

Neutral Citation Number: [2013] EWHC 2537 (Ch)

Claim No: CH/2013/0190

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
Fetter Lane
London EC4A 1NL

Wednesday, 17 July 2013

BEFORE:

HIS HONOUR JUDGE PURLE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

BETWEEN:

FRENCH & ANOTHER

Claimants/Appellants

- and -

SAVELIEVA

Defendant/Respondent

MR GABRIEL BUTTIMORE instructed by Bates Solicitors appeared on behalf of the
Claimants/Appellants

MR EDWARD PETERS instructed by Brown Rudnick LLP appeared on behalf of the
Defendant/Respondents

Approved Judgment
Court Copyright ©

Digital Transcript of Wordwave International, a Merrill Corporation Company
165 Fleet Street, 8th Floor, London, EC4A 2DY
Tel No: 020 7421 4046 Fax No: 020 7422 6134
Web: www.merrillcorp.com/mls Email: mlstape@merrillcorp.com
(Official Shorthand Writers to the Court)

No of Folios: 28
No of Words: 2,028

J U D G M E N T

THE JUDGE:

1. This is an application for permission to appeal, with the appeal to follow if permission is given. The appeal is from a decision of Mr Simon Brilliant, sitting as a deputy adjudicator to Her Majesty's Land Registry. He made an order on 27 March 2013 requiring production of photographs, negatives (and other similar materials in the case of digital photographs) for the purpose of instructing a photographic expert to inspect them.
2. The application arose in the following circumstances. The Land Registry proceedings began back in 2010 when the appellants, Mr and Mrs French, claimed a possessory title to a small strip of land otherwise registered in the name of the defendant, Dr Savelieva. The matter came to a hearing in April 2012. There was not enough time for that hearing to be completed and the hearing was adjourned to 27 and 28 November 2012. During the course of those proceedings Dr Savelieva had made a number of witness statements and in each of them she had cast doubt on the authenticity of photographs produced by Mr and Mrs French. Those doubts were expressed in witness statements made in January 2012, March 2012 and latterly in October 2012. Despite those doubts and other orders being sought and made in relation to disclosure, no application of the kind made in March 2013 was made. The oral evidence was all heard. There was some cross-examination of Mr and Mrs French in relation to the photographs, but it was not put to them that they were in any way fabricated or interfered with. That is not surprising as there was no material upon which counsel who appeared for Dr Savelieva, Mr Peters, could properly have put that to either Mr or Mrs French. What is more, Mr Peters accepts that he could not put that to them today. This is why the March 2013 order was needed, as the proposed inspection by the expert might reveal some basis for Dr Savelieva properly to advance a positive case.
3. The order provided for the expert's report to be filed and served by 10 May 2013. If Dr Savelieva did not intend to rely on it, she was to inform the adjudicator and Mr and Mrs French by the same date. In that event the adjudicator would proceed with the preparation and delivery of his decision, which is what he was doing before the application was made. If, however, the report was relied upon, then further directions were envisaged by paragraph 6 of the order under appeal. Although Dr Savelieva had permission to file and serve an expert report, she was not given permission to rely on it. That would be for the further directions. That limitation is spelt out in express terms in paragraph 5. Dr Savelieva was also to pay the costs both of obtaining the report and Mr and Mrs French's costs of the application from the date that the claim was intimated to the date of the hearing. She was also to obtain, at her own expense, transcripts for the hearings of 27 and 28 November 2012. Provision was also made for further submissions to be made concerning the features shown in certain photographs. That is not a matter which concerns me on this appeal.
4. The application before the deputy adjudicator was initiated by a letter dated 17 December 2012. It was alleged in that letter that two photographs were different in the sense that one was a different version of the other. That was true to this limited extent: one photograph had been blown up and copied differently so as to focus attention upon what was thought to be its most important feature, namely a laurel hedge apparently running across part of the boundary between the two properties. It was said in the letter of 17 December that the new photograph (that is to say the new version of the old photograph) had not originally

been disclosed. It is now accepted that that was not correct. Both versions were disclosed prior to the trial coming on for hearing. The following assertion was also made:

"Our client is also concerned that the negative of the old photograph, which our client inspected with her solicitor of this firm ... may have not been an authentic one."

5. Other concerns were expressed as to whether the photographs were produced from the negative or from a digital copy. These very much mirrored the sort of suspicions that Dr Savelieva had already canvassed in her witness statements. Yet it was only on this occasion, on 17 December 2012, over two weeks after the closing submissions were concluded and the evidence was long since closed, that any application for examination by an expert was sought. This gives the impression that this might be the action of someone who, seeing the writing on the wall, is prolonging the dispute Micawber-like, in the hope that something might turn up. The deputy adjudicator was not of course in a position to rule definitively upon that possibility. By a further letter of 30 January 2013 Dr Savelieva's solicitors explained why the new photograph (as it was called) and the differences between that and the old photograph did not come to their client's attention until after the hearing in November 2012. Whether or not that was so, it certainly should have come to her attention because it had been disclosed before the hearing began in April.
6. The application for production to an expert came before the deputy adjudicator at a hearing, as he declined to deal with it on paper. The deputy adjudicator, as I have indicated, allowed the application. He explained that he had been working on the judgment but had stopped as soon as he had received the letter of 17 December. He heard full submissions, first from Mr Peters, whose application it was, then from Mr Buttimore, who resisted it, and there were detailed skeleton arguments before him. Mr Buttimore's primary ground of resistance was that the application was far too late. There had been, as is evident from what I have seen and been told, ongoing disputes about the ambit of disclosure, and the like. Express doubts had been cast upon the authenticity of photographs, yet no one on Dr Savelieva's side had thought it appropriate to make this application earlier
7. Moreover, between the April hearings and the November 2012 hearings, Dr Savelieva and her solicitor had inspected the photographs and negatives which became the subject matter of the application. That inspection had not prompted them to suggest that expert examination was necessary.
8. The deputy adjudicator, whilst querying why the application was made so late, did not either get or provide any answer to that. He appeared to have been persuaded by two considerations, amongst others. First, that it was very important that the losing party should not bear any resentment at the shutting out of evidence. He explained that in the following way:

"The most important person in the case is the person who loses and the most important thing in any judgment is so that the person who loses comes away knowing why he or she or it has lost, that ample reasons have been given."
9. He also drew comfort from the fact that, as he put it, at page 16 of the transcript, line 33, to Mr Buttimore: "If you are so confident, what do you have to lose?" That of course did not deal with the delay point, and was no reason for allowing an application which was not

otherwise justified. It is important in all forms of judicial proceedings that there be an orderly structure to a trial or hearing. Whilst there is no doubt that there is jurisdiction to receive evidence late, the deputy adjudicator has not (at least yet) allowed in late evidence. He has gone back to square one to consider whether or not further evidence might be let in. For that purpose there is first to be prepared a report. That report may of course be entirely exculpatory of Mr and Mrs French. It may, however, raise question marks saying that there is some evidence of something which may have gone wrong, but he cannot say what it is, or it may raise a more damning conclusion adverse to Mr and Mrs French. Whatever the report may reveal, it cannot be assumed that this will be an end of the matter. There is likely to be, unless the report is a simple whitewash, a further application by Dr Savelieva to allow further evidence in, so that the trial, which had previously finished, will be protracted indefinitely.

10. It seems to me that it was incumbent upon the deputy adjudicator to require a good reason to be shown for Dr Savelieva's delay, before giving rise to the possibility of further delay, cost and disruption that the order he made inevitably engenders. It may well be that the deputy adjudicator, having been persuaded that there was jurisdiction to make the order (which was not in dispute) equated jurisdiction with a reason for exercising his discretion, rather than requiring an answer to the question: has any good reason been shown for the delay? None was shown. The deputy adjudicator left the absence of good reason out of account. In my judgment, that led him into plain and manifest error with the result that he made an order which he could not properly have made had he taken all relevant factors, including the unexplained and unjustified delay, into account. For that reason alone, in my judgment, this appeal must succeed.
11. I should add that I am also concerned that the deputy adjudicator did not give proper consideration to the impact of litigation stress upon Mr and Mrs French, which Mr Buttimore highlighted in his submissions. The deputy adjudicator seemed to equate that with the risk of further costs being incurred. It is fair to say that, having decided to make an order, he built in certain costs safeguards and a strict timetable which would hopefully minimise the ongoing impact of delay and costs from Mr and Mrs French's perspective. However, what he did not take into account at all was the litigation stress arising from the mere fact of prolonging the litigation. It is no answer to that to say, as Mr Peters does, that Mr and Mrs French bought the proceedings before the Land Registry themselves. Claimants just as much as defendants are entitled to have their cases heard with due expedition, and fairly
12. There have been in this case some delays for which no one is to blame, but the deputy adjudicator was by his order adding to the delay and therefore to the litigation stress. Whilst he sought to minimise the further delay, it does seem to me that he overlooked the impact of litigation stress attributable to the threat of reopening the evidence and argument, which everyone must have thought had come to an end.
13. In the circumstances, the deputy adjudicator's order must be set aside. Permission to appeal is accordingly given and the appeal is allowed.