IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Claim No: HC-2015-000741
NCN: [2016] EWHC 3385 (Ch)

7 Rolls Building,
Fetter Lane,
London EC4A 1NL

Friday, 14 October 2016

Before:

THE HONOURABLE MR JUSTICE BARLING

Between:

DALE VINCE AND ANOTHER

Claimants/Respondents

and

HM REVENUE & CUSTOMS

Defendant/Applicant

MR ALEC HAYDON *(instructed by Dentons UKMEA LLP, One Fleet Place, London EC4M 7WS)* appeared on behalf of the Claimants/Respondents.
MR MARK VINALL *(instructed by Business and Property Taxes Litigation, HM Revenue & Customs, Solicitors Office and Legal Services, Second Floor Bush House, Strand, London WC2B 4RD)* appeared on behalf of the Defendant/Applicant.

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JUDGMENT
(Approved)

Words: 4,415/ Folios: 61

Friday, 14 October 2016

MR JUSTICE BARLING:

1. This is an application by the defendant, HMRC, represented by Mr Vinall, of counsel, for permission under CPR, Rule 32.10 to introduce a witness statement of Mr Martin Alder dated 27 September 2016 in order to enable the defendant to call Mr Alder to give evidence at the trial. There is a subsidiary application as to whether, if permission is given, Mr Alder should be permitted to give his evidence via video link.

2. The main application is opposed by the claimants, Dale Vince and Ecotricity Group Limited, represented by Mr Haydon of counsel, essentially on the ground that relief from sanctions is required by the defendant and should not be granted in the circumstances.

3. The trial is, I am told, listed for four days, with the start day floating between 31 October and 3 November 2016. In other words, the trial may well come on within about two weeks' time.

4. The background to this matter needs to be outlined in a little detail. The battle lines, in very general terms, are drawn up as follows: Mr Vinall submits that if permission is given to introduce the witness statement and allow the evidence of Mr Alder at the trial, that will not necessarily cause the trial date to be vacated as any further preparation that needs to be done can be accomplished by both parties, and in particular by the claimants, in the time that is available between now and the start of the trial.

5. Mr Vinall also accepts (for reasons which emerge from the account of the background which I will give in a moment) that in terms of the first of the three stages in the court's consideration in an application for relief from sanctions, as set out in the case of *Denton v White* [2014] EWCA Civ 906, that the breach of the rules in the present case falls into

the serious/significant category. He is perhaps not so willing to concede, in relation to the second *Denton* stage, that there is no good reason for the breach. But, although seeking to explain why the breach occurred, he does not expressly contend that the explanation that he has put forward amounts to good reason within the meaning of *Denton*.

6. The overall approach of the claimants is that if the application were to be allowed, the extra work, investigation and preparation which the claimants would need to carry out would certainly not be able to be carried out in such a way that the current trial date could be maintained. It would inevitably mean that, unless they were to be seriously prejudiced in relation to their claim, the trial date would have to be vacated and re-fixed. So, that is a bird's eye view of the way in which the parties approach this application.

7. The claim, which was commenced in March 2015, was apparently in some respects the culmination of an HMRC investigation of a wider nature, and was brought to resolve a question of ownership of certain trademarks. The claimants seek a declaration that the first claimant "was at all material times until 20 December 2007 the absolute legal and beneficial owner of the trademarks and each of them." It is not necessary for me to set out in any further detail the nature and background to the specific claim. Clearly, it involves the tax liabilities of the claimants and possibly others, but it is, I believe, common ground that a central if not *the* central issue in the claim as is stands is whether the first claimant, Mr Vince, was the legal and beneficial owner of specific trademarks.

8. A defence was served by the defendant on 23 November 2015 and I hope I am accurately paraphrasing if I say that, in paragraph 3 of that defence, the defendant denies that the first claimant is the sole beneficial owner of the trademarks in question. That paragraph goes on to say:

> "It is to be inferred from (in particular, but without limitation) the facts and the matters set out below that the trademarks (or alternatively, some or each of them) were beneficially owned by REC at all relevant times until 20 December 2007."

The reference there to REC is to a company called the Renewable Energy Company Limited of which the first claimant, together with Mr Alder and another person, were shareholders and also, I believe, directors at the relevant time. The defence goes on to say at paragraph 3.4:

> "As a director of REC, Mr Vince owed fiduciary duties: (a) not to place himself in a position where his own interest conflicted or might conflict with those of REC; and (b) not to make an unauthorised profit out of or in connection with his position. In the circumstances, Mr Vince could not, consistently with his fiduciary duties to REC, have procured the registration of the trade marks (or any of them) in his own name without the informed consent of the other shareholders of REC (who were at all relevant times until 12 November 1999, Mr Martin Alder and Miss Karen Lane). Alternatively, without disclosure to the board of directors (who were at all relevant times until 8 November 1999, Mr Alder and Ms Lane)…..
> So far as HMRC is aware, no such consent was sought or given and no such disclosure was made. To the extent that Mr Vince did obtain registrations in his own name without such consent, alternatively disclosure, he held them on constructive trust for REC."

9. The claimants replied to that pleading in their reply of February 2016. In paragraph 6(b) the claimants said this:

> "As to the third sentence, at all material times it was understood and agreed by Mr Alder and Ms Lane that Mr Vince was the absolute legal and beneficial owner of the trademarks and each of them and licenced the Ecotricity Group to use the trademarks and each of them."

10. Paragraph 6(b) was the subject of a request for further information by the defendant and the claimants provided further information by a response dated 8 March 2016, in which they said (first citing the request):

> "Please state whether this is alleged to have been agreed orally or in writing. If orally, please state the gist of the words used by whom to whom, when and where it was spoken. If in writing, please put the date next to the document and provide a copy.
> Response: The claimants' case is that this was agreed orally. These matters will be the subject of witness evidence in due course."

11. It can be seen, therefore, that by March 2016 at the latest there was a clear issue on the pleadings whether or not Mr Alder had made the alleged agreement as to the ownership, beneficial and otherwise, of the trademarks in question. Indeed, as indicated above, the reference to Mr Alder was made by the defendant itself in its defence.

12. On a date even earlier than the response to which I have just referred, the defendant had indicated that it was not its intention to call any witnesses at the trial. That was indicated formally by the defendant in January 2016. On 15 April 2016 there was a CMC at which the claimants' costs budget for trial and preparation for the trial was reduced, taking into account that the claimants would not now need to deal with any witnesses called by the defendant, that having been confirmed in the defendant's own costs budget on 12 April 2016.

13. At the CMC a deadline for provision of witness statements was stipulated. Initially that was 30 June 2016, but as a result of various extensions which were all, I believe, ultimately agreed (although there had been initial objections to some requests for more time), the final date was 4 August 2016. On that date the claimants served on the defendant four witness statements and, consistently with the stance that it had made clear, the defendant did not serve any.

14. The defendant's position, as explained to me by Mr Vinall, was that when it received the witness statements of the claimants on 4 August they sparked off a perception within HMRC that they would now wish at least to interview and possibly to call Mr Alder as a witness on the defendant's behalf. As I understood his submissions, Mr

Vinall has put forward the defendant's thinking at that time, not by way of submitting that it amounted to a good reason for the conduct of the defendant, but simply as an explanation for its change of strategy. Putting it in a nutshell, the explanation is that when HMRC saw the witness statements of Mr Vince and Ms Roberts (formerly Ms Lane) who were shareholders and directors of REC, the defendant saw that this described a situation in which Mr Alder had held 33 per cent of the shares in REC, whereas the shares in the other companies in the Ecotricity group were wholly-owned by Mr Vince and Ms Lane alone. Ms Lane was Mr Vince's domestic partner at the time.

15. The defendant states that in the light of this evidence it also noted that (1) the name Ecotricity, which was used by REC to sell its electricity, was intended to be used instead of the somewhat clumsy name of REC itself; (2) although Mr Alder was apparently not particularly enthusiastic about the effectiveness of the Ecotricity name, the evidence provided no other explanation why he would have agreed, or did agree, to an arrangement whereby the trademark used by the company of whose shares he owned 33 per cent would be owned by Mr Vince alone; and (3) the licence or permission that REC had to use the Ecotricity name was not set out in a formal licence agreement, and gave no exclusivity over the use of the name.

16. Mr Vinall states that these factors caused HMRC to consider it surprising and implausible that Mr Alder would have agreed to Mr Vince holding the trademark entirely in his own name and ownership, beneficial and otherwise. This triggered a change of strategy on the part of HMRC, and it was decided at that stage to contact Mr Alder in order, as it is put by Mr Vinall, to hear his side of the story.

17. One bears in mind that this was in the context of the witness statements having been provided to HMRC on 4 August 2016, with a trial due to begin at about the end of

October. Despite the timing, it is not in dispute that contact with Mr Alder was not made until 15 September 2016, nearly six weeks after the evidence had been received, and with only about 6 weeks remaining before the trial.

18. Mr Vinall, in response to a question from me and after taking instructions, stated that the delay was because there had been (to paraphrase his response) some breakdown of communication within HMRC. Someone within the defendant's organisation had seemingly put forward a request for Mr Alder to be contacted. However, that person may not have had sufficient authority to put the request in motion, and the person who *did* have authority was not approached.

19. Whatever the reason, the upshot was that nearly six weeks passed before Mr Alder was contacted, and a statement from him did not emerge until nearly two weeks more had elapsed, ie until 27 September 2016 - two or three weeks ago. The witness statement, which is in the papers before me, is not long. It goes to the issue that I have described as one of the central issues in the case, namely, whether Mr Alder did or did not agree to the ownership arrangements in respect of the trademarks in question. The witness statement indicates that he did not agree. So, undoubtedly, the evidence of Mr Alder would be relevant evidence going to an important issue in the claim.

20. That is the unfortunate background to this matter.

21. It is common ground that the issue before me today is (or is equivalent to) an application for relief from sanctions in accordance with CPR 3.9ff, to which the principles and guidance set out, in particular, in *Denton* (above) apply. The sanction in the present case would be that, if permission were not given under CPR 32.10, Mr Alder could not be called to give oral evidence.

22. As I have already said, Mr Vinall takes the realistic view that the failure to comply with the procedural requirement here is a significant and a serious one, given the delay

that has occurred since the final date for exchange of witness statements at the beginning of August 2016 and the nearness of the trial. However, he does not accept that the introduction of Mr Alder's witness statement would cause the trial date to be vacated, and submits that that is a factor which goes to the degree of seriousness and significance of the failure to comply, and is also relevant to the court's overall discretion to allow the application. Mr Vinall's submission is that the claimants have overstated the steps which they say they would need to take, as set out, in particular, in the witness statement of their solicitor, Mr Daniel Bodle.

23. The most significant aspect of the problems which Mr Bodle outlines and which, in his view, would lead to the need for the trial to be vacated if the court were to give permission for Mr Alder's evidence to be admitted, is in relation to the witnesses the claimants would need to consider interviewing and calling. These fall into two categories.

24. In the first category are witnesses whom they would wish to contact and interview about the circumstances in which Mr Alder left the company (both for the purposes of cross-examination of Mr Alder and possibly also to call as witnesses). It seems to be common ground that there had been some form of disciplinary hearing presided over by Mr Vince himself, which may have involved allegations of a conflict that Mr Alder is said to have been subject. This alleged conflict was between certain other companies with which Mr Alder was involved and his involvement with the Ecotricity group. It is therefore suggested that there may have been some antagonism when he left the company several years ago. Mr Bodle states that these are matters which, if his evidence is admitted, the claimants will need to investigate further.

25. The second category of witnesses which the claimants say they would need to consider are in connection with the ownership of the trademarks. At all times up to 27

September 2016 it was the claimants' understanding that they would not have to deal with any witness evidence at all on the question of ownership of the trademarks. Whatever arguments were going to be made by HMRC, would be made by way of cross-examination of Mr Vince and the claimants' other witnesses, and by inference. The claimants state that if it had been known that Mr Alder was going to give evidence, they would have adopted a different approach: they would have wished to, as it were, turn over more stones and make more intense investigations. In particular, they would have sought to interview a Miss Cole (possibly now called Miss Bell), who was an employee of the company at the time when Mr Alder was still involved. She had been to some extent responsible for dealing with the registration of the trademarks in question, and might be able to throw light on the ownership issue, or on what any of the parties might have said about it at the time.

26. In addition, the claimants say that they would have wished to make further enquiries about another potential witness, a Miss Julie Wood, who was a solicitor with Bond Pearce and was the company's commercial adviser at about the relevant time. She was involved in handling the departure of Mr Alder from the company. Indeed, she is said to have been the author of the contemporaneous minutes which are available, but which are said not to reveal any detail. The claimants state that they had made some contact with Ms Wood, and that she had said there may be relevant documents connected with that period still in the possession of the solicitors with whom she had formally worked after leaving Bond Pearce, namely, Osborne Clarke. She has since moved again. The claimants say they would need further time to explore these issues with her, and also to investigate whether the documents to which she has referred, or any other relevant documents, can be found.

27. Finally, in this category, the claimants state that Mr Alder had accountants who made a

valuation of Mr Alder's shares in REC at the time that he left the company. It is submitted that the claimants would need a proper opportunity to contact the accountants to see whether they are able to provide any further information relevant to ownership of the trademarks.

28. Those are the main points the claimants make in relation to further potential evidence that they would wish to investigate.

29. Mr Vinall submits that, to the extent that this needs to be done, it can be done within the eight working days or thereabouts which are available before skeleton arguments have to be lodged. That is clearly an unrealistic suggestion. Nor do I accept the defendant's submission that these are not reasonable investigations for the claimants to make. In my view, bearing in mind principles of proportionality and common sense which ought to apply in litigation, until 27 September 2016 the claimants were entitled to take the view that they could reasonably rely upon the evidence that they had lodged on 4 August 2016 in relation to the establishment of their claimed ownership of the trademarks, given the absence of any positive evidence on the part of the defendant. However, once it is suggested that there will be a witness who is going to challenge the claimants' witness evidence, it is realistic and entirely reasonable for the claimants to consider that they need to take a more stringent approach.

30. I agree with Mr Haydon's submission that, if I were to grant the application, the trial would have to be vacated. He applies for the trial dates to be vacated in that event. We are clearly now at the eleventh hour and the fifty-ninth minute - at a point when, as Mr Bodle states in his evidence, the legal teams wish to be engaged fully in preparation for the imminent trial. The introduction of Mr Alder's witness statement would put a new complexion on the case, and would mean that further investigations would have to be

made by the claimants, which would very possibly lead to the admission of additional evidence from their side. It is wholly unrealistic to suggest that those matters can properly be achieved within the short time available before the trial window without prejudice of an unacceptable kind to the claimants. Therefore, this is a case where the significance and seriousness of the failure to comply with the procedural directions is of a very high order: if relief from sanction is granted it would inevitably result in the vacation of a trial date that has been fixed since April 2016.

31. As for the second stage of the *Denton* criteria, there is, in my view, no good reason for the failure to comply. While seeking to explain what had occurred within HMRC, Mr Vinall did not seriously suggest otherwise. It may well be that when they saw the claimants' evidence it was brought home to HMRC that the question of ownership needed to be investigated with Mr Alder. Nevertheless, the issue of his participation in an agreement could not have been more clearly on the pleadings, and had indeed been raised by the defendant itself as far back as March 2016. Therefore, it is very difficult to understand why the penny only dropped on 4th August 2016 when they saw the claimants' witness statements. In any event, that delay was wholly unjustified. There was no good reason for it in the light of the pleadings.

32. However, the matter then becomes even worse, in a way that is relevant to the degree of seriousness/significance of the failure as well as to whether a good reason for it exists. For, having decided that they needed to contact Mr Alder, HMRC still did not act promptly. Far from it. For whatever internal reasons, nearly six weeks more were allowed to elapse before they did so. No proper explanation has been provided for that additional delay.

33. It is just conceivable that if HMRC had interviewed Mr Alder in August 2016 and had made an application for relief promptly, the trial date might have been retained, though

I am not sure. However, by leaving it as late as they have, HMRC have made it quite impossible for the trial date to be maintained. So, there is certainly no mitigation for HMRC to be found at the second *Denton* stage.

34. The court is obliged next to consider all the circumstances of the case. The majority of the Court of Appeal in *Denton* were of the view that the court should give particular weight to factors (a) and (b) in CPR r.3.9, namely, the need for litigation to be conducted efficiently and at proportionate cost, and to enforce compliance with rules, practice directions and orders.

35. As to factor (a), it would clearly be inefficient and would result in additional cost for this trial to be vacated. The needless vacation of a trial due to be heard in the very near future is disruptive and wasteful of the court's and the parties' timetable and resources. The delay in relisting the trial, and therefore in resolving the dispute, may well be significant.

36. As to the need to enforce compliance with practice directions, rules and orders, in April 2016 the trial date was fixed for October 2016, and the parties must have known that if the ultimate timetable for exchange of witness statements was not complied with, that would endanger the trial date.

37. So, factors (a) and (b) militate against the application being granted here. Of course, the court has to consider all the circumstances of the case. The factor which has caused me most anxiety, as I indicated in the course of argument, is that the proposed witness is one whose evidence would go to a central issue in the case. It is relevant evidence which, if it is not admitted, the trial judge will not have the benefit of hearing. That is a powerful factor to be weighed in the balance in favour of granting the application.

38. However, there are other factors to be considered. In addition to the inevitable disruption of the court's timetable which would be caused by the vacation of the trial

and the need to relist the case, probably several months in the future, there would also be significant prejudice and cost to the claimants, whose witnesses, legal advisers and support team have set aside time for this trial which will now not be required. The vacation and relisting of trial dates, and the need to carry out further investigations are likely to require amendments to pleadings, amendments to witness statements, additional evidence and documents, lengthier (and possibly additional) hearings such as CMCs, and so on.

39. Weighing all these factors, and bearing in mind the overriding consideration that the court is required to deal with cases justly and proportionately, I have come to the conclusion, notwithstanding the possibility that the defendant's prospects of success may be affected adversely, that justice would not be done by granting this application. In my view, the factors against allowing it outweigh those in favour. The defendant's failure to comply with the direction is a very serious one, involving lengthy and inexcusable delay which, if the application were allowed, would result in the vacation of a long-fixed trial date, and significant prejudice to the claimants and the court, as well as to the overall administration of justice. In all the circumstances, I would not be justified in granting the application. The application is therefore refused, and Mr Vinall's second application does not arise.