Neutral Citation Number: [2020] EWHC 499 (QB)

Case No: QA-2019-000312

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
On appeal from the County Court at Central London
HHJ Roberts

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th of March 2020

Before :

MRS JUSTICE FARBEY

- -

Between :

SARAH PHILLIMORE	**Claimant/ Respondent**
- and -	
BARBARA HEWSON	**Defendant/ Appellant**

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- -

Mr E Gold (instructed by **3D Solicitors Ltd**) for the **Appellant**
The Respondent appeared in person

Hearing dates: 20 February 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE FARBEY

In relation to and in connection with this appeal, there shall be no reporting (including by individuals on social media) of the name of the Claimant's/Respondent's daughter, her address, her school or any other information or image which may identify her directly or indirectly.

Any person who knows of this order and disobeys this order or does anything which helps or permits any person to whom this order applies to breach the terms of this order may be held to be in contempt of court and may be imprisoned, fined or have their assets seized.

MRS JUSTICE FARBEY :

1. This is an appeal, brought with the permission of Stewart J, against the order of HHJ Roberts sitting in the County Court at Central London on 5 September 2019. By that order, HHJ Roberts granted permission to the respondent (whom I shall refer to as the claimant, as she was below) to lift a stay made in a Tomlin order agreed by the parties on 25 March 2019. The Tomlin order was the compromise of the claimant's first claim against the appellant (whom I shall refer to as the defendant, as she was below).

2. The judge also struck out the claimant's second, more recent claim against the defendant as amounting to repetition of the first claim. However, the judge regarded three of the allegations in the second claim as not warranting strike out. I shall refer to those allegations as "allegations T to V" (reflecting their positioning in the second set of Particulars of Claim). In order that allegations T to V could proceed, the judge granted permission to the claimant to amend the Particulars of Claim in the (revived) first claim in order to include those later allegations. He ordered the defendant to pay under half the claimant's costs.

3. Before me, as below, Mr Elliot Gold appeared for the appellant; the respondent appeared in person. I am grateful to both of them for their succinct and focused submissions.

Procedural history

4. The history of proceedings in the County Court can largely be taken from the judge's account in his judgment. By a claim form issued on 25 February 2019, the claimant sought an injunction to prohibit the defendant from publishing online or elsewhere her name, her daughter's name and address, and any information about her daughter's school. The claimant attached a witness statement in support of her claim. The claimant sought relief under section 3(1) of the Protection from Harassment Act 1997.

5. That first claim was settled by way of a Tomlin order with a confidential schedule. There is no need to set out the terms of the schedule here. The County Court does not appear to have sealed the order which led to some uncertainty before me. The copy of the order in the appeal bundle was not in the form of a Tomlin order. When I inquired about this, it transpired that the bundle contained an earlier draft which had been superseded. On instructions, Mr Gold was able to supply a copy of the order which was said to have been provided to the judge. As a matter of caution, I asked the defendant's solicitor to review the case file overnight and to provide a brief witness statement in order to confirm the terms of the order that had been filed in the County

Court. I received confirmation in a witness statement from Mr Daniel Berke that the appeal hearing had proceeded on the basis of the correct version of the order.

6. In any event, it is not in dispute that the parties agreed to settle the first claim on the basis of a Tomlin order. For the purposes of this appeal I am able to treat the first set of proceedings as having been compromised on the basis that all further proceedings in the claim would be stayed except for the purpose of carrying the terms of the schedule into effect, with permission to apply to the court to carry those terms into effect.

7. On 16 April 2019, the claimant issued a second claim. The Particulars of Claim alleged that the defendant had carried out 22 acts against the claimant, amounting to harassment under the 1997 Act.

8. On 3 May 2019, the appellant applied to strike out the respondent's second claim under CPR 3.4(2)(a), (b) and (c). The judge heard the application on 5 September 2019 and gave an ex tempore judgment on the same day.

9. The claimant's position before the judge was that the defendant had breached the terms of the schedule to the Tomlin order - only days after it had been agreed - by sending emails about the claimant to more than one person with a view to undermining her reputation. The defendant's position was that she had not breached the terms of the schedule. The transcript of the hearing shows that the judge asked the claimant:

> "You did not issue an application to lift the stay relating to the Tomlin order, as you could have done, saying, 'I apply to lift the stay because the schedule has been breached'? You have chosen to issue fresh proceedings?"

The claimant agreed that she had not filed an application, explaining that she was unfamiliar with civil procedures. She said:

> "What I would say is rather than striking me out, it would surely be the more proportionate and fair response to allow me to remedy any deficiencies in my drafting, or in my technical approach. Striking out would seem, in the circumstances of this case, in my submission, a fairly harsh remedy."

10. The claimant explained that she had made it very clear to the defendant after the compromise of the first claim that, if there were to be any repetition of the behaviour that had caused her concern, she would return to court. She thought that the sensible way of returning to court was to file a second claim which included material in the first claim, as this had not been adjudicated upon by a court.

11. Mr Gold emphasised to the judge that the claimant had neither filed an application form nor submitted evidence to support the lifting of the stay. He submitted that under the Civil Procedure Rules the claimant ought to have applied for the stay to be lifted. No special indulgence should be granted to a litigant in person simply because she had not been aware of the correct procedural step to take.

12. Having heard the parties' submissions, the judge put to Mr Gold that he was troubled by allegations T – V and asked why those allegations should be struck out. Mr Gold

submitted (among other things) that allegations T to V were not adequately particularised. The judge put to Mr Gold that the precise time, date, subject and wording of the emails which formed the basis of allegations T – V had been pleaded, and said to Mr Gold that he regarded the allegations as serious. It appears from the transcript that, on behalf of the defendant, Mr Gold did not accept that that was the case.

13. In his judgment, the judge concluded that most of the allegations contained in the second claim should be struck out on the grounds that they were raised in the first claim or were an elaboration of allegations made in the first claim. It would be an abuse of the process of the court to seek to litigate them again. In the alternative, the claimant was estopped from raising those issues again.

14. Nevertheless the judge held that allegations T to V were three new allegations, which had not been included in the first claim and which could, if found proved at trial, amount to harassment under the 1997 Act.

15. The judge continued:

> "11. The question is whether the second claim should be allowed to proceed with the new allegations or whether the new allegations should be added to the first claim by way of amendment and the stay lifted. It seems to me that it is undesirable for there to be a multiplicity of proceedings and that the new allegations should be added to the original proceedings, and the stay lifted, so that the new allegations can be adjudicated upon justly and at proportionate cost.
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> 12. Counsel for the [Defendant] objected that the Claimant had not said that she wishes the stay on her first claim to be lifted and her first claim to be amended to include the allegations at [T to V]... I gave Counsel for the [Defendant] an opportunity to address me on this course of action. In my judgment, the central finding of the Court is that the allegations raised by the Claimant at [T to V]… should not be struck out and it is proportionate that they are dealt with in the first claim. It was always obvious that if any of the allegations in the second Particulars of Claim were not struck out, either the second action would continue, limited to those allegations, or the stay in the first action would be lifted and the Particulars of Claim amended to include the new allegations".

16. For these reasons, the judge lifted the stay on the first claim, granted permission to the claimant (in effect) to move allegations T to V from the second to the first claim, and struck out the remainder of the second claim.

17. After judgment had been given, Mr Gold applied for permission to appeal on the grounds that the judge had lifted the stay of his own motion without an application from the claimant. The only live issue before the judge was the defendant's application to strike out the second claim. Mr Gold submitted that he had not had an opportunity to take instructions or to make submissions on other matters.

18. The judge then asked Mr Gold to make any submissions that he wished. Mr Gold asked for time to consider his submissions and take instructions. The judge eventually rose for this purpose. When the hearing resumed, Mr Gold submitted that it was not fair for him to make submissions "on the hoof, as it were, in a matter of moments." The correct course was for the claimant to apply for the stay to be lifted in relation to the terms of the schedule but that the substantive claim should not be restored. Mr Gold then continued with his application for permission to appeal, which was refused by way of a short ruling.

19. Mr Gold asked for the costs of the hearing as the defendant was the successful party. The judge took the view that the defendant had been partially successful as allegations T to V remained extant. He ordered that the claimant should pay half the defendant's costs which he summarily assessed as £2,500. Given that the defendant's costs – as set out in the schedule provided to the judge - were nearly £6,000, Mr Gold asked the judge to reconsider. He refused.

The effect of the Tomlin order

20. So far as relevant to this appeal, the effect of a Tomlin order is that a claim is compromised on scheduled terms. Further proceedings in the claim are stayed except for the purposes of carrying those terms into effect. The effect of a stay is not equivalent to a discontinuance: the stay may be removed if "proper grounds" or "good cause" are shown (*Cooper v Williams* [1963] 2 QB 567 at 580 and 582).

21. In deciding whether proper grounds or good cause are shown, it is necessary to consider all the circumstances of the case (*Hollingsworth v Humphrey*, Court of Appeal, 10 December 1987, per Fox LJ). However, in considering the situation as between the parties, I shall follow the approach of Fox LJ in *Hollingsworth* as applied by the Court of Appeal in *Wagstaff v Colls* [2003] EWCA Civ 469; [2003] C.P. Rep.50, para 46:

> "The first question, it seems to me, is the meaning of the agreement reached between the parties. That agreement, I think, consists not only in the scheduled terms of the compromise but includes the provision for a stay itself which is an integral part of the compromise.
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> The wording of the order is that 'all further proceedings in this Action except for the purpose of carrying the said terms into effect be stayed' . As between the parties, therefore, it seems to me that, while the action is not discontinued or dismissed, **the bargain was that the action would not be resorted to thereafter save for the purpose of enforcing the terms**. That is the plain meaning of the language used. Moreover, it seems to me that there is no reason why the parties would have intended anything else" (emphasis added).

22. The wording of the Tomlin order in the present case shows (as in *Wagstaff*) that the parties agreed that the claim would not be revived save for the purpose of enforcing the agreed terms.

Scope of the appeal

23. By virtue of CPR 52.21(1), this appeal is not a rehearing but is limited to a review of the judge's decision. The appeal stands to be allowed only if the judge's decision was (a) wrong; or (b) unjust because of a serious procedural or other irregularity (CPR 52.21(3)).

24. By virtue of CPR 52.20, this court on appeal has all the powers of the lower court. The court has power to affirm, set aside or vary any order or judgment made or given by the lower court. It may exercise its powers in relation to the whole or part of the lower court's order.

The parties' submissions

25. There are eight, overlapping grounds of appeal which, in his oral submissions, Mr Gold advanced in four groups. First, the decision of the County Court to lift the stay on the claimant's first case, settled by way of the Tomlin order, amounted to a serious irregularity because there had been no application before the judge to lift the stay. The judge had lifted the stay without giving the defendant an opportunity to make submissions about this course of action - which was unfair. To the extent that the judge had excused the claimant from filing an application form supported by a witness statement, he had made an error of law: unrepresented litigants are not entitled to any greater indulgence in complying with the Civil Procedure Rules than represented parties (*Barton v Wright Hassall LLP* [2018] UKSC 12, [2018] 1 WLR 1119, paras 18 and 41-42; *R (Kigen) v Secretary of State for the Home Department*, Practice Note, [2015] EWCA Civ 1286, [2016] 1 WLR 723, paras 14- 15).

26. Secondly, it was unfair that the judge had lifted the stay when he had heard no evidence on whether the terms of the schedule of the Tomlin order had been breached. He had erred in principle in lifting the stay because the effect of the Tomlin order was that the first set of proceedings came to an end, save for the implementation of the terms of the schedule. Thirdly, the judge had failed to give adequate reasons for lifting the stay.

27. Fourthly, in so far as the defendant was the successful party in the only application properly before the judge, he had failed to exercise his discretion lawfully in awarding the defendant less than her full costs. There was no proper reason for departing from the usual rule that a successful party should recover his or her costs (CPR 44.2(2)(a)). Nor did the judge carry out an adequate summary assessment.

28. The claimant in her written and oral submissions said that she had believed that the defendant's breach of the agreement made on 25 March 2019 meant that she would be able to pursue those allegations which had not been heard by a court. If she were wrong about that, she sought to rely upon those allegations that post-date the agreement. Given the serious and persistent misconduct alleged against the defendant over time, which had involved the claimant's teenage daughter, it would be wrong and unfair to allow procedural difficulties to stand in the way.

29. If the first set of proceedings cannot be revived, she would be happy to rely instead on the second set or will draft a third set. This is not a dispute between two commercial parties but between two individuals where one party is seeking the protection of the

court for herself and a child. She was seeking a sensible and proportionate way forward. While recognising that procedural rules stand to be applied to litigants in person, the cornerstone of the CPR is fairness between the parties. The defendant should not be permitted to take procedural points for the purpose of deterring the claimant from presenting allegations T to V in court. When considering the costs of the hearing before the judge, I should take into consideration that three significant allegations survived in the second claim.

Analysis and conclusions

30. I have a good deal of sympathy for the judge. He endeavoured to reach a just and proportionate outcome in relation to new allegations against the defendant which arose only days after a Tomlin order had ostensibly settled the parties' obligations to each other. He was justified in refusing to strike out the new allegations and was correct to seek a proportionate procedure for the trial of allegations T to V. However, in my judgment, he made an error of law in reviving the first claim beyond the claimant's right to have breaches of the schedule to the Tomlin order considered by a court. In taking such a course, he did not give effect to the parties' agreement that the first claim would not be revived save for the purpose of enforcing the terms of the schedule. No other point fell to be re-opened.

31. The effect of the judge's error is that all the allegations in the first claim would advance to trial. It is possible that this is not what the judge intended but, on a fair reading, his judgment and his order have that effect. The appeal will be allowed in order to correct this error.

32. As for the second claim, the allegations covered by the Tomlin order could not be revived by the side wind of a fresh set of proceedings: the judge was right to strike them out.

33. That leaves allegations T to V which (i) formed no part of the first claim; and (ii) were not struck out. Mr Gold submitted that, as the claimant had not filed a cross-appeal, I was constrained by the discrete part of the judge's order by which the second claim was struck out. As allegations T to V could not attach themselves to a struck-out claim and were irrelevant to anything in the Tomlin order, the claimant could only seek relief on those allegations by lodging a third set of proceedings.

34. I reject Mr Gold's approach. He cites no authority for the proposition that this court, having decided that the judge fell into error in relation to part of his order, has no power to vary other parts without a respondent seeking and obtaining permission to appeal (CPR 52.3 and 52.13). The assertion that I cannot vary a part of the judge's order without a cross-appeal does not take account of the provisions of CPR 52.20(2) which empower an appeal court to vary the order of the court below. In my judgment, that power is wide enough to encompass those matters which are consequential to a successful appeal and which are necessary in order for the court to do justice in the appeal which is before it. Mr Gold's approach would have the unjust outcome that three serious allegations would not be examined or scrutinised by a judge unless the claimant lodged a third claim.

35. Nor can the defendant realistically be prejudiced by the absence of a cross- appeal. It ought to have been plain to the defendant at all times that, if the court below made an

error, this court would consider those consequential matters that it considered necessary to achieve a just outcome. The Respondent's Notice itself makes plain that, should the appeal succeed, the claimant would ask the court to revive the second claim as a vehicle for the trial of allegations T to V. The defendant suffers no prejudice by such an outcome and Mr Gold did not (when I asked) elucidate any prejudice beyond the continued existence of proceedings against the defendant with the risk of an adverse outcome.

36. I shall therefore vary the judge's order so that the second claim is struck out save for allegations T to V. If I do not take such a course, the allegations which troubled the judge will fall away – which is the opposite of what the judge correctly decided should happen to them.

37. In the circumstances, it is not necessary for me to consider the defendant's other grounds of appeal relating to the Tomlin order. I would not have allowed the appeal on those grounds which suggest that the claimant ought to have filed an application form in relation to restoring the first set of proceedings. The claimant did not need permission to apply to enforce the terms in the schedule: she already has permission under the order and therefore has a "summary method of ensuring compliance" (*Hollingsworth v Humphrey*, above). However, that was not Mr Gold's concern before me. His concern was that the judge had restored the entirety of the first set of proceedings outside the terms of the order. There is a lack of logic in criticising the claimant for failing to lodge an application which on the defendant's own case was bound to fail.

38. Nor is it necessary for me to deal with the issue of fairness and whether Mr Gold ought to have been granted some further notice during the hearing that the judge was considering lifting the stay. It seems to me that the matter was not put squarely to Mr Gold before (as opposed to after) the judge gave his judgment but the more significant point is that the judge made an error of law in relation to the effect of the Tomlin order – not that the defendant did not have a fair hearing. The grounds relating to whether the judge gave adequate reasons are also superfluous.

39. As for the costs order, the judge regarded the defendant as the successful party in so far as he made a costs award against the claimant. He was entitled as a matter of his discretion to reduce the amount to be paid, in order to reflect the fact that the defendant had not wholly succeeded: three allegations were not struck out (CPR 44.2(4)(b) and 44.2(6)(a)). The question for me is not whether I would have taken a different decision but whether the judge has made an error of principle or exceeded the ambit of his discretion.

40. Mr Gold submitted that the judge's order was designed to punish the defendant. I discern nothing in the transcript to support that proposition. He submitted that the judge had one application (the defendant's) before him and ought to have awarded full costs as that application had succeeded. However, that submission fails to acknowledge that three allegations were not struck out.

41. The judge's reasons for reducing the costs award were bound up with his decision to revive the first claim, which I have found involved an error of law. Even so, reading the transcript and taking into consideration the role of allegations T to V at the hearing, I am not persuaded that a 50% reduction was wrong.

42. It is not apt for this court, on appeal, to apply a mathematical approach by calculating the proportion of allegations struck out as against those which were allowed to remain. Contrary to Mr Gold's submission, allegations T to V cannot be described as incidental to the proceedings before the judge. It is plain from reading the transcript that unsuccessful submissions about allegations T to V took up court time and were the focus of a substantial part of the hearing. In these circumstances, the judge was entitled to reduce the defendant's costs award by 50%

43. However, it is not clear why, having told the parties that the defendant would be awarded half her costs, the judge then awarded a lesser sum. I propose, therefore, to vary the judge's order so that the claimant will pay half of the defendant's costs below.

44. In summary, the judge made errors in reviving the first claim beyond the effect of the Tomlin order and in not awarding the claimant half her costs as he had announced. To this extent, this appeal is allowed.