Neutral Citation Number: [2020] EWHC 1622 (QB)

Case No: QB-2018-004329

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2020

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

Melanie Stanley	**Claimant**
- and -	
London Borough of Tower Hamlets	**Defendant**

- -
- -

Azeem Suterwalla (instructed by **Irvings Law**) for the **Claimant**
Howard Cohen (instructed by **Plexus Law**) for the **Defendant**

Hearing dates: 18 June 2020

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Approved Judgment

Judgment Approved by the court for handing down.

The Honourable Mr Justice Julian Knowles :

Introduction

1. This is an application by the Defendant, the London Borough of Tower Hamlets (the Council), to set aside judgment in default that was awarded in favour of the Claimant, Melanie Stanley, on 17 April 2020. It also applies for relief from sanctions.

2. The hearing was originally listed on 12 June 2020. However, because of the late and defective service of papers by the Claimant's solicitor, that hearing had to be aborted and the matter re-listed. I then held a remote hearing on 18 June 2020 at which the Claimant was represented by Mr Suterwalla and the Council was represented by Mr Cohen.

The factual background

Background to the claim

3. The Claimant is suing the Council for breach of the Data Protection Act 1998, breach of the General Data Protection Regulation (Regulation (EU) 2016/679), breach of confidence, misuse of private information, and breach of Article 8 of the European Convention on Human Rights. The claims arise in the following circumstances.

4. On 7 December 2018 the Claimant attended a child protection conference arranged by the Council. The conference had been convened to discuss the welfare of her daughter. It was attended by a large number of professionals including social workers, the police, and school nurses. The Claimant's ex-partner also attended. The Claimant's GP records had been obtained by the Council but were not disclosed at the meeting.

5. Following the conference, the Council disclosed the Claimant's GP records to those who had attended it. As well as basic information such as the Claimant's address, date of birth, telephone numbers and NHS number, they included details of various medical conditions which the Claimant had had or was suffering from, and medical procedures she had undergone. It is not necessary to set these out; suffice it to say that this information was sensitive and definitely not the sort of information that one would wish to be disclosed to any person who did not need to know it.

6. After she discovered that her medical records had been disclosed without her consent, the Claimant made a complaint to the Council. Following an investigation, the Council concluded that there had been a data protection breach and apologised to the Claimant by a letter dated 10 January 2019 in which it acknowledged there had been a data protection breach. There was also a similar admission in a letter dated 11 February 2019 to the Claimant's GP. The Claimant also made a complaint to the Local Government and Social Care Ombudsman.

Background to the default judgment application

7. On 6 November 2019 the Claimant instructed solicitors to pursue a compensation claim. Proceedings were issued on a protective basis on 4 December 2019. The Claimant

claims damages of up to £10,000. As pleaded in the Particulars of Claim, the losses claimed for are 'psychological distress, stress, inconvenience and financial loss.' These are not further particularised; there is no medical report, nor any schedule of special damages.

8. On 23 January 2020 the Claimant's solicitors sent a letter before claim to the Council by post and email. No response was received. On 6 February 2020 the Claimant's solicitors sent a second letter by post and email pointing out that the Council was in breach of the pre-action protocol (which required a response within 14 days). The Claimant's solicitor gave the Council a further seven days to respond.

9. Again, no response was received, and so on 13 February 2020 the Claimant's solicitor, Mr McConville, telephoned the Council's Legal Services Department. He was provided with the name and contact details of the file handler, who was not himself present in the office at the time; the person to whom Mr McConville spoke could not assist as it was not his case. Mr McConville told that person he would instruct counsel to draft Particulars of Claim in readiness for the service of proceedings. Mr McConville also emailed the file handler in the same terms. Mr McConville asked if the Council would accept service of proceedings by email and was told service had to be by post and that service by email would not be accepted. This point is important in light of what happened later.

10. Particulars of Claim were drafted and signed off by counsel on or about 24 March 2020. The Council had still not replied by that date. Mr McConville put the relevant documents in the post on 25 March 2020 which meant that the deemed date of service was 27 March 2020. The Council's Acknowledgement of Service was thus due on or before 9 April 2020.

11. By 10 April 2020, the Council had not filed an Acknowledgment of Service. Mr McConville therefore applied for judgment in default on 15 April 2020. This was granted by Senior Master Fontaine on 17 April 2020.

The Council's evidence

12. Nicola McDougall, the solicitor instructed by the Council, has made a witness statement in which she attempts to explain what occurred and why the Council did not respond in a timely fashion to the service of proceedings on behalf of the Claimant.

13. She was instructed on 27 April 2020. She wrote to the Claimant's solicitor indicating that she was instructed to accept service. The following day she received an email from the Claimant's solicitors indicating that judgment in default had already been entered.

14. Ms McDougall attempted to ascertain where the papers had been sent to the Council, and when. She discovered they had been posted on 25 March 2020.

15. At this point it is necessary to recall what was happening around the time Mr McConville served the papers on the Council. On 23 March 2020 the UK Government put the country into 'lockdown' because of the COVID-19 pandemic. On that day the Prime Minister said that people were going to be required to stay at home and work at home. Emergency legislation (Coronavirus Act 2020) was passed by the House of Commons

without a vote that same day, and became law on 25 March 2020. There followed a raft of emergency secondary legislation which required all but essential businesses to close and severely restricted the ability of people to go to work and to travel. All but essential workers were required, by law, to stay at home. There were only limited exceptions, such as for exercise and the purchase of essential items. It was a criminal offence to be outside if an exception did not apply. Social distancing of 2m had to be observed, apart from in respect of people living in the same household.

16. The coronavirus pandemic is generally recognised to be the greatest peacetime emergency that this country (and indeed, the world) has ever faced. It has already caused the biggest shrinkage in the UK's economy on record, and its effects are likely to be felt for generations to come. That is on top of the deaths of over 42,000 people in the UK from the virus (as of 18 June 2020). The history of this crisis has yet to be written, but its effects have been all too palpable for every woman, child and man in the UK, and in many other countries too.

17. Ms McDougall says that the Council shut its offices on 23 March 2020 in accordance with the lockdown, with staff working from home after that. She also worked from home and she says that she assumes the Claimant's solicitor did also. She says that a 'skeleton staff' are working at the Council's offices, but they are not familiar with court proceedings. She says that as far as she is aware the relevant legal team within the Council's legal services department has not received the papers which were sent by Mr McConville.

18. Ms McDougall says it was unreasonable for Mr McConville to effect service by post when he knew that the Council's offices were shut. She says that he should have made contact by phone or otherwise to ascertain how to effect service 'in these unfortunate and unprecedented times'.

19. Ms McDougall makes clear in her witness statement that the Council intends to defend the claim. She points out there is no medical evidence and no schedule of special damages, and that this is a breach of CPR Part 16 PD, [4.2]-[4.3]. She says that the Claimant has not shown that the information in her GP records was not already known to the recipients, and if that is the case, there has been no breach in the various ways that are pleaded.

The CPR

20. CPR r 13.2 specifies when a court *must* set aside a default judgment. Those circumstances do not apply in this case. However, CPR r 13.3 provides:

> "(1) In any other case, the court may set aside or vary a judgment entered under Part 12 if –
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> (a) the defendant has a real prospect of successfully defending the claim; or
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> (b) it appears to the court that there is some other good reason why –

> (i) the judgment should be set aside or varied; or
>
> (ii) the defendant should be allowed to defend the claim.
>
> (2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly."

21. As I will explain later, an application to set aside default judgment requires an application for relief from sanctions. CPR r 3.9 is therefore relevant:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
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> (a) for litigation to be conducted efficiently and at proportionate cost; and
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> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence."

The parties' submissions

22. On behalf of the Council, Mr Cohen submitted that I should set aside the default judgment on either or both limbs of CPR r 13.3(1), namely because the Council has a real prospect of successfully defending the claim, and/or that there is some other good reason. As to the first limb, he said that as currently pleaded there was no evidence that any breach by the Council (even if proved) had caused the Claimant any actionable injury or loss. As to the second limb, he said the Claimant's solicitor served papers on an office that he knew to be closed and did not ascertain whether there was anyone there who could deal with the matter at a time of an unprecedented national health emergency when every undertaking in the country was scrambling to react and put into place emergency measures and that provided a good reason to set aside the default judgment. He said Mr McConville's approach was contrary to the overriding objective, and failed to take into account the COVID best-practice guidance agreed by both APIL (the Association of Personal Injury Lawyers) and FOIL (Forum of Insurance Lawyers) which recommends good communication and in particular, that it is in the best interests of clients and the effective conduct of claims to agree that firms temporarily agree to accept service by email.

23. Mr Cohen accepted that he needed relief from sanctions, according to the three stage test in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 and *Denton v TH White Ltd (De Laval Ltd, Part 20 defendant)* (Practice Note) [2014] 1 WLR 3926. He accepted there had been a serious and significant breach, but that having regard to the circumstances overall, I should grant relief from sanctions.

24. On behalf of the Claimant, Mr Suterwalla resisted the application. He said that the Council had admitted that there had been a breach of data protection (namely, when it responded to the Claimant's complaint) and that accordingly there was no real prospect of the Council defending the claim. Nor, he said, is there some other good reason why the judgment should be set aside. He said the claim had been admitted. He said that although the Council prays in aid the circumstances arising from the COVID-19 lockdown it has not adequately explained why the lockdown caused it to fail to file an Acknowledgment of Service and/or Defence. He criticised Ms McDougall's evidence as lacking in any real detail to explain why the Council had defaulted. He said the Council – which is responsible for a wide variety of time-critical and sensitive legal matters – should have had a system in place so that the proceedings served by Mr McConville were dealt with timeously.

25. Mr Suterwalla pointed out that all Mr McConville did was what he had been told to do in February 2020, namely, serve proceedings by post. He also relied on the Council's failure to reply to correspondence before the lockdown and said that in light of that unexplained failure I should be sceptical before accepting that the lockdown was the reason for the Council not filing an Acknowledgement of Service in time, as opposed to general dilatoriness on its part.

Discussion

The test to be applied

26. The approach which I must apply to this application is set out in the judgment of Christopher Clarke LJ in *Dexia Crediop SpA v Regione Piemonte* [2014] EWCA Civ 1298 at [38]-[41], which was approved in *Gentry v Miller* (Practice Note)) [2016] 1 WLR 2696, [23]-[24]. In the former case, Christopher Clarke LJ said:

> "38. A question arose at the hearing of the appeal as to the extent to which the principles laid down in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 applied to applications to set aside a default judgement. Since the hearing this court has given judgment in *Denton v TH White Ltd (De Laval Ltd, Part 20 defendant)* (Practice Note) [2014] 1 WLR 3926 and the parties have made written submissions on it. Neither case was concerned with applications to set aside a judgment.
>
> 39. In essence [the defendant] submits that the *Mitchell/Denton* principles do not apply to an application to set aside a default judgment. The majority in *Denton* considered that the *Mitchell* decision was correct to attribute a particular importance to the factors listed at CPR r 3.9(1)(a) (the need for litigation to be conducted efficiently and at proportionate cost) and (b) (the need to enforce compliance with rules, practice directions and orders) because the Civil Procedure Rule Committee had rejected a recommendation in the Review of Civil Litigation Costs final report that CPR r 3.9(1) should be reworded so that rule 3.9(1)(b) read the interests of justice in the particular case. But the final report did not propose any amendment to CPR r 13.3 so that the

> reasoning of the majority in *Denton* does not apply to it. There is thus, it is submitted, no reason to conclude that the *Mitchell/Denton* principles apply to an application under CPR r 13.3 or that promptness under CPR r 13.3 should be regarded as anything more than a factor. I disagree.
>
> 40. In my judgment the matter stands thus. CPR r 13.3 requires an applicant to show that he has real prospects of a successful defence or some other good reason to set the judgment aside. If he does, the courts discretion is to be exercised in the light of all the circumstances and the overriding objective. The court must have regard to all the factors it considers relevant of which promptness is both a mandatory and an important consideration. Since the overriding objective of the Rules is to enable the court to deal with cases justly and at proportionate cost, and since under the new CPR r 1.1(2)(f) the latter includes enforcing compliance with rules, practice directions and orders, the considerations set out in CPR r 3.9 are to be taken into account: see *Hussein v Birmingham City Council* [2005] EWCA Civ 1570 per Chadwick LJ at para 30; *Mid-East Sales v United Engineering and Trading Co (PVT) Ltd* [2014] 2 All ER (Comm) 623, para 85. So also is the approach to CPR r 3.9 in *Mitchell/Denton*. The fact that the courts judgment in *Denton* was reinforced by the fact that CPR r 3.9 was not reworded in the manner proposed by Jackson LJ does not detract from the relevance of CPR r 3.9, and what was said about it in *Denton*, to applications under CPR Pt 13.
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> 41. *Denton* makes clear that any application for relief against sanctions involves considering (i) the seriousness and significance of the default (ii) the reason for it and (iii) all the circumstances of the case. At the third stage factors (a) and (b) in CPR r 3.9 are of particular, but not paramount, importance."

27. Hence, in summary, I first have to decide whether one or both limbs in CPR 13.3(1) are satisfied. If I am, I then have to exercise my discretion about whether to set aside default judgment in accordance with the *Mitchell/Denton* principles.

Application of the test

28. I am satisfied that Mr Cohen was right to submit that as things stand at present, the Council has real prospects of successfully defending the claim. At bottom, the Claimant is claiming for personal injuries, namely psychological distress arising out of the Council's alleged data protection breach. The Claimant has not, however complied with [4.2] or [4.3] of CPR PD 16, which provide that in personal injury cases:

> "4.2 The claimant must attach to his particulars of claim a schedule of details of any past and future expenses and losses which he claims.
>
> 4.3 Where the claimant is relying on the evidence of a medical practitioner the claimant must attach to or serve with his

> particulars of claim a report from a medical practitioner about the personal injuries which he alleges in his claim."

29. The Claimant will have to rely on the evidence of a medical practitioner if she is going to establish psychological injury giving rise to actionable loss. At the moment there is therefore no evidence that the Claimant has suffered any actionable loss as a result of the Claimant's alleged unlawful conduct. Without loss, there is no cause of action. Mr Suterwalla sought to argue that the claim is not one for personal injury, but I reject that submission. As Mr Cohen pointed out, CPR r 2.3 defines 'claim for personal injuries' as meaning (emphasis added):

> "… proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person's death, and 'personal injuries' includes any disease *and any impairment of a person's physical or mental condition*"

30. However, I am not persuaded by Mr Cohen's submission (which Ms McDougall also raised in her witness statement) that the Claimant has not established a *prima facie* case that the information in her GP records was not already known by the people who received them, or was otherwise in the public domain. Whilst that might be true for some of the information, e.g. her date of birth and her address, the nub of her complaint is not about that, but about the disclosure of her sensitive medical information. Her ex-partner might have been aware of some of those details - I know not – but other recipients would definitely not have been.

31. Mr Suterwalla set great store by what he said had been the Council's admission of liability in its responses to the Claimant's complaint. I do not consider that the Council's responses can bear the weight he put on them. The letter from the Council dated 10 January 2019 did accept there had been a data protection breach. It was signed by an 'Interim Service Manager'. The letter to the GP in February 2020 was signed by the same person and made a similar admission. These were not admissions the Claimant had suffered any loss. Moreover, there is no evidence that this person had the authority to admit the claim on behalf of the Council (which, at that stage, did not even exist), nor is there even any evidence that she is legally qualified. Ms McDougall's evidence makes clear that the Council intends to resist the claim on the basis she indicates.

32. I therefore conclude that the first limb of CPR r 13.3(1) is made out.

33. I turn to the second limb. Even if I wrong about my earlier conclusion, I am satisfied that there is a good reason to set aside the default judgment. That reason is the unprecedented national health emergency which was unfolding at precisely the time Mr McConville posted his documents to the Council. From 23 March 2020 onwards the country was grinding to a halt and every employer and business in the UK - and indeed across the world - was suddenly having to develop new ways of working and to find ways of coping with employees not being able to travel into work. There were myriad problems and challenges to be faced, including, for example, establishing technological links and putting in place new systems of working. Parents had to worry about children no longer being able to go to school and all the associated child care issues related to that. Emergency plans were having to be implemented and rapid adjustments made across all sectors of the economy.

34. Mr McConville's witness statement is entirely silent as to why he thought it appropriate to post documents to the Council's offices when he knew or should have known they were shut and the Council was highly unlikely to be in a position to respond. I take Mr Suterwalla's point that the Council had not exactly covered itself in glory with how it had dealt with (or rather, not dealt with) the pre-action correspondence. Its non-responsiveness was not acceptable and I do not excuse it. However, that was history by the time of lockdown. Mr McConville took no steps to ascertain whether the papers had been received and were being processed. It is not good enough for him to say, as he does, that was because he was told in mid-February 2020 (some five weeks or so before lockdown) that service had to be by post, and so that is what he did. The world shifted on its axis on 23 March 2020 and it was incumbent on him as a responsible solicitor and an officer of the court to contact the Council to acknowledge that the situation had changed, and to discuss how proceedings could best and most effectively be served. In her witness statement Ms McDougall accused Mr McConville of 'sharp practice'. I do not find that he unscrupulously took advantage of the situation, but I do find he exercised poor judgement. A moment's thought on his part would have shown that it was not fair or reasonable for him simply to place papers in the post to an office that he knew or should have known had been closed down two days before because of a national emergency.

35. I turn to the three stage *Mitchell/Denton* test. As I have said, Mr Cohen accepted that there had been a serious and significant default by the Council in its failure to serve an Acknowledgement of Service and a Defence. I agree. However, I accept that the circumstances which led to the default were unique and that overall I should grant relief from sanctions having regard to the second and third stages of the test and the criteria in CPR r 3.9. Here, I am bound to have regard to CPR PD 51ZA (Extension of time limits and clarification of Practice Direction 51Y – coronavirus), which provides at [4]:

> "4. In so far as compatible with the proper administration of justice, the court will take into account the impact of the Covid-19 pandemic when considering applications for the extension of time for compliance with directions, the adjournment of hearings, and applications for relief from sanctions."

36. I find that the reason for the Council's default was the COVID-19 crisis, and that, but for the Council's offices being shut, it would have responded in time to the Claimant's claim. Whilst, as I have said, the Council had shown something of a cavalier attitude prior to the issuing of proceedings, I am satisfied it would have acted in accordance with the rules once proceedings had actually been issued. Another relevant circumstance is that Mr McConville was at fault for not checking whether service by post was still possible and feasible. That was an obvious step which he should have taken. The Council moved promptly to instruct Ms McDougall once it became cognisant of the Claimant's claim and this application to set aside default judgment was made promptly thereafter. I fully recognise the need to enforce compliance with the rules and the need to conduct litigation at proportionate cost. However, overall, I am satisfied that the interests of justice require judgment in default to be set aside. It would be unconscionable in my view for the Claimant to benefit from the unprecedented health emergency which prevailed at the end of March (and which is still subsisting today).

37. I therefore set aside the judgment in default, grant relief from sanctions, and give permission to the Council to file and serve an Acknowledgment of Service and Defence. That must be done within 14 days of the date of the order giving effect to this judgment.