Case No: QB/2016/0273

Neutral Citation Number: [2017] EWHC 1126 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
The Strand
London WC2A 2LL

Friday, 10 February 2017

BEFORE:

MRS JUSTICE WHIPPLE

BETWEEN:

DHEMRAIT

Respondent

- and -

BASUTA

Appellant

MR ATKINSON appeared on behalf of the Appellant

MR DE WILDE appeared on behalf of the Respondent

JUDGMENT
(As Approved)

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MRS JUSTICE WHIPPLE:

Introduction

1. This is a renewed application for an extension of time to appeal from the final decision of the county court given by Mr Recorder Grahame Aldous QC ("the Recorder"). That decision was given in the Central London County Court sitting at the Mayor's and City of London County Court on 28 September 2016. Notice to appeal was lodged on 20 December 2016. It is accepted that the notice of appeal was lodged two months out of time because it was due on or before 20 October 2016. The application for an extension of time was refused on the papers by Foskett J by order dated 26 January 2017. He did not consider that the appeal had a reasonable prospect of success and would have refused permission, and for that reason he also refused the extension of time but he invited an oral renewal. That is an invitation that the applicant (who was the defendant in the proceedings below) has accepted. He now seeks to renew the application for an extension of time. I have today had the benefit of skeleton arguments and evidence filed by both parties. Mr Atkinson of counsel has appeared for the appellant (who was the defendant below) and Mr De Wilde has appeared for the respondent (who was the claimant below). I am grateful to both of them and their solicitors for the help I have received.

My approach

2. It is agreed that this application for an extension of time must proceed and be treated as an application for relief from sanctions applying the authority of R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633. In that case, Moore-Bick LJ said at paragraph 23 that guidance on the proper approach to relief from sanctions is now to be found principally in two decisions of the Court of Appeal, namely Mitchell and Denton. He then addressed the argument about whether those authorities should apply to applications for extension of time, and reached the conclusion at paragraph 36, that the principles to be derived from Mitchell and Denton do apply to applications for an extension of time. It is that paragraph which has doubtless informed the parties' agreement before me that I must approach this application according to the Mitchell and Denton guidelines.

3. Staying within Hysaj, paragraph 37 sets out the Mitchell guidance, and paragraph 38 looks to Denton, where the court confirmed the guidance that had already been given in Mitchell, and set out paragraph 24 from Denton, which I set out in this judgment also:

> "24. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]' [as referred to in rule 3.9(1)]."

4. In this case it is common ground that the default of two months in filing the notice of appeal is serious and significant, thus that the first stage in Denton is passed. The issues in this application centre on stages two and three of Denton, namely: first of all, why the default occurred and whether a good reason for it has been shown; and secondly, whether, evaluating all the circumstances of the case and taking account of the specific factors in CPR 3.9(1), time should be extended.

5. In relation to the second of those matters (in other words, stage three), the appellant (the defendant below) invites me to consider the merits of the underlying appeal. Before I leave Hysaj I should recited paragraph 46 which deals specifically with that point. It was said as follows:

> "In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them."

Background

6. Before deciding today's application, I should briefly set out the background to it. The Recorder heard the claimant Mr Basuta's claim for malicious prosecution by the defendant, Mr Tara Singh Dhemrait, over three days in September 2016. He gave an *ex tempore* judgment on the third day of trial. The facts giving rise to the dispute are recorded at paragraphs 2 to 5 of the Recorder's judgment, which state as follows:

> "2. The essential background chronology and facts are agreed between the parties. Mr Basuta and Mr Dhemrait are related. Mr Basuta is an engineer who is based in Derby but often works in London and in 2013, whilst working at Heathrow on a project, he needed weekday accommodation in London. It is common ground that in October of 2013 he moved in with the defendant in the defendant's flat at 7 Sun Lea Court. The following January, when he was still there, there was a conversation between the parties about payment of rent. I will return to that conversation and its significance in due course but that there was a conversation and that that conversation led to a series of events is common ground.
>
> 3. On 13 January the defendant wrote a letter to the claimant referring to an agreement for payment of rent and giving the claimant notice to leave the property. That letter, it is now agreed, was delivered on 17 January 2014 at the property and was signed for by the claimant at 10.30 in the morning. 17 January was a Friday and the following day, therefore, 18 January, was a Saturday, and it is common ground that the claimant's daughter visited the property that following day. It is further common ground that on 23 January 2014 there was a further

> conversation between the parties regarding an allegation by the claimant that the defendant had been entering his room at the property.
>
> 4. On 27 January 2014 the defendant went to the police and made an allegation of assault on him by the claimant. As a result the following day, 28 January, the claimant was arrested, questioned and, having been held for questioning at the police station, subsequently released and charged with assault, and the claimant appeared as a result of that charge at the North West London Magistrates' Court on 19 February. The matter was adjourned because he pleaded not guilty to the 11 March 2014 at Willesden.
>
> 5. On that date the prosecution had received a body of evidence served on behalf of the claimant, who was the defendant in those Magistrates' Court proceedings, and an adjournment was sought in order that that evidence could be considered. Having considered the position, the CPS discontinued proceedings on 7 May 2014. The claimant's allegation in this case is that that prosecution was procured by the defendant maliciously on the basis of an untrue allegation that the defendant knew was untrue and that he did so not for the purposes of a proper prosecution but maliciously in order to further his own ends and to harm the claimant."
> (Quote unchecked)

7. In the event the Recorder found for the claimant, Mr Basuta. He awarded Mr Basuta damages comprising, first of all, out-of-pocket expenses, namely costs of around £29,000 incurred in the course of defending himself in the criminal proceedings, and secondly, general damages of £8,000 for distress and embarrassment. The total award of damages was nearly £37,000. He also ordered Mr Tara Singh Dhemrait to pay Mr Basuta's costs of the trial which he assessed. Mr Tara Singh Dhemrait was dissatisfied with that outcome and wishes to appeal, and that is the reason for the present application.

Stage two: the reasons for the delay

8. The reasons for the delay in lodging the notice of appeal in this case are explained in a witness statement filed on Mr Dhemrait's behalf by his solicitor, Mr Tan. That witness statement is dated 16 December 2016 and is further supported by a witness statement of Mr Surjit Dhemrait, who is the son of Mr Tara Singh Dhemrait. That witness statement is also dated 16 December 2016. Mr Tan acknowledges that Mr Dhemrait (senior) was represented by counsel at trial, a Mr Bennett. It appears that the possibility of an appeal was discussed between lawyer and client the moment judgment was given and was therefore on the agenda at a very early stage. I am told that Mr Bennett did not invite the Recorder to consider the issue of permission once the trial was over. However, after the trial the parties agreed to share the cost of transcripts and in the event the transcripts of the judgment arrived with Mr Tan on 17 October 2016. Mr Tan says at paragraph 12 of his witness statement that at around this time he was instructed to instruct fresh counsel in place of Mr Bennett. He declines to give the reason for that, stating only that this is covered by legal professional privilege. The deadline for lodging the notice of appeal then expired.

9. Mr Tan set about instructing fresh counsel and identified Mr Atkinson, who had not so far been involved. Mr Tan then sought further transcripts of the evidence and the closing submissions adduced at trial. Those were requested on 28 October 2016 and were available on 16 November 2016, forwarded to Mr Atkinson the next day. Formal instructions from Mr Tan followed to Mr Atkinson on 21 November 2016. They were accepted on 23 November 2016. A conference between client and counsel took place on 28 November 2016, and Mr Atkinson perfected his advice on 30 November 2016. Funds were then received from the client on 7 December 2016 to enable counsel to draft the grounds of appeal which were settled by him on 13 December 2016. The notice of appeal was lodged, as I have said, on 20 December 2016, two months late.

10. Mr Atkinson argues that this chronology amounts to a good reason for the delay. He submits that all reasonable steps were taken to progress the appeal. Mr De Wilde disagrees and points to the signal failure of the claimant by his representatives to get the appeal notice lodged by 20 October 2016. He also points to delays thereafter. He also points to discrepancies or uncertainties in the evidence that has been filed by Mr Dhemrait (junior) about what was in fact happening during the period of delay and relies on a witness statement filed by his own instructing solicitor, Neville Takiar, dated 7 February 2017.

11. I have considered the facts as explained in these witness statements carefully and I have considered the sequence of events as has been outlined to me as well as the submissions in relation to them. I conclude that no good reason has been made out for the delay in lodging the notice of appeal. My reasons are as follows:
    (a) Mr Dhemrait (senior) has at all times had a solicitor on the record acting for him, that is, Mr Tan. Mr Tan could have put a notice of appeal into court within time. I have been given no explanation of why he did not do that even on a protective basis.
    (b) Mr Dhemrait was present at trial, as was his barrister and possibly his solicitor too. Mr Dhemrait knew the reasons why he had lost because those reasons were given to him by the Recorder in his *ex tempore* judgment. There was therefore no pressing need to obtain a transcript of the judgment before deciding whether to appeal. It was perfectly possible in this case to have lodged an appeal based on what the Recorder had said, knowing the areas with which Mr Dhemrait took issue in that judgment.
    (c) In any event, the transcript of the judgment was obtained on 17 October 2016, which was still within time to appeal, so even though the transcript was available, no appeal was lodged and the deadline then passed.
    (d) I am given no explanation as to why different counsel was appointed in mid-to-late October 2016. I am therefore unable to count that factor in Mr Dhemrait's favour because I do not know the reasons why that happened. Mr Dhemrait is of course entitled to rely on privilege, but, having done so, the change of counsel must become a neutral factor which cannot assist him in his application.
    (e) Once fresh counsel was instructed, I accept that he could not advise without having more information in the form of transcripts of the hearing and conferences with his client. There can be no criticism at all of Mr Atkinson, who appears to have turned his hand to this appeal with great speed, but it was still open to Mr Dhemrait or his solicitor to lodge a holding appeal while counsel was brought up to speed.
    (f) Even after Mr Atkinson was involved, there continued to be delays. First of all, counsel advised on 30 November 2016 but funds for grounds of appeal were

apparently not provided until 7 December 2016 and so that further delay occurred. Secondly, counsel provided grounds of appeal on 13 December 2016 but the appeal notice was not lodged until 20 December 2016. This again constitutes an unexplained further delay.

12. All in all, taking all these points and all the evidence into account, I conclude that the explanation for the delay is unsatisfactory. Mr De Wilde invites me to conclude that the notice of appeal was only submitted in the end because of a related application for an injunction over property that was then being sold by Mr Dhemrait (senior). I can make no finding about that. I do not need to. It is sufficient for present purposes that the reasons which have been given by Mr Dhemrait (senior) via his lawyers and others, even taken at their highest, are insufficient to explain the delay.

Stage three: all the circumstances of the case

13. There is no need for me to go on to stage three of the Denton analysis given my conclusions on stage two, but I do so to record the submissions made and in case I am wrong in my analysis on stage two. It is at this point that Mr Atkinson invites me to have regard to the merits of the underlying appeal. Mr Atkinson very fairly emphasises that a number of conclusions that were reached by the Recorder are not challenged in the grounds of appeal and nor could they be. However, one conclusion reached by the Recorder is challenged. Mr Atkinson before me and indeed by the grounds of appeal he has drafted argues that the Recorder erred in law in concluding that Mr Basuta was prosecuted by Mr Dhemrait (senior). Mr Atkinson sets out his submissions on the law at paragraphs 23 to 52 of his skeleton. The particular alleged failure on the part of the Recorder is characterised at paragraph 28 of the skeleton where this is said:

> "He failed entirely to analyse whether it was virtually impossible for the police and CPS to exercise a discretion or judgment in deciding to prosecute independently of the appellant. This was with respect a particularly glaring omission given that it is a well-established part of the 'prosecutor' test. It is an essential question to ask given that *prima facie* in modern times it is taken that in a prosecution by the state the prosecutors in law are the police and/or the CPS."
> (Quote unchecked)

14. The language of "virtually impossible" which is used by Mr Atkinson in the passage that I have quoted comes from the judgment of Brooke LJ in Mahon v Rahm (No 2) [2000] 1 WLR 2150 at paragraph 269, as set out at paragraph 34 of Mr Atkinson's skeleton. However, it is clear that the language of "virtual impossibility" is not universally used in the case law. Alternative formulations have been used, and just reading through Mr Atkinson's skeleton, one sees as follows: paragraph 30 of his skeleton, citing Moore-Bick LJ in Hunt v AB [2009] EWCA Civ 1092 at paragraph 77, refers to whether the defendant "actively procured" the prosecution of the claimant; paragraph 32 of Mr Atkinson's skeleton refers to a further passage from Moore-Bick LJ's judgment in Hunt v AB, itself referring to an earlier case, Martin v Watson [1996] AC 74, where reference is made to whether the defendant is properly to be regarded in all the circumstances as having "set the law in motion" against the plaintiff; paragraph 35 cites a passage from Sedley LJ in Hunt v AB to the effect that there is no "bright line"; and at paragraph 42 of the skeleton, Sedley LJ in Hunt v AB is cited as having said that it would be necessary to establish that the defendant had "deliberately

manipulated" the prosecutorial authorities. Thus, it is clear that there is no particular magic in the words "virtually impossible". The absence of those words from the Recorder's judgment is not an error in and of itself.

15. Mr De Wilde invites me to conclude that the Recorder understood perfectly well what the test in law was and that nothing turns on the fact that he did not use the words "virtually impossible" in terms. Further, I am invited to conclude that the Recorder made impeccable findings of fact which reflected the legal test and that the conclusion that Mr Dhemrait had prosecuted Mr Basuta is unassailable.

16. I turn then to the terms of the judgment of the Recorder. I note the following:
    (a) Paragraph 6 commences with the Recorder's acknowledgement that there was agreement between the parties as to the test that he should apply. In circumstances where the legal test is agreed, one would not expect the judge to set out the case law extensively.
    (b) At paragraph 6.1, citing from Martin v Watson [1994] QB 425, the Recorder sets out the first of the four elements that the claimant needs to satisfy the court in order to succeed, "firstly that he was prosecuted by the defendant, that is to say, that the legal proceedings in the magistrates' court were set in motion by the defendant. I will return to that more in due course". This was the Recorder's formulation of the first limb of the test for malicious prosecution and, as can be seen, it fits perfectly with the case law, the words "set in motion" being those used by Moore-Bick LJ in an earlier case.
    (c) At paragraph 7 the Recorder noted that there were separate strands and that the claimant needed to satisfy him separately in relation to each strand and that he needed to address and consider each of those strands separately, but that was not to say that he needed to consider each strand divorced from the others and divorced from the evidence in relation to the others. He went on to note that the strands may well in this case be entwined with each other, and that compelled him to consider the overall factual background about what actually happened and then against that factual background to consider each of the strands separately.
    (d) At paragraph 10 the Recorder set out his understanding of the first of those strands and said this:

> "It is not enough simply that a complaint was made, even if that complaint was false, for that to amount to the complainant procuring a prosecution. The complainant needs to do more than simply make a complaint. It seems to me however that in looking to what that more amounts to, I need to take into account the motivation, the accuracy and the knowledge of the complainant in making the complaint, but I accept that what is required is a deliberate action on the part of the complainant in an attempt to procure the prosecution for his own ends to manipulate the system. For my part, I find the language of abuse of process helpful in trying to pinpoint what the law is looking for in terms of activities by the complainant that cross the line from a simple complaint to the procuring of a malicious prosecution."
> (Quote unchecked)

It seems to me that if the evidence shows that a complaint was made in an attempt to abuse the process of the criminal justice system rather than to further it, then it is that kind of behaviour that crosses the line.

(e) At paragraph 36 the Recorder addresses the facts and concludes that he is satisfied that the defendant went to the police and deliberately made a false allegation and that he did so in order to try and prompt the police to intervene in his favour and get rid of the claimant rather than going through any proper channels or indeed having a proper conversation about it with the claimant. As a result, the Recorder found that the officer made his report and "inevitably" the claimant was arrested, he was charged and there were two court appearances, and it was only as a result of the defence evidence being put in that the CPS ultimately discontinued.

(f) Paragraph 38 sets out the Recorder's conclusion on this issue, where the Recorder asks himself was the claimant prosecuted by the defendant,

> "… that is to say, was the law set in motion against him on a criminal charge by the defendant? By that, as I have already indicated, it means more than did the police take action because the defendant made a complaint but was the whole prosecution brought about by and for the aims of the defendant? It seems to me quite clear that it was. That is the very reason why the defendant went to the police … It seems to me that this is one of those cases where the court should conclude that this was a prosecution that was brought about by and for the defendant as an abuse of the criminal justice system for his own ulterior motives and not as a proper use of the criminal justice system."
> (Quote unchecked)

17. Despite Mr Atkinson's efforts, my conclusion is that there is no defect in the Recorder's approach or indeed in his conclusions. The Recorder was plainly aware of the case law, he characterised the legal test adequately (to put it at its lowest) and he made findings in accordance with that test which were open to him and which are properly reasoned. Therefore, contrary to Mr Atkinson's submissions, this is not a case where the merits of the appeal are obviously very strong. Applying Hysaj, paragraph 46, the merits do not in this case weigh in Mr Dhemrait's favour and cannot be used to support the application for an extension of time. Indeed, my own view is, if anything, that the merits of this appeal are very weak and, as such, should, if anything, weigh against Mr Dhemrait applying Hysaj at this point.

Other factors to take into account

18. I have considered all the circumstances of the case including the need for litigation to be conducted efficiently and at proportionate cost and the need for the rules prescribing time limits to be complied with. They all lead me to the same conclusion.

Conclusion

19. I conclude that this application for an extension of time must fail and with it must fail the application for permission to appeal.