

[2019] EWHC 2882 (Ch)

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**CHANCERY DIVISION**

7 Rolls Building  
Fetter Lane  
London  
EC4A 1NL

Wednesday, 11 October 2019

BEFORE:

**MR JUSTICE MORGAN**

BETWEEN:

**NATHAN LEMAS & GEORGE SEALY**

Claimants

- and -

**WINSTON WILLIAMS & RODERICK LEMAS**

Defendants

MR RODERICK LEMAS appeared in person

**COSTS JUDGMENT**

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(Official Shorthand Writers to the Court)

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1. MR JUSTICE MORGAN: This is an application for an extension of time for appealing against an order made by Master Price on 17 December 2018. The matter came before me on the papers and, on 11 July 2019, I refused an extension of time for appealing and I indicated that if I had granted the extension of time sought, I would have refused permission to appeal on the ground that the proposed appeal did not have a real prospect of success. The proposed appellant, Mr Roderick Lemas, has asked for that decision to be reviewed at an oral hearing which has taken place today. Mr Lemas has appeared in person, but he has put in a detailed statement which addresses or seeks to address the points that had been made in the order I made on 11 July 2019.
2. The judgment which led to the order under appeal was a reserved judgment, and the reserved judgment was handed down on 17 December 2018. Prior to that date, the master had provided the parties with a draft of the judgment to be handed down. I am not clear as to precisely when the parties had that draft judgment, but the document in the appeal bundle shows that the draft was finalised on 7 December 2018, so the parties including Mr Roderick Lemas had that judgment some date between 7 and 17 December 2018, probably nearer to the 7<sup>th</sup> than to the 17<sup>th</sup>. It is also right to say that at the hearing before the master, which took place prior to 17 December 2018 and again on 17 December 2018, Mr Roderick Lemas appeared in person. The case being put was that he together with a Mr Sealy were trustees of the property which underlay this dispute, and the beneficiaries for whom they held the property on trust were Roderick Lemas's children, Nathan Lemas and his sister, Jessica. Indeed, Nathan Lemas was one of two claimants in the action, the other one being Mr Sealy, and according to the cover sheet to the draft judgment, Mr Nathan Lemas had instructed counsel, a Mr Martin Birkin. Mr Birkin appears in the history a little later, and I will refer to that in due course.
3. The dispute before the master was the taking of an account and the holding of an inquiry pursuant to an earlier order made by Mr Elleray QC sitting as a deputy judge of the High Court. Mr Elleray's order was made on 29 December 2014 following several days of a trial in July, September and November 2014. Mr Elleray directed a certain account and inquiry to be made and taken. That was what the master was dealing with. Mr Lemas in his submissions to me today has emphasised that Mr Williams, who was the accounting party, had been guilty of various acts of delay and procedural non-cooperation prior to the handing down of the judgment on 17 December 2018. However, although there was an account and an inquiry, and although Mr Williams had not fully cooperated with that matter, he essentially succeeded on the account and inquiry because when the master added up the gross income and took away sums incurred to earn that income and also took away a management allowance for Mr Williams, it turned out that the account was in deficit and was not positive, so that no sum had to be paid over to the trustees, Mr Sealy and Mr Lemas.
4. Now, that was the result on 17 December 2018, and the parties knew that result before 17 December 2018, and the parties including Mr Lemas had a full written judgment running to 15 pages giving the master's reasons for that result before 17 December 2018. On 17 December 2018 judgment was handed down and there was a hearing as to consequential matters. Mr Roderick Lemas appeared in person. No one appeared for Nathan Lemas, and counsel appeared for Mr Williams. I have been provided with a transcript of what was said by everyone on 17 December 2018, although that transcript

is certainly not a necessary transcript for the purpose of conducting an appeal of the kind which Mr Roderick Lemas wishes to present. I have also been given a transcript of a short judgment given by the master on 17 December 2018 where he explains why he was making a certain order for costs against Mr Roderick Lemas and, indeed, in the end, against Mr Nathan Lemas and Mr Sealy. So that is a short judgment on costs, and the real thrust of the appeal is not so much about what was said on 17 December in that judgment but what was said in the reserved judgment about the taking of the account.

5. The order was perfected on 2 January 2019, although everyone knew what the order would say because it had all been spelt out in the reserved judgment and in the oral judgment. At any rate the order of 2 January 2019 was available to Mr Roderick Lemas to enable him to file an appellant's notice referring to that order within 21 days from 17 December 2018. Mr Roderick Lemas did not appeal within 21 days from 17 December 2018. Instead, having asked for permission to appeal from the master and having been refused permission to appeal by the master at the hearing on 17 December 2018, he delayed, and eventually an appellant's notice was filed on 20 May 2019. That was well in excess of four months late, and it was more than five months after the judgment which was to be the subject of that appeal. Although the trustees had always been described as being Roderick Lemas and George Sealy, George Sealy plays no part in the appellant's notice. The sole appellant is Mr Roderick Lemas. Mr Roderick Lemas sought to give me an explanation for that, which I am not wholly persuaded by but I will pass over that point as it is not central to what I am going to decide today. What matters today is the delay in serving the appellant's notice.
6. I have been given a number of explanations, and I have received a number of submissions about how one should react to this question of delay. First of all, in the appellant's notice at page 10 of the bundle, it is said that Mr Lemas seeks an extension of time for three reasons. The first is that the order was made just before Christmas 2018 and, as the appellant's notice puts it, "Most good barristers were away until Monday, 7 January". The second reason is it took until mid-February to get a transcript of the hearing and it is said that a transcript is needed for the appeal. The third reason is, as can be seen from copies of emails attached, the quoted costs of legal advice and assistance to make the appeal was several thousands of pounds from both solicitors and barristers:

"No solicitor was willing to consider a conditional fee agreement or read the papers without charging thousands of pounds simply to give a quote to act. Barristers were about £10,000. Present solicitor and counsel can also confirm my other litigation matters that needed urgent funding for hearings. They took over £25,000 and used up all evidence available to me."
7. So that is what was said in the appellant's notice. The appellant's notice was accompanied by grounds of appeal and skeleton submissions settled by Mr Sapsford QC, and in paragraphs 17 to 19 of that document Mr Sapsford sets forward what are described as reasons for delay in filing this application. Paragraph 17 says that for financial reasons it was impossible for funding to be put in place in time for the necessary legal advice and assistance required. Paragraph 18 refers to the Christmas and New Year period. It refers to the need for a transcript which was not received until

13 February. It says that enquiries were made of barristers and solicitors but the fees quoted were outside the ability of, it says, the claimants. I take that to be a reference to the proposed appellant. Then it adds:

"The settlor has now threatened to apply for a bankruptcy order against all parties. Permission to appeal is therefore an essential step now to be taken."

8. Just dealing with that last sentence, it is not clear what I should make of it. One reading of it is that whereas Mr Roderick Lemas had effectively given up any hope of appealing, when there was a threat of bankruptcy proceedings against him and others (the words are "now threatened"), it was then seen to be desirable to appeal the previous orders. That may be reading too much into the sentence, but it certainly is an interpretation suggested by the way it is put.
9. I also have a witness statement from Mr Roderick Lemas which seems to have come with the appellant's notice, and in paragraphs 13 and 14 of that witness statement he refers to the suggested reasons for the delayed application. He says he was not delaying in taking steps to try and find the legal representation. He refers to emails. Much of this is a repeat of what is elsewhere, but I will just identify the broad headings. The first is the Christmas and New Year period. The second is that a transcript was needed for the appeal and not received until 13 February 2019. It is said that the transcript was needed by legal representatives. There is a reference to the fees they would charge. It is also said that there were demands on available finances and the money was not forthcoming or available, and then it is said that if permission is denied, Mr Williams, the respondent to the appeal, would seek to make all other three parties bankrupt.
10. Those documents have referred more than once to emails, and I have been provided with I think six emails which simply do not bear out what is being said in those various submissions. There is a two-page document which Mr Roderick Lemas must have prepared. The heading to the document, which is not an email but is his text, says that the emails show attempts to find representation to prepare skeleton arguments for permission to appeal. It said those attempts were taken immediately, initially from the two former barristers who acted on the case. It said that "as they acted for the claimants and other reasons, they were not in a position to act for me". It then says after months of canvassing other barristers and/or solicitors recommended, it took until the time of the application to find an affordable one.
11. The first email in the chain is from Mr Roderick Lemas to Mr Birkin of counsel, someone to whom I have referred earlier. In that email Mr Roderick Lemas sends to Mr Birkin his typed-up note of the hearing on 17 December 2018. He says he has also ordered the trial transcript and the 17 December 2018 transcript. Just on that, that email shows that on 7 January 2019 counsel to whom Mr Roderick Lemas wrote had available the full reasons for the reserved judgment of the master and also a note of the hearing which would have included the oral judgment on 17 December 2018. Although the email refers to the trial transcript, that has not been produced in the appeal bundle, so it does not appear to be needed in order to present the intended appeal. The second email is from Mr Birkin, saying he would rather act for Nathan

Lemas rather than Roderick Lemas. I do not quite know what is behind that. He had acted for Nathan Lemas, one of the two beneficiaries, rather than Roderick Lemas, one of the two trustees, but Mr Birkin goes on, "I will settle appeal documents for him. You can easily adapt them for your appeal". That was said on 8 January 2019, so that at quite an early point, much earlier than the appellant's notice of May 2019, Mr Lemas is in touch with counsel, who says he will settle appeal documents which can be adapted by Mr Roderick Lemas for his appeal. That was 8 January 2019. The third email is the next day, 9 January 2019, when Roderick Lemas says Nathan is at times hard to get hold of. He says, "Should I wait for a copy of the order?". He says he did not want to be accused of not appealing within the 14 or 21 days "on the basis that we knew what Master Price said at the hearing and did not need to wait for the order". The fourth email is from Mr Birkin on 9 January 2019. He said to Mr Roderick Lemas the 21 days ran from when the order was pronounced in the court. He refers to the costs order against Nathan Lemas, and he advises Mr Roderick Lemas that both Nathan and Roderick Lemas needed to appeal. Then on 10 January I have the fifth email, when Mr Roderick Lemas sends Mr Birkin the court order. He says that he has calculated the 21 days runs out on 7 January, so at that point he was a very short time out of time. The email goes on, "We agree that you will prepare the appeal on behalf of Nathan and myself, including completion of the relevant form and submissions, the agreed fee being £600 inclusive of VAT, i.e. £500 plus VAT". That email is very significant. Taken on its own, it suggests that a few days out of time Mr Roderick Lemas and counsel, Mr Birkin, who had been involved in the case, who had had a transcript of the reserved judgment and who had had a client's notes of the oral hearing on 17 December 2018, had agreed to prepare the appeal. The fee was not unreasonable and very much at variance from the figures which Mr Roderick Lemas has been quoting in the documents to which I have referred, giving rise, he said, to financial problems in raising the funds. I fear that there simply is not any explanation put forward by Mr Roderick Lemas as to why what was agreed to happen on 10 January 2019 did not happen promptly on or after 10 January 2019. The sixth and last email is from Rex Howling QC. Two weeks have gone by, because this email is 25 January 2019. If I rely on the text written by Mr Roderick Lemas above these emails, I would infer that Mr Howling had previously acted on the case. Mr Howling's point is that he would have difficulty representing Mr Roderick Lemas without Mr Sealy's express written consent. That may well have been on the basis that, certainly from the documents I have seen, the joint trustees were Mr Sealy and Mr Roderick Lemas and the appeal essentially to have been by both of them and not by one of them. At any rate, what Mr Howling is talking about is representing Mr Lemas. He is not talking about settling the appellant's notice. That was something which would typically be done by junior counsel and which junior counsel, Mr Birkin, had agreed he would do on 10 January 2019.

12. I have gone into those emails in some detail, because they have been put forward by Mr Roderick Lemas as an explanation of the difficulties he has had, but in fact they do not explain any such difficulties. They show an entirely different picture. Taking up Mr Sapsford's skeleton argument suggesting there were problems about bringing an appeal in time or shortly after the time limit, let me deal with them in the light of what the emails reveal. Paragraph 17 of Mr Sapsford's skeleton said, "For purely financial reasons, it has proved impossible for funding to be put in place for the necessary legal advice and assistance required in this longstanding and complex litigation". There is absolutely no sign of that, certainly no sign of that being a reason for delaying an

appellant's notice. Paragraph 18, "The Christmas and New Year period intervened", that is no doubt right, but by 7 January Mr Roderick Lemas was in contact with counsel previously involved in the case, and by 10 January that counsel had agreed to prepare the appeal documents. Mr Sapsford's skeleton argument goes on, "The requisite transcript required for the permission application to be drafted was not received until 13 February 2019". That simply is not the case. The requisite transcript or requisite document was the reserved judgment handed down by Master Price. Mr Roderick Lemas has suggested to me today that the draft judgment would be no good for the purpose of an appeal, but it is a striking fact he has never obtained the signed, perfected judgment. He has always relied upon the draft judgment, and indeed I would have had no hesitation when dealing with this appeal in relying upon the draft judgment in order to consider whether permission to appeal and so on should be given.

13. Then Mr Sapsford's submissions go on that enquiries were made of barristers and solicitors but the fees quoted were outside the financial ability of the appellant, but the emails do not bear that out. There has been a complete failure on Mr Lemas's part to explain why matters did not proceed as they were agreed to proceed on 10 January 2019. Then Mr Sapsford says that there is now a threat of a bankruptcy proceeding and so it is necessary to appeal. I have commented on the possible interpretation of that statement. Finally Mr Sapsford says that the delay involved is short. I do not take that view. I will return to the question of the length of the delay in a moment. It then says that any prejudice to other parties is difficult to identify. Again, I will deal with that. I do not take that view either.
  
14. So that was the material which was before me when I refused an extension of time. In giving that decision, I was guided by the decision of the Court of Appeal in *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472. Mr Roderick Lemas today has put in a detailed answer to the reasons I have put forward, and I am grateful to him for the care he has taken and indeed the persuasive character of his presentation, and I will give my own reasons in a moment as to the extent to which I accept and the extent to which I do not accept those submissions. As I indicated, the legal principles which I will apply are accepted to be those in the *Hysaj* case. The headnote to the practice note, which is the form of the report, is that an application of the present kind should be approached in the same way and with the same rigour as an application for relief from sanctions under Rule 3.9. At paragraphs 37 to 38 of the judgment of Moore-Bick LJ in that case, he summarises the principles under Rule 3.9. He identifies the three stages, which I will summarise very briefly as referring to the seriousness and significance of the failure to comply with the Rule, the explanation for the failure, and the third stage requires an evaluation of all the circumstances of the case to enable the court to deal justly with the application, including the seriousness and significance of the failure to comply with the Rule and the presence or absence of an application. *Hysaj* is of use in this further way. Moore-Bick LJ laid down a number of guidelines of general application. He dealt with shortage of funds at paragraph 43, he dealt with litigants in person at paragraphs 44 to 45 and he dealt with the merits of the proposed appeal at paragraphs 46 to 48. He then applied all of the principles he had identified to the three appeals which were listed before him and which are reported as part of the practice note, and one sees the practical application of the principles to the facts of those cases.

15. So the first matter I ought to deal with is whether the delay in this case is serious and significant. Mr Lemas says that it is not enough for the delay to be serious, it must be in addition significant, and I will assume that is correct. Mr Lemas accepts that the delay in this case was serious. The Rules provide for a 21-day time limit. That is not a long time limit. It might be said to be a short time limit. The reason for it being 21 days is that if there is to be an appeal, the appellant must get on with it and put in issue in that way the finality of the judgment that has been given. The respondent is entitled to know after 21 days that the respondent has secured a final ruling of the court. Plainly one can extend time where there is some short delay, particularly where it is explained, and those cases do not present any difficulty. But in general the respondent has achieved finality after the 21 days has gone by, and to wait until May in this case is a serious amount of delay. It is also significant because of the impact on the respondent, because it changes the position where the respondent has got a final judgment into one where the respondent may have the judgment taken from him and the judgment reversed on appeal. I have no hesitation in saying that the delay in this case was both serious and significant.
16. The next question is whether there is a good explanation for the delay. Mr Roderick Lemas has suggested there is a good explanation. He says there needed to be a transcript. I do not agree. He says there was a problem getting legal representation. That simply is not the case based upon the material which Mr Lemas has himself chosen to put before the court. In addition I remind myself of what is said by Moore-Bick LJ about shortage of funds and litigants in person, although those general remarks are not needed in this case because the emails show that on 10 January 2019 Mr Roderick Lemas had agreed to instruct Mr Birkin to prepare an appellant's notice and the other documents for £500 plus VAT, and there simply has not been any explanation as to why that did not proceed as agreed. So there is no good explanation. There has been an attempt to offer a poor explanation, but it is rather stark when one reads the emails that no reason for the delay has been identified, no reason past 10 January 2019. So this application for an extension of time, where there is serious and significant delay with no explanation worthy of the name, gets off to a very bad start.
17. Mr Lemas is entitled to say that everything really hinges on the third stage, all the circumstances of the case to enable the court to deal justly with the application, but I must take into account the delay and the absence of an explanation for a delay. Mr Lemas says there is no prejudice to Mr Williams. I do not accept that. Mr Williams was entitled to proceed on the basis when the 21 days were up that the matter had been finally determined. It is in itself prejudicial for uncertainty to be introduced more than four months later by the issue of an appellant's notice if I were to extend time. It is also right that Mr Williams has taken no part in this matter. The matter has been dealt with on paper, and today's hearing is an oral renewal by Mr Roderick Lemas.
18. Before finally disposing of the application, I should deal with the question of the merits of the appeal, which is a topic considered in the *Hysaj* case. In my written reasons I stated that I would have refused permission to appeal on the merits. There are a number of points made or which would be made if the appeal were to proceed. One is that income meant gross income rather than net income, so that Mr Williams had to account for the turnover of the business, not for the income retained, having incurred expenditure to earn that turnover. I do not think much of that point as a ground of

appeal. Then it is said that the master was wrong to treat the evidence as to staff wages and the like in the way he did. I do not think much of that ground of appeal. These are matters for the trial judge, in this case the master. He had evidence which allowed him to make the findings he made. Then it is said (and one is getting down to much more modest sums at this point) that the master should not have given Mr Williams a management allowance, and it is also said that he gave him the management allowance twice.

19. As regards the management allowance, the master directed himself by reference to two cases, *Murad v Al-Saraj* [2005] EWCA Civ 959 and the leading case of *Boardman v Phipps* [1967] 2 AC 46, and he thought in the circumstances of the case that it was appropriate to allow a management payment. That is essentially a matter for the master, applying the legal principles which he identified. It is then submitted that *Boardman v Phipps* and the principles there stated were rather overridden by the terms of the accumulation and maintenance trust under which Mr Roderick Lemas and Mr Sealy were the trustees. It was provided that those trustees were not to confer benefits on the settlor. No doubt that is an important provision for tax purposes to ensure that the settlor does not retain a benefit under the trust. I am very far from clear that paragraph 13.1 was relied upon by Mr Lemas before the master. There is no sign of it in the judgment. But even if it had been, I am inclined to the view it is a bad point. The trust which bound Mr Williams was a bare trust because he had settled the property on trustees, and he held the property as a bare trustee for the trustees. Paragraph 13.1 of the trust document is about the duties of the trustees to the beneficiaries, not the duties of the bare trustee to the intended trustees. So the probable answer is that the law was indeed the law stated in *Boardman v Phipps*. So, so far, it does not seem to me that the appeal would have very much by way of prospects of success.
20. Mr Lemas has raised a further point at the oral hearing (and it is fair to say that he put it in a document which he himself drafted and Mr Sapsford did not draft) which was that this management allowance had been given twice. I am not in a position to comment on that. One would need to go into the matter. However, it is right to say that brings the importance of the appeal down very significantly, because on the master's findings, if he had wrongly allowed the management time twice, there would have been a small surplus of £16,000 rather than a deficit of £71,000, so one has to bear in mind that it might be, if (which I have not tested) there is anything in this double allowance point, it is of much more modest proportions than the scope of the intended appeal.
21. Standing back, I reach the conclusion that I have here serious and significant delay, that there has been no explanation given for it. I suspect the explanation is that Mr Lemas was not going to appeal until he was threatened with bankruptcy, and then he (out of time) wished to appeal, but, even if that is wrong, it remains the fact there is no explanation for the delay. The delay will cause prejudice to the respondent by reopening a closed matter. The merits of the appeal (with one possible exception, which I cannot evaluate) are weak, and in those circumstances it seems to me the justice of the case is such that I should refuse an extension of time to appeal. Accordingly I will dismiss the application for an extension of time for appealing.



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This transcript has been approved by the Judge