Neutral Citation Number: [2021] EWHC 2823 (QB)

Appeal Ref: M21Q423
County Court Ref: F14YY593

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
HIGH COURT APPEAL CENTRE MANCHESTER

1 Bridge Street West
Manchester
M60 9DJ
21st October 2021

Before :
MR JUSTICE FORDHAM

- -

Between :

MR UMAR ALTAF **MR ZEESHAN AURANGZEB** **MR FAIZAN AURANGZEB**	**Appellants**
-and-	
CLOSE BROTHERS LTD	**Respondent**

- -
- -

The Second Appellant in person
(assisted by Colin Sinclair as a McKenzie Friend)
The **Respondent** did not appear and was not represented

Hearing date: 21.10.21
Judgment as delivered in open court at the hearing

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, from use of the Judge's voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM :

Introduction

1. This is the reconsideration of an application for permission to appeal, following refusal on the papers by Robin Knowles J on 29 April 2021. Having looked at this matter carefully and afresh, I am not going to give permission to appeal in this case. I take the unusual step of saying that right now. I appreciate that that is bad news for the Appellants and for the Second Appellant who has appeared and has assisted me properly and courteously. I can also say, immediately, that there is no further cost implication for the Appellants of not succeeding in getting permission to appeal at this hearing. I hope by announcing the result straight away I am minimising stress and anxiety for anyone who would otherwise be sitting listening and thinking "have I won?" I consider it better in this case – in circumstances of which I have been made aware – to avoid the build-up of suspense. It is now my duty to give my reasons for the conclusion that I have reached. That is the purpose of this judgment, which will also be made available in writing. I think it important that I give those reasons with some care. The hearing before me was in-person. The proceedings involved a claim by the Respondent under 2016 guarantees and indemnities, given by the Appellants in order to secure monies due under a lease agreement entered into by the Respondent with a company of which the Appellants were directors. The lease agreement had involved the hire of two commercial vehicles to the company. The Respondent had contended from the date of demand in July 2019 that a sum of £22.2k was due and owing. The Appellants disputed liability and made a counterclaim alleging overcharging of £9,510.56. The proceedings were allocated to the fast track.

2. On today's application I have needed to consider afresh whether there is in this case an appeal which crosses the relevant threshold for permission to appeal. One of the points made in the skeleton argument filed and relied on by the Second Appellant for today's hearing is that at the time of Robin Knowles J's refusal of permission to appeal on 29 April 2021 the transcript of the proceedings before the Judge – to which I will come – were not available. I have that document and the other materials in the case, and I have considered them in looking afresh at whether there is any viable appeal. Another of the points made in the skeleton argument is that the test is whether the prospects on appeal are fanciful: that is, whether there is a real prospect of success. The Second Appellant emphasises in his arguments that a substantive appeal hearing is the best forum for ventilation of the issues, fully protecting rights of access to the court, and that a respondent is protected through costs orders in a case in which an appeal ultimately fails. He has strongly invited the Court to allow this case to proceed to a substantive appeal hearing.

The hearing before the Judge

3. The case was listed for trial, as a case in the floating list, at the County Court at Manchester for 24 November 2020. On that day, Counsel (James Hannant) appeared for the Respondent. The Second Appellant was present at court at the start of the court day and there was communication between the two of them. A judge was found (HHJ Evans) ("the Judge") who was able to take the trial. It was called on. The hearing began at 12:00 noon. There is before me the transcript which records what was said. Mr Hannant informed the Judge that the Second Appellant had been at court "this morning", that they had been in discussions, but that "somewhat surprisingly, with no

apparent reason, he has disappeared, which is frustrating because those discussions were going fairly well". As to the timing of that departure, Mr Hannant said to the Judge that the Second Appellant had left around an hour earlier. He then raised with the Judge two possibilities. One was making a phone call to try and contact the Second Appellant. The other, a course which he invited, was an adjournment to start the trial at 2pm. The Judge, observing that the Second Appellant "does not seem to have informed any of the court staff that he's got a reason… why he needs to leave or that he is planning to return", decided that in all the circumstances it was appropriate to proceed to hear the trial there and then.

4. Mr Hannan, in opening his case, informed the Judge that the Respondent had encountered an issue, "this morning", namely that the sum sought in the proceedings appeared to be incorrect, which he was obliged to disclose to the Court. He explained that the true figure was lower, that the total value of the claim was £9,370.17, and that the claim had thus been "overstated". Mr Hannah then called a witness (Mr Robert Richardson) who gave evidence, including giving an explanation of what he said was the correct calculation. The Judge asked Mr Hannan whether there was anything else that she needed to look at, given his "duty to the Court as being only on one side and nobody on the other side". Mr Hannan said there was "nothing further than my duty to identify the error in the accounting, nothing beyond that". Mr Hannan then offered to address the Judge further, if she needed any further assistance, which she indicated that she did not. The Judge then gave a short judgment. In it, she explained that the Second Appellant had attended and booked in at court; that he had left at around 11 o'clock, after which Mr Hannan had not seen him, nor had the court staff; that multiple tannoys had been put out for him to which there had been no response; and that he had not given any message to the usher or anybody else about an urgent need to leave nor any indication as to whether he was coming back. The Judge explained that in those circumstances she had decided to proceed and hear the trial in his absence. She then explained that she was satisfied as to the correct amount owing, and that she was dismissing the counterclaim, firstly because no defendant was present to pursue it and secondly because she accepted Mr Richardson's evidence of there being the revised balance owing to the claimant. She entered judgment in the revised sum of £9,370.17.

5. The Judge then turned to the question of interest which she allowed (£1,047.40), and the Respondent's application for costs, which she allowed and assessed at £4,685.00 making reference to the originally demanded and claimed sum and the different and much reduced recovered sum. By the time of the discussion on interest and costs the Second Appellant had reappeared and had been brought into the court room. The transcript records what the Judge told him. She said she had just finished dealing with the case; that he had not been there when the trial was called on; and that he had not answered any of the tannoys made by the court staff in the half an hour between 11:30 and 12:00 noon. The Second Appellant said that he had been on the ground floor of the court building trying to speak to the other two defendants. The Judge asked for Mr Hannan's submission on "what should happen now?". His submission was:

> ***The order is made unless an application to set aside would be the right course. Hopefully, that would be unnecessary because, as Your Honour has decided, the liability is rather lower than that sought and it may be that the order made is acceptable to the defendants.***

The Second Appellant then asked the Judge whether it was "too late to submit my argument statement". The Judge said this:

> ***Yes, too late, I have done it. The court staff tried to tannoy you for half an hour. You did not reply and so I have dealt with the case. There is a judgment against all 3 defendants for £9,370.17, plus the interest of £1,047.40, and you have to pay the claimant's costs of bringing the claim, which I have allowed at £4,685. That is the judgment. If you want to try to change that, then what you will have to do is make an application to try and set aside my order on the basis that you are not here when I dealt with the trial.***
>
> ***But, to do that, you have got to persuade somebody, first of all, that you had a good reason for not being here when I started the trial and, secondly, that you would have had real prospects of succeeding in the case if you had been here when I started the trial. If you want to do that, then you and your other defendants need to make an application with a form from the court office to do it. It may be that you decide the thing to do is to speak to the claimants about the figures that in the end they won, because it is quite a lot less than they were wanting originally from the three of you. But you will need to go away and think about that.***

The application to set aside judgment

6. By an application dated 4 January 2021 the Appellants applied to set aside the judgment and order. In the meantime, there had been correspondence between the parties, to which reference was made in the application. The correspondence included the following. On 26 November 2020 the Second Appellant emailed the Respondent's solicitor stating: "on Tuesday at the Court your barrister told us (after we missed the hearing) that you would write to us explaining what the Judge's decision was. Can you please now do that, so we know where we stand". In response, a letter explaining what had happened, accompanied by documents showing how the corrected figure had been calculated, was written by the Respondent's solicitor on 11 December 2020. The Second Appellant then sent a further email on 15 December 2020, criticising the way in which the Respondent had approached the case, to which the Respondent's solicitors replied on 23 December 2020. On 29 December 2020 the Second Appellant emailed to say that he was now going to make an application to the Court to set aside the order. As I have explained, the application was issued on 4 January 2021. A skeleton argument, written by Martin Budworth of Counsel (dated 15.3.21), was filed in support of the application. The Respondent was represented by Mr Hannant, who had filed a skeleton argument (12.3.21). The application came on for a telephone hearing on 17 March 2021 in front of District Judge Iyer ("the District Judge"). The District Judge refused the application, giving a judgment in which he concluded that the Appellants had not satisfied the first of the three mandatory preconditions in CPR 39.3(5), namely that they had not "acted promptly when [they] found out that the court had exercised its power to… entered judgment or make an order against [them]". I shall return below to the District Judge's reasons.

The application to this Court for permission to appeal

7. By a notice of appeal dated 5 April 2021 the Appellants sought permission to appeal against the District Judge's decision of 17 March 2021 and, in the alternative, against the Judge's decision of 24 November 2020. Permission to appeal was, as I have explained, refused on the papers by Robin Knowles J on 29 April 2021. That was on the basis that the District Judge's conclusion that there was a failure to act "promptly" was a conclusion that was properly and reasonably open to the District Judge to make and that there was no real prospect of success for the proposed appeal. On 25 May 2021 the Appellants requested oral reconsideration of permission to appeal pursuant to CPR 52.4(2). Meanwhile, and "under protest", on 1 April 2021 they had paid the sums outstanding in full. They filed (4.5.21) a Grounds of Appeal document, which has been

amended (29.9.21). Directions for today's hearing had been made by Soole J (16.6.21). The Appellants also filed a chronology and then the skeleton argument. The Respondent's solicitors had made representations in writing in a letter (15.10.21).

Discussion 1: The challenge to the Judge's decision

8. The Appellants' notice of appeal (5.4.21) includes an application, substantially out of time, for permission to appeal the Judge's decision (24.11.20). The grounds of appeal and the skeleton argument seek in essence to impugn the Judge's decisions: in failing to restart the trial after the Second Appellant's arrival, notwithstanding the adjournment to 2pm and/or the attempted phone contact invited by the Respondent's Counsel, described in the skeleton argument as sensible, reasonable and practical, which it is said that the Judge "dismissed almost out of hand"; the Judge's decision to enter judgment in circumstances of the "high inflation" of the claim, an overstatement which called for "scrutiny", which and whose implications – including on the question of costs – it is said that the Judge failed appropriately to address or consider. Complaint is also made of the fact that – as a Judge taking a floating trial – she had not pre-read the papers and that she did not use the time at the hearing to read the key documents including a skeleton argument which the Appellants had filed. That, as I see it, is the essence of the challenge on this part of the case, as put in the grounds of appeal, including the amendments, and in the skeleton argument.

9. I have considered all of these points. But there is no viable appeal – having a real or realistic prospect of success – by way of a freestanding challenge to what the Judge did. Express provision is made in the rules (CPR 39.3(3) and (5)) to address the situation where a party does not attend and the court gives judgment against that party. Such a judgment can be set aside if, and only if, the party in that position satisfies each of three preconditions in that rule: (i) prompt action; (ii) good reason for non-attendance; and (iii) a reasonable prospect of success at the trial. It would cut across that express scheme, and those clear preconditions, if a party in that position could simply seek to appeal the judgment on the basis that it is said to be wrong, whether substantively or procedurally, and with permission to appeal then being granted provided that there is a sufficient prospect of success. As the commentary in the White Book (2021 page 1343) explains, failure to attend trial means "a failure to attend by the time the judge due to try the case decides they cannot wait any longer before commencing the hearing". That was the position in this case. It is no answer to that point that the Second Appellant was elsewhere in the building. Having checked in and having had discussions with the Respondent's counsel, he then went to a different floor without telling counsel or the staff with whom he had checked in where he was going. As the White Book commentary also explains: "where a party does not attend a hearing, and the Court refuses an adjournment and gives judgment or makes an order against them, it is an abuse of process for the party who failed to attend to appeal against the refusal of an adjournment where they also have the opportunity to apply to have the judgment or order set aside under rule 39.3(3)". That is this case. There is therefore no basis for granting permission to appeal, still less out of time, against the decision of the Judge. Rule 39.3 was the route under the rules and it is the District Judge's application of that rule which necessarily forms the prism for any viable appeal in this case. The question is whether the Appellants are able to impugn the decision of the District Judge in the application of rule 39.3(5), a rule which he – plainly correctly, and notwithstanding Mr Budworth's written and oral arguments to the contrary and notwithstanding the

submissions made to me – recognised was engaged by the circumstances of the Second Appellant's absence from the trial hearing. The circumstances in relation to absence are not irrelevant. Rather, they go to one of the three preconditions under rule 39.3 ("good reason for not attending the trial"). It was those preconditions with which the District Judge was dealing. If there is a viable appeal in this case it can only be by challenging the District Judge's decision in the application of rule 39.3. I turn to that.

Discussion 2: The challenge to the District Judge's decision

10. As I have already recorded, the District Judge found against the Appellants on the basis of the first of the three preconditions in rule 39.3: prompt action. On that basis, the other points did not arise and he did not address them. Indeed, given that the promptness point would of itself be fatal, and given the conclusion to which he came, he did not hear argument on the substance. The District Judge was clearly right to regard the promptness precondition as a necessary trigger to his jurisdiction to set aside the judgment. Mr Budworth's arguments to the effect that rule 39.3 was not engaged were, and remain, unconvincing and the District Judge was clearly right – beyond argument – to reject them. So, promptness was a precondition under the rule which the Appellants needed to satisfy. That means that before this Court, they would need – before any appeal could be viable – to show that the District Judge was arguably wrong in his approach to that question of promptness. I said earlier that I would return to the District Judge's reasons. The District Judge's starting point was that the trigger date under rule 39.3 for the duty of promptness to arise was 24 November 2020 – the date on which the Appellants found out that they had lost – and not some subsequent date. That conclusion by the District Judge was plainly, and beyond argument, correct. The rule states, in terms, that the duty on the applicant seeking to set aside judgment is a duty to act promptly "when he found out that the court had exercised its power… to enter judgment or make an order against him". The Appellants in this case had clearly "found out" about the judgment and the order on 24 November 2020 when the Second Appellant entered the court room and the Judge explained in terms, which I have already set out, the judgment which she had entered against the Appellants and the order which she was making against them.

11. In addressing the question of promptness, the District Judge considered the case law related to promptness and rule 39.3. The case-law is discussed in the commentary in paragraphs 39.3.7 and 39.3.7.1 of the now 2021 White Book. Mr Budworth, for the Appellants, had argued by reference to cases such as Pereira [2011] EWCA Civ 241 and Mohun-Smith [2016] EWCA Civ 403 that the Court should not be "very rigorous" on the issue of promptness. Mr Budworth had also pointed out (as the White Book commentary itself explains) that in Watson [2002] EWCA Civ 1875 the Court of Appeal was satisfied in relation to promptness where the application had been "issued six weeks after judgment". Mr Budworth specifically emphasised the exchanges of correspondence between the parties, to which he drew the District Judge's attention in the bundle. He submitted that the Appellants were to be "forgiven, before launching into an application" for "waiting for the claimant's courtesy to fill the defendants in on exactly what happened. Because of course what happened and what was said might be material to the application". He further submitted that the delay was "entirely forgivable, because if somebody is going to move an application of this nature, they would inevitably want to be appraised, so far as they are able to be appraised, by the claimant responding [about] what was said that may have been material at the trial

which has led to the disposal in the claimant's favour, but at a significantly different figure [than] was being claimed in counsel's skeleton argument on the day of trial". Mr Budworth also referred, in relation to promptness, to the pandemic and the Appellants position before the Judge as litigants in person. The District Judge was not, as he explained, persuaded by those submissions. He held that in all the circumstances the application should have been made within about "3 weeks". He emphatically rejected the argument based on the Second Appellant having "wanted to know why the claimant did not get the full amount before he could make an application". He concluded that 6 weeks, in the factual circumstances of the present case, was a failure to act "promptly". In those circumstances, he held that the application could not succeed, and he dismissed it.

12. As I see it, the essence of the Appellants' challenge, on this part of the case, is as follows. The skeleton argument submits that the District Judge overanalysed or incorrectly analysed the position. As the grounds of appeal had put it, the legal arguments of Mr Budworth had set out the relevant law, procedures and court rules and the District Judge did not correctly apply the law or procedures to the circumstances of the case, in the light of the arguments advanced. It is said that the District Judge was wrong or in error in failing properly or adequately or reasonably to consider that the time taken in the exchanges of correspondence by email were reasonable and sensible, especially given the substantial difference between the judgment amount of £9.3k and the claim amount of £22.4k, and – as it is put, in brackets, in the grounds of appeal – "(especially since HHJ Evans had expressly suggested we do communicate with the claimant's lawyer before deciding whether it might be sensible to try to set aside)". Emphasis is placed on the unfairness, in not having the chance to present the defence and counterclaim at a new and proper trial, questioning the claimant's evidence. Emphasis is also placed on what is said to be the seriousness of the Claimant's carelessness and/or misconduct in having put forward what the skeleton argument describes as a grossly inflated claim and only having corrected it at the hearing of the trial. The skeleton argument submits that the District Judge gave undue weight to procedure and failed to weigh the modest delay against matters of substance, including the implications of the overstatement of the claim. That is the essence of the challenge as it is put in the grounds of appeal, the amendments to those grounds, and the skeleton argument.

13. I will start with a point which was made in writing in the grounds of appeal, which grounds were adopted at this hearing. It concerns the expressed suggestion from the Judge about communication with the claimant's lawyers. This is the point which was put in brackets in the Appellants' grounds of appeal: "especially since HHJ Evans had expressly suggested we do communicate with the claimant's lawyer before deciding whether it might be sensible to try to set aside". As I have already recorded, the transcript of the proceedings before the Judge records the Judge as having said to the Second Appellant: "It may be that you decide the thing to do is to speak to the claimants about the figures that in the end they won, because it is quite a lot less than they were wanting originally from the three of you. But you will need to go away and think about that". This was said in the context of the recourse being to apply to set aside. I have also recorded what was said by Mr Hannant. The Judge did not refer to the requirement of promptness. In my judgment, nothing that was said – or not said – by the Judge served as an encouragement of any material delay on the part of the Appellants. The Judge was inviting the Appellants to "talk" to the Respondent's representatives, and to

"think" about what they wanted to do. But she was not telling them to delay, still less materially to delay, before issuing an application to set aside. So, the Appellants cannot fairly attribute their lack of promptness to what the Judge had said. Taking steps to "talk", and to "think", are not inconsistent with also taking steps "promptly" to take the first act in seeking the recourse available. Indeed, if the Appellants had felt somehow 'led up the garden path' by what the Second Appellant had been told by the Judge – and this was something which did not need a transcript in order to raise it, since it was said in the Second Appellant's presence – that would have been at the forefront of the arguments on promptness made in writing and orally by Mr Budworth. No complaint that 'we were following what the Judge told us to do' featured in Mr Budworth's written or oral submissions on the question of promptness and in relation to the writing of the correspondence. That means the District Judge can hardly now be criticised on this basis. But it also means that this cannot convincingly be said to have been the reason why the Second Appellant acted as he did. In fairness to the Second Appellant, this was not a point emphasised in the skeleton argument.

14. The requirement of promptness is a clear and express precondition which appears on the face of the relevant rule. Whether the requirement of promptness is met calls for an evaluative conclusion in all the circumstances. As the case-law discussed in the White Book commentary explains: what constitutes promptness is very fact sensitive (Pereira); facts and circumstances in relation to a litigant in person may go to an assessment of promptness but will only operate close to the margins (Tinkler [2012] EWCA Civ 1289). As is also explained, the 6 weeks taken in Watson constituted sufficient promptness on the facts of that particular case, given its complexity: as a case involving "a considerable amount of documentation". That is an illustration of a fact-sensitive evaluative judgment, given the particular nature of a document-heavy case. The District Judge was clearly – beyond argument – entitled to regard the present case as not being such a case. The District Judge considered the delay, the circumstances in which it had arisen, and the correspondence which had been written. He made clear that he had considered the circumstances of the case, including the personal circumstances of the Appellants. In my judgment, it is not arguable with any real prospect of success that the District Judge adopted an overanalytical or incorrect analysis, or that he was 'over-rigorous' or 'unduly-rigorous'. His conclusion is not rendered erroneous by the facts that the Appellants were litigants in person, something which as I have explained can make a difference 'at the margins'. The District Judge was plainly, in my judgment, entitled to conclude that the delay in making the application was not excused by the desire to seek clarification. In that regard, there is this further point. The three weeks referred to by the District Judge in the context of promptness would have been around 15 December 2020. The Respondent's detailed letter of explanation was provided on 11 December 2020. The Second Appellant chose to engage in further correspondence on 15 December 2020 rather than issuing the application at that point. It follows in my judgment – beyond argument – that, even if there were good reason for not issuing the application until having received a response, that would still not excuse the failure to file the application at that stage. It would not excuse the delay beyond the 3 weeks referred to by the District Judge. It would not and could not undermine his conclusion on lack of promptness.

15. Stepping back, I cannot accept that it is arguable, with any real prospect of success, that the District Judge's decision was wrong: whether on the basis of giving undue weight to procedure, or undue weight to a modest delay; nor in the context of the substantive

claim including the overstatement of the claim; nor on any other basis. I can see no real or realistic prospect of success in the Appellants being able to overturn at a substantive appeal hearing the District Judge's evaluative conclusion as to promptness in all the circumstances. I can see no arguable error of law, error of approach or error as to that conclusion. That means the proposed appeal could not succeed. In those circumstances, having looked at the matter carefully and afresh, I have in fact reached the same conclusion as Robin Knowles J. In my judgment, the District Judge's conclusion that there was a failure to act "promptly" was one which was properly and reasonably open to him, and that there is no real prospect of success on the proposed appeal. The Respondent has not attended at this hearing and there will be no order for costs.

21.10.21