IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION
[2022] EWHC 2018 (Ch)

No. CH-2021-000152

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday 16 June 2022

Before:

MR JUSTICE ADAM JOHNSON

B E T W E E N :

RAYMOND CLEWER — Claimant/Appellent

- and -

HIGGS & SONS (A FIRM) — Defendants/Respondents

MR CLIVE WOLMAN appeared on behalf of the Claimant.

MR FRANCIS BACON appeared on behalf of the Defendant.

J U D G M E N T

(Please note this transcript has been prepared without access to documentation)

MR JUSTICE ADAM JOHNSON:

1 This is a professional negligence action against a firm of solicitors. There is an issue whether the claim is still alive. That arises because on 23 October 2020, Deputy Master Hansen made an unless order requiring the service of the claim form and particulars of claim, and payment of the correct court fee, by 1 November 2020. The defendants have taken the position that the unless order was not complied with and thus applied before Deputy Master Marsh in June 2021 for a declaration that the claim was struck out. Deputy Master Marsh made that order. However, the court has now given permission to appeal his decision on two grounds and the appeal is yet to be determined.

2 Now comes the present question. Both Deputy Master Hansen and Deputy Master Marsh made costs orders. The costs order made by Deputy Master Hansen was in the sum of £15,000. That made by Deputy Master Marsh was for the claimants to pay the defendants' costs of the action but with £30,000 to be paid on account. As of today, neither sum has been paid. The question which arises is whether the court should make it a condition of the permission to appeal already given that the sum of £45,000 be paid to the defendants within twenty-eight days. There has been no stay of the costs orders. Although at an earlier stage the claimant, Mr Clewer, had intimated an intention to apply for a stay, he has not, in fact, done so.

3 I pause there to note that originally there were two claimants, namely Mr Clewer and his wife. It is entirely unclear, however, what cause of action Mrs Clewer ever had against the defendants. Her claim has been dismissed and will not be revived even if the appeal is successful. In any event, the costs orders presently in issue were made against both Mrs Clewer and the remaining claimant/appellant, Mr Clewer.

4 I have no evidence as to his present needs from Mr Clewer. In fact, I have no evidence from him at all in relation to the present application although his counsel Mr Wolman says he has limited liquid assets.

5 Mr Wolman in his skeleton argument, again without the benefit of any evidence, has drawn attention to the fact that according to Land Registry records, the Clewers are owners of a property which they bought for £450,000 in 2013 which is held by them as joint tenants. There is one charge in favour of a lender called "*more2life*" which Mr Wolman again in his skeleton and without the benefit of evidence says was in respect of a £50,000 loan taken out by the Clewers in order to finance pursuit of the present claim. Against that background, Mr Wolman says that the defendants could very easily have sought to protect their position by obtaining an interim charging order on the property. Mr Wolman argues that the defendants' motivation is thus less about securing payment of their outstanding costs orders and more about stifling the conduct of the appeal.

6 For the defendants, Mr Bacon argues that the lack of any evidence is deeply unsatisfactory and says that the limited materials provided with Mr Wolman's skeleton, when properly analysed, in fact support the idea that a condition on pursuit of the appeal *should* be imposed. That is because they support the view that the decision not to make payment of the outstanding costs orders was one deliberately taken by Mr and Mrs Clewer.

7 That is for this reason. The original order of Deputy Master Hansen made on 23 October 2020 required £15,000 to be paid by 4 December. One can see from the documents produced by Mr Wolman that Mr and Mrs Clewer's loan application was made by them at

the end of September 2020 and that the funds, i.e. the £50,000 loan, were made available to them on about 7 December. Having funds available, they nonetheless chose not to pay the costs under Deputy Master Hansen's order, and neither did they pay those due under the subsequent order of Deputy Master Marsh (although they *did* choose to make payment of costs under a later order made by Deputy Master Rhys in February 2021 and, it seems, have also been paying fees to their own legal advisors in the meantime).

8 Moreover, says Mr Bacon, there is this further issue. On 31 October 2020, at a point in time when their loan application was being processed, Mr and Mrs Clewer had made an application on form EX160 for exemption from court fees. That is surprising, says Mr Bacon, if the Clewers knew they were in the process of applying for a loan taken out for the purpose of funding their litigation.

9 Taken all together, say the defendants, this is a deeply unsatisfactory situation in circumstances where the defendants themselves have been forced to incur very substantial and increasing costs which are not, of course, limited to the costs reflected in the two orders presently in question.

10 Turning then to the legal principles, under CPR 52.18, an appeal court may impose or vary conditions on which an appeal may be brought although under CPR 52.18(2):

> "The court will only exercise its powers ... where there is a compelling reason for doing so."

11 There is much learning on what amounts to a compelling reason and detailed commentary in the present version of the White Book between pp.1909-1911.

12 In a case called *Merchant International Company Ltd v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy (Rev 1)* [2016] EWCA Civ. 710, after a careful review of the authorities, Christopher Clarke LJ summarised the relevant principles as follows:

> "(a) the essential question is whether or not there is a compelling reason to make payment in of the judgment sum, plus costs and interest (or some part thereof) a condition for further pursuit of the appeal ('a security payment order');
>
> (b) whether there is a compelling reason is a value judgment to be made on the particular facts of the case under consideration;
>
> (c) the fact that a judgment has been entered against the appellant and no stay has been sought or granted does not mean that, as a matter of course, compliance with the judgment should be made a condition of appeal nor does it, alone, afford a compelling reason for a security payment order;
>
> (d) on the contrary the power in CPR 52.18 was not designed to be no more than an alternative means of securing enforcement and is only to be exercised with caution;
>
> (e) whilst every case depends on its particular facts the court is likely to find there to be a compelling reason to make a security payment order which has that effect if the judgment debtor has in the past or is likely in the future to take steps to denude itself of

assets or to put its assets beyond the reach of normal enforcement processes;

(f) there may be a compelling reason to make a security payment order even if it is not established that the appellant has acted as in (e) above (this may be the case if there are considerable practical difficulties in effecting execution)."

13 In two passages at p.1909, the White Book also refers to *Macleod & Ors v Gold Harp Properties Ltd* [2014] EWCA Civ.532. The first passage is as follows:

> "Where a respondent applies for the satisfaction by the appellant of an order for payment of costs on account made against him by the court below to be imposed as a condition upon which the appeal may be brought, the fact that the appellant was not facing any consequence as a result of the failure to comply with that order does not constitute a 'compelling reason' for imposing such a condition."

The second reference to *Macleod* is as follows:

> "Although a good deal may be said in favour of a principle to the effect that a defendant who wishes to appeal and obtains permission to appeal, but who has not complied with a judgment of the court below and has obtained no stay of execution of it, must as a matter of course be required to comply with and satisfy that judgment as a condition of being permitted to pursue an appeal, that is not the law."

14 Turning then to the present case, I have come to the following conclusions:

(1) The present situation, in which Mr Clewer has put forward no evidence of matters relevant to the court's assessment, is obviously deeply unsatisfactory. This has led to practical difficulties for the defendants and, indeed, for the court in the conduct of the present hearing which are most unfortunate and which have led to time being wasted.

(2) I accept Mr Bacon's submission that Mr and Mrs Clewer must have made a deliberate choice not to discharge at least the order of Deputy Master Hansen given that as of 7 December 2020 at least, they had available funds which would have enabled them to do so.

(3) Even accepting that, however, I am not satisfied that such conduct in and of itself makes it appropriate for the court to require payment of the two outstanding costs orders as a condition for pursuit of the ongoing appeal. The reason is that, as the *Macleod* decision makes clear and as is apparent from what Christopher Clarke LJ said in his factor (c) in the *Naftogaz* case, non-payment of a judgment or order is not in and of itself a compelling reason. Something more is needed. As it seems to me, the emphasis of the *Naftogaz* factors generally is on the difficulty which the successful respondent may have in securing enforcement in the event that the appeal fails. In the *Naftogaz* case itself, the compelling reason was effectively that the intended appellant was an overseas entity against which enforcement would be very difficult and which, in any event, was shown to be taking steps to make enforcement a practical impossibility. It was in a position where, absent a condition requiring it to comply with the judgment already rendered against it, it would be left free to pursue the

intended appeal as a one-way bet, i.e. it would have the benefit of the appeal if successful but would be able to walk away if it lost.

(4) Subject to the points I will mention in a moment, that seems to me different to the present case in which the defendants cannot point to any similar expected difficulty in securing enforcement in the event the appeal fails. In that eventuality, the position seems to be that there is substantial unencumbered equity in the Clewers' property against which enforcement could be levied. That is not to say that enforcement will be straightforward. It may not be but I do not see that there are likely to be the sorts of unusual and considerable practical difficulties contemplated by *Naftogaz* factor (f). To put it another way, Mr and Mrs Clewer are presently exposed to such enforcement steps as the defendants may wish to pursue and Mr Clewer's level of exposure is likely only to increase if the appeal is unsuccessful. Thus, Mr Clewer is not saying that he should be able to pursue his appeal without any downside risk, which was what provided the compelling reason in the *Naftogaz* case. Instead, he is willing to take the risk.

(5) Bearing in mind that what I have called the *Naftogaz* factors are not intended to be a comprehensive code and that as Mr Bacon emphasises, the court has a general discretion, I have considered whether other factors might give rise to a compelling reason within CPR 52.18. I think not. The real nub of the defendants' complaint is the basic unfairness which arises from them having to incur ongoing costs in circumstances where Mr and Mrs Clewer, and Mr Clewer in particular as the remaining appellant, are deliberately flouting existing orders of the court. I agree that looked at in one way that is deeply unfair and, in practical terms, is most unsatisfactory, but it is not unusual and, in my judgment, does not give rise to a compelling reason. I have also considered the question of the application made by Mr and Mrs Clewer for fee exemption at a point in time when their loan application was pending, but again do not consider that that gives rise to a compelling reason. The detail of the relevant events may be material in the context of the appeal itself and so I tread with caution. However, I note on the basis of the brief submissions made by Mr Wolman that it does seem to be the case that loan proceeds and the value of a litigant's home are excluded from the relevant calculations.

(6) I come back, however, to two related issues. The first is the present lack of evidence from Mr Clewer. This is obviously unsatisfactory. The court should not have to rely on the factual submissions set out in Mr Wolman's skeleton and on the documents attached to it. The second point is that the terms of the loan advanced to Mr and Mrs Clewer contemplate the possibility of further advances being made in excess of the £50,000 already advanced. Mr Bacon makes the point that if that happens, then the execution risk for his clients may very well increase. Mr Wolman says that is an unlikely scenario but, of course, he has no evidence from Mr or Mrs Clewer which attests to the point. I agree that both these points are matters of concern and while they do not persuade me there is presently a compelling reason which would justify acceding to the application as made they do, I think, need to be addressed in another form.

(7) That being so, what I propose to do is the following:

(a) I will for now make no final order on the present application but will adjourn it generally with liberty to restore.

(b) I will direct Mr Clewer within fourteen days to make a witness statement confirming the truth of the factual matters presently attested to in Mr Wolman's skeleton argument and exhibiting copies of the documents provided by Mr Wolman. That witness statement should also, importantly, identify precisely the amount of unencumbered equity in the relevant property and that should include an indication of presently accumulated loan interest and an indication of the estimated present value of the property.

(c) I will make an order requiring Mr Clewer promptly to notify the defendants in the event that either he or Mrs Clewer, or anyone else on their behalf, makes an application for a further loan advance either to the present lender or any other lender secured on the property.

15 The point of proceeding this way, which I accept is somewhat unusual, is to allow the defendants to consider their position further both in light of the evidence to be filed and in light of any changed circumstances concerning the property.

16 If the position remains that the defendants' potential for successfully enforcing their existing costs orders is as Mr Wolman has represented it to be, then they will be well advised not to restore their application for further hearing. However, if the position on the evidence as produced is materially different or if that position changes, then no doubt they will wish to do so.

17 I will need assistance from counsel as to the precise form of order. I will also need to hear submissions from them in relation to the costs of the hearing today.

L A T E R

18 I need to deal with the costs of the hearing today.

19 As to the principle, it seems to me that I should make an order for costs and that the form of order should be for costs to be payable to the defendants and subject to immediate summary assessment. I say that for the following reasons.

20 To begin with, although the defendants have not achieved the form of relief they sought, neither has their application been definitively dismissed. Instead, the effect of the order I have made has been to keep the present situation in suspense pending the provision of evidence by Mr Clewer and to require Mr Clewer to keep the defendants up to date as regards developments in relation to his residential property.

21 I do not regard that, in substance, as a victory for Mr Clewer. I do not think it right to proceed to assess costs on the basis that he has effectively been successful in defending the defendants' application. Rather, it seems to me the situation is closer to the hearing of the that application having been adjourned and costs wasted in light of the failure by Mr Clewer to provide in a timely manner the evidence that was needed to enable the application to be satisfactorily dealt with today. That being so, it seems to me logical that the costs effectively wasted as a result of today's hearing and which could have been avoided should be recoverable by the defendants.

22 The second related point I make is as follows. It is clear from correspondence I have been shown that the substance of Mr Clewer's response to the present application only became clear at the eleventh hour; that is to say at some point during yesterday, the day before the hearing, and in fact only during yesterday afternoon. That is so despite exchanges of

correspondence by email seeking clarification from Mr Clewer of precisely what his position in relation to the hearing was to be. As I say, that position only emerged very late in the day in a manner which put both the defendants and, indeed, the court in some practical difficulty in dealing with today's application in an orderly manner. It seems to me appropriate that the court should express its displeasure at this unsatisfactory state of affairs by making a costs order against Mr Clewer as the defendants invite me to do.

23 So, for those two broad and interrelated reasons, it seems to me it is appropriate for a costs order to be made now and for the form of the order to be an order in favour of the defendants on the footing that their costs will be subject to immediate summary assessment.

L A T E R

24 I will assess costs in the full amount of £5,277.50.

25 Mr Wolman has made a submission to me that there should be a discount in relation to costs incurred by the defendants in producing their witness statement on the basis that it covered matters which were irrelevant to the determination I have made. Leaving aside the fact that that is a surprising submission to make in circumstances where the serious problem affecting Mr Clewer is the fact that he has produced no witness statement at all, and even assuming there is something in the point, I have to take account of the appropriateness of the costs figure overall, and as Mr Bacon has legitimately submitted, the costs figure in his schedule was based on an anticipated hearing time of one hour. As matters have turned out, the hearing has taken a great deal of the court day. The reason for that, very largely, has been the need for the court and for the defendants to engage with the material served late by Mr Clewer. In those circumstances, it seems to me that the overall figure of £5,277.50 contained in the costs schedule served by the defendants is an entirely appropriate figure and a proportionate one.

26 For those reasons, I will assess costs in the full amount identified in the defendants' schedule.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.