr Cogley sought to persuade us that we should re-exercise the discretion on the basis that the appellant had deliberately flouted the order of the court, and that thus on that basis the judgment entered on 26th August should not be set aside, I would decline to do so (a) because there is no finding of the judge that supports such a conclusion; and (b) because I am not persuaded that it would have been a finding open to the judge on the evidence before him.

26. I would accordingly allow the appeal. I would reinstate the appellant's action on the provision of security in the sum of £80,000 by payment into court or by such other means as are reasonably acceptable to the respondents.

27. Since this judgment was prepared, a written submission from Mr Cogley has been received arguing that if the court were otherwise minded to allow the appeal, it should not do so, but should refer the matter back to the judge to consider the question (not is it said considered by the judge) whether the appellant deliberately flouted the order of Master Turner. If it was to be argued that the judgment was to be retained because of a deliberate flouting of the order, that should have been raised and argued before the judge by the defendants. Since it was not and there is thus no finding by the judge, it would not be right to send the matter back.

Lord Justice Keene:

28. I agree that this appeal should be allowed in the terms and for the reasons set out by Waller LJ. I would only emphasise that there can be no automatic setting aside of a judgment in default merely because the litigant against whom the judgment has been entered subsequently comes forward with the money. In particular, much will depend on whether the non-compliance with the "unless" order is a deliberate flouting of that order by a litigant who could have complied with it. The courts cannot allow a litigant who could comply with a court order to choose whether or not he will do so.

29. In the present case Eady J made no finding that the appellant was in a position as at 25 August 2005 to provide £125,000 security for costs, nor does such evidence as has been put before this court establish that such was the case. In those circumstances we cannot approach this appeal on the basis that there was a deliberate non-compliance by the appellant.

Lord Justice Carnwath: I agree with both judgments.