Neutral Citation Number: [2014] EWHC 3341 (Comm)

Case No. 2013/822

IN THE HIGH COURT OF JUSTICE
COMMERCIAL COURT

The Rolls Building
Fetter Lane
London
EC4 1NL

Date: Friday, 29 August 2014
BEFORE:

HIS HONOUR JUDGE MACKIE QC

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BETWEEN:

CARLTON ADVISORS

Claimant/Respondent

and

DORCHESTER HOLDINGS LTD

Applicant

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MR STEVEN THOMPSON appeared on behalf of the Claimant/Respondent.

MR PAUL DE LA PIQUERIE appeared on behalf of the Applicant.

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JUDGMENT

Please note that due to the poor quality of the Judge's microphone, it has not been possible to produce a high quality transcript in this case

HIS HONOUR JUDGE MACKIE QC:

1. This is an application under CPR 23.11 by the nine defendants to this action. They seek to set aside my order of 25 July, when they did not attend, and they want the matter to be listed for hearing. Mr Thompson appears for the claimant and Mr De La Piquerie for the applicant.

2. The court has power to grant relief under CPR 23.11, as one sees from its terms. The application is based by counsel for the defendants on some observations about the jurisdiction by the then Neuberger J. Those observations have to be seen in the context of the current procedural regime as explained by the decision of Turner J in *Lawton*, an extract from which appears in Mr Thompson's skeleton argument.

3. There is evidence concerning the circumstances of the non-attendance of the defendants at the hearing on 25 July from the solicitors on each side. An explanation is given by Mr Diamond for why it was, notwithstanding the fact that this was plainly an important application, counsel was not briefed. That explanation includes the fact that the original trial counsel was not available, neither was anybody else in the chambers, and the terms of the retainer with the client did not permit the solicitors to instruct anybody else, it seems, or even provisionally instruct anybody else. If those were the terms of the retainer, they were unwise terms to include. It appears that there is some exception to this because the defendants are fortunate in having the services of Mr De La Piquerie today. The explanation for not instructing some other counsel to appear is wholly unsatisfactory. In August 1968 I heard Lord Denning make the remark that there are plenty of fish in the sea. I heard him make that remark again from time to time and it has been my experience over the last 40 odd years that counsel are always available in a commercial case.

4. I extended to the solicitors for the defendants the opportunity to attend on 25 July without counsel, an opportunity that I always offer solicitors. That invitation was declined initially because it would appear that the defendants' solicitors gave priority to some meetings with other clients and a conference with counsel. The court was fortunate, however, in the sense that, once those commitments fell away, Mr Diamond was able to return to lower priorities such as attending the hearing. He gives in his evidence an account of how he tried to do that. He had various transport problems and could not turn up. I do not dispute the factual statements that he makes about that. He did not attend court and I made an order. That order included an obligation upon the solicitors to explain various matters to the court.

5. The order which I made on that occasion also included these provisions. I set aside an order made on 27 June, and there is no dispute about that. No one seeks to revisit paragraph 1. I granted the claimant relief from sanctions by extending time for exchange of witness statements to Friday week, 1 August

2014. The claimant had been late with statements, but I granted it leave because on 25 July the witness statements had already been in and had already been lodged at court by 11 July. I made a similar order requiring the defendants to serve their witness statements by 4pm on Friday, 1 August. That did not happen. I did, however, receive a helpful letter from the defendants' solicitors on 29 July and I responded immediately by giving them an opportunity to come to court on 30 or 31 July. I did that because I was concerned about what was happening with a trial that was due to take place on 6 October, at a time when there are many other calls on the court's time. My invitation was not acceptable for reasons that are given, which I can understand but do not accept as being good ones. The result is this application before the court and we are now at 29 August.

6. The witness statements of the defendants have still not been served. It seems to me extraordinary, given the events that have unfolded, that the defendants are not even today, on 29 August, here having served their witness evidence. It is very unusual in circumstances of such seriousness, with an imminent trial, for that obvious step not to have been taken. What is the reason for it? The reason for it appears to be that the defendants have a director from whom the defendants' solicitors found it difficult to get instructions, particularly in August when that individual is incommunicado and on holiday. That is no justification, of course, for what has happened. It is the duty of the clients to make themselves available to give instructions and for their solicitors to make that very clear.

7. Counsel submit that the reason why the witness statements of the defendants were not available was because they were waiting for a response to a request for further information. There is some evidence that that is correct, but there is also quite strong evidence drawn to my attention by Mr Thompson going the other way. The balance of the evidence, it seems to me, supports the submission of Mr Thompson. Moreover, even if that submission is well founded on its facts, it faces this difficulty. There is, of course, no justification for a party declining to comply with an order of the court for the service of witness statements because their request for further information has not been answered. If he finds himself in that position, it is his job either to seek an accommodation from the other side or to apply for a variation of the order from the court. The defendants failed to do that. It is pointed out that whilst what has happened is very regrettable it is not a deliberate flouting of the rules. It is suggested that the trial date can still be met. That is common ground. The defendants said that they can exchange witness statements by Friday, 5 September, experts' reports by 15 September and a joint report by 22 September. It is, therefore, submitted that the order of 25 July should be set aside and a revised directions timetable put in place.

8. Against that broad factual background and given the terms of the order, it seems to me that I would be fully justified and acting well within the discretion open to me if I refused any relief at all to the defendants. Indeed, I would probably have taken that course and dismissed this application altogether, but for the availability of the power of the court to make an order against a party to secure costs in the circumstances explained in the case of

Huscroft v P&O Ferries Ltd in which the leading judgment in the Court of Appeal was that of Moore-Bick LJ. Put shortly, the position is that the court does have the power under 3.1(5) to order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol.

9. The defendants have clearly failed to comply with the overriding objective and also with the provisions which I have drawn attention to expressly and implicitly so far.

10. That jurisdiction has to be exercised very cautiously for the reasons set out by Moore-Bick LJ and in the judgments to which he refers. It does seem to me clear that it is not necessary when making an order of that kind to be satisfied that there is not much of a defence in this case. It seems to me that where there is the flouting, which it seems to me there plainly has been, the court does have jurisdiction. As I say, if it does not, then the application will be dismissed altogether. All the signs, bringing together what has been happening over recent weeks, are that the defendants are not serious about defending this case properly. It may be that I am wrong about that. If I am wrong about that, it is the fault of the defendants for conducting themselves and their case as they have. I am, therefore, going to grant relief, but only on the following basis. First, the defendants will comply with the time limit advanced by the claimant so far as compliance with further pre-trial directions is concerned. Secondly, all existing costs orders - and such costs orders as I make today will be paid within 14 days of today. Thirdly, and also within 14 days of today, the defendants will deposit £25,000 in court as reassurance to the claimant that they are not going to have their money wasted in preparing fruitlessly for a trial. It also seems to me that the extent to which the claimant is under an obligation to take certain steps itself in the next 14 days that it should feel free to do so on as economical a basis as is consistent with compliance with orders of the court until the money has come in and has been seen to come in. Subject to those conditions, I will grant relief to enable this trial to proceed so that evidence from both sides is available.

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