

Neutral Citation Number: [2020] EWHC 1853 (Ch)



IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
PROPERTY TRUST AND PROBATE LIST (ChD)

No. HC-2017-001227

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 19 February 2020

Before:

DEPUTY MASTER LINWOOD

B E T W E E N :

MR JOHN TIBBS

Claimant

- and -

(1) MR ROBERT TIBBS
(2) MS ANN LESLEY TIBBS

Defendants

MR J. HARDMAN (instructed by Clarke Kiernan LLP) appeared on behalf of the Claimant.

MR P. WILLIAMS (instructed by Sanders Witherspoon LLP) appeared on behalf of the Defendants.

J U D G M E N T

THE DEPUTY MASTER:

- 1 This is the second day of trial of this inquiry and account. The claimant, Mr John Tibbs, is represented by Mr Hardman, of counsel, and the defendants, his brother, Mr Robert Tibbs, and his sister-in-law, Ms Ann Lesley Tibbs, are represented by Mr Williams, of counsel.
- 2 Yesterday, and after preliminary matters were considered and Mr Hardman opened his case, the cross-examination in chief of Mr John Tibbs, the claimant, started at ten-to-one. It continued over the short adjournment and over the overnight adjournment. Mr Tibbs is still in the witness box and under oath.
- 3 What has happened is that, as of this morning, an application notice was issued by the claimant's solicitors requesting an order in these terms:

“Permission to rely upon the third witness statement of Jason Ferrando and the documents exhibited, namely, the signed facility letter and all-moneys charge.”

The deponent is Mr Ferrando, not Fernando. The application continues:

“The defendants in this matter have again raised the issue as to disclosure of the signed facility letter and all-moneys legal charge upon which Tower Bridging Limited made the initial loans to the claimant. Copies of the partially-signed documents have been located from historic emails held by Jason Ferrando which have been forwarded to me. I have produced a witness statement to be signed by Jason Ferrando exhibiting the documents. The court is aware that Jason Ferrando has produced witness statements and an affidavit confirming that these documents were indeed signed. His third witness statement corroborates those statements. I am not attempting to introduce documents that have not been previously disclosed but merely the executed page.”

That is signed by Mr Adrian Charles Gillan, a consultant solicitor with the claimant's solicitors.

- 4 Also in support of the application is the third witness statement of Mr Jason Ferrando and in it, at para.2, he states that he makes it to clarify two matters, namely, the execution of the facility letter and the all-moneys legal charge. He refers to his earlier evidence and says that he was telephoned at about 5 p.m. yesterday to confirm what time he would attend court today. During that conversation, he was asked about the existence of the original facility letter and legal charge. He says:

“I was informed that the defendants again state that they do not believe the documents existed when the initial loan was made. The court will be aware that I have already stated that if the documentation had not been executed, no moneys would have been advanced and no charge could have been secured upon the property owned by John and the late Maureen Tibbs.”

Paragraph 4:

“I informed Adrian Gillan the documents would have certainly existed and would possibly now have been archived by the solicitors. I cannot now recall if I had been requested to obtain the originals but have not done so. I was asked, however, if signed copies would have been forwarded to me. I searched my emails for the relevant period and can confirm that solicitors acting on behalf of TBL had forwarded to me emails from the solicitors acting for both John and the late Maureen Tibbs in which they attached a copy of the facility letter and legal charge that had been duly signed. I would not add my signature to those.”

Then he says,

“I accept these are only signed by John and the late Maureen Tibbs, but can confirm that our solicitors would have signed the documents on our behalf as set out above.”

The statement in front of me is unsigned, but I am told that the original was signed by Mr Ferrando at about 9.45 this morning.

5 The exhibit is 41 pages long and consists, first of all, of exchanges of emails between the solicitors then acting for Mr Tibbs and his late wife and the solicitors acting for Tower Bridge Lending (or, as I will call them, “TBL”). In particular, the solicitors copied in as the solicitors for Mr Tibbs were Whitehead Monckton and one of their solicitors witnessed on the signed copy of the charge the signatures of Mr Tibbs and his late wife.

6 An unsigned version of this document has been in the evidence, but the signed version has not and the importance of this cannot be understated. In terms of the approach taken by the defendants and, in particular, in Mr Williams’ cross-examination of Mr Tibbs, he has put this fairly and squarely in issue: the failure to produce a signed copy of this charge. It is a most important issue. Now, suddenly, this has been produced.

7 Mr Hardman submits that there is little prejudice caused for the simple reason that this document has been in evidence except the signed version has not been. He submits that there is no proper explanation, but these are important documents. The prejudice, he says, caused to the defendants’ counsel and the defendants is minimal, except that he accepts that substantial time has been spent on this. There is also, I think he accepts, the failure to comply with court orders and, in my view, failure to conduct litigation in a proper and appropriate manner in accordance with the overriding objective. There were orders for disclosure made by Master Bowles on 24 July 2018, where, at para.6, he states that,

“By 4 p.m. on 20 September 2018, parties must give to each other standard disclosure of documents by list of category limited to issues 3(b) to (e) referred to in para.3 above.”

The point is that it goes to the very basis of this claim in terms of moneys lent and interest due.

8 Further, I made an order for exchange of witness statements on 21 June 2019. The time was extended quite considerably from then to 18 October 2019 by agreement of the parties. In any event, the matter comes before me with Mr Williams submitting that the application is flawed, because not only is it late, it is manifestly late. Indeed, he submits that it is two years late. He submits that the claimant has to make an application for relief from sanctions as the order was very clear that, unless evidence was filed, it cannot be used: it must be in the bundles. He referred to the fact that there was a second or even third bite of the cherry

over the weekend and on Monday when I requested parties' counsel to attend before me on a directions hearing. He also submits that the complaint from the court about the lack of this document was raised by Deputy Master Cousins at the first hearing about two years ago.

- 9 Mr Hardman referred me to the decision in *Andrew Ian McTear & Another v. Engelhard & Ors* [2016] EWCA Civ. 487, where the Court of Appeal, when faced with an appeal in respect of an application to a judge to dismiss a second application concerning new documents, set out their approach at paras.45 to 49. In particular, from para.45, Vos LJ (as he then was) said:

“The defendants ought, as I have said, to have made the new documents available to the claimants as soon as they were found.

Then he said,

“It is, I think, rather less clear that they needed to seek an extension of time for the service of the new list, since the documents concerned were not disclosed in response to Master Bowles's order of 24th January 2014 requiring disclosure relating to the original amendments.”

I interject there to say that there is obviously a substantial difference, because that related to amendments to a claim as opposed to here. He continues at para.45:

“The documents ought anyway to have been disclosed in the original list, but it is not as if the defendants failed to serve any list in response to the original order. All they failed to do was to include some documents in their possession which they had not then found.”

Then at para.47:

“The judge relied on CPR Part 31.21 which only provides that a ‘party may not rely on any document which he fails to disclose ... unless the court gives permission’, but by the time of the hearing the defendants had not failed to disclose the new documents; they had served a list in respect of them.

48. The question, therefore, is whether the judge was right to treat the application in relation to the new documents as purely one for relief from sanctions. I do not think that he was. The important question was whether, in all the circumstances, the defendants were to be permitted to rely upon them at the forthcoming trial. That depended, amongst other things, on considerations including whether the claimants would have wished to rely on them, the circumstances in which they had not been disclosed before, and their relevance to the issues.

49. I accept also that the failure to produce the documents at the initial disclosure stage was a significant breach. Parties must take seriously the need to conduct proper searches for documents in response to an order for standard disclosure by a fixed date. But here there was an excuse ... The documents had been thought to have been destroyed, but were discovered when new counsel emphasised the need to look for them. “

- 10 I should add that there is, of course, the obvious difficulty for the claimant's solicitors in that they cannot take instructions from Mr Tibbs, as he is currently in the middle of his evidence, as I referred to earlier.

- 11 Approaching this on the basis of the *Denton* test, first, is the breach significant? As Mr Hardman quite rightly concedes, it is. As Mr Williams says, it is difficult to think of a breach more serious. When the claimant has had several years to provide the documentation which goes to the heart of this issue, to produce it in the middle of trial - we are literally on the middle day - is not the right place.
- 12 Secondly, why has the default occurred? Again, I am grateful to Mr Hardman in that he accepts that there is no proper explanation and it is as simple as that. There should be an explanation from the solicitors: there is not. This is something that should have been obtained years ago. This is a substantial failure and it is of great concern to me in terms of the proper running of this litigation and, in particular, this trial.
- 13 Thirdly, I have to look at all the circumstances of the case. Mr Williams says that it can only be negative to the length of trial, with which I would agree, or a possible adjournment, with which I may have to agree if he makes such an application. The prejudice to the defendants, and, in fact, the court, is that a considerable amount of time was spent yesterday in cross-examination, which simply has been wasted, on the basis of the defendants' approach, which was that this documentation had never been executed. Mr Tibbs, quite reasonably, at times, was saying that these events were years ago and he could not remember. But the existence of these documents, I must say, to my mind, must have been or should have been obvious to the solicitors at the time.
- 14 Having said that, the document is in evidence, but not the signed version. The documents were obtained from a third party, TBL, and therefore were not directly in the possession of the claimant, but - and this is a substantial "but" - the documents or at least the email correspondence I referred to, which, effectively, set up the provision of the signed charge, was in the possession of the claimant's former solicitors. I have no idea as to whether they were asked and what the result of any searches would have been, but it seems to me they certainly were in the possession, custody or power of the claimant through his previous solicitors. But, having said that, there is no reason - indeed quite the reverse - for the claimant deliberately to fail to disclose this signed version.
- 15 I therefore consider the prejudice, save as to time, and the way in which the defendants' counsel has approached the case, is limited, because this confirms the claimant's position that these documents should have been disclosed a long time ago. Therefore, as I have to apply the *Denton* principles in the first place, I do give permission for the witness statement of Mr Ferrando to be adduced in evidence and for these documents to be added by way of a supplementary list. I should say that, if this is not, as appears from the *McTear* decision, a case where I do need to consider purely the *Denton* principles, it seems to me that it is only just that I do admit these documents, albeit at this extremely late stage. I do think that these documents in their signed form may be fundamental in establishing what happened. Mr Williams says that *McTear* should be distinguished because at para.48 it says, "to rely upon [the documents] at the forthcoming trial" and we are here in mid-trial.
- 16 I appreciate and accept that, but I think in all the circumstances, and particularly to do justice to this case, it is necessary, notwithstanding the unfortunate, especially late and indeed regrettable circumstances in which the documents have arisen, for me to grant the permission the claimant seeks.