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Case No: ZC18D00139/ZC17D00299/2019/0009

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2020

Before :

MRS JUSTICE LIEVEN

Between :

LILI NEGAHBANI

and

FARHAJ SARWAR

Applicant

Respondent

Mr Stephen Trowell QC (instructed by Sears Tooth) for the Applicant
Mr Stephen Lyon and Mr Harry Langford (instructed by Withers) for the Respondent

Hearing dates: **13 March 2020**

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.

.....
MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This matter first came before me on 19 February 2020. I made a Legal Services Payment Order (LSPO) to cover the costs of Ms Negahbani's legal team at the hearing of two appeals by Mr Sarwar which were listed to be heard by me on 16-17 March 2020. I made the LSPO sought in the sum of £67,920. I made the payment of that sum a condition of Mr Sarwar continuing with the appeal and made an "unless" order that if Mr Sarwar did not pay the sum to Ms Negahbani by 4pm on 26 February his appeal would be dismissed.
2. Mr Sarwar did not pay the sum ordered and instead, on 26 February, lodged an appeal against the LSPO together with an application for a stay of the order. I note that he also appealed a second "unless order" in respect of unpaid costs that I made at the same time (the costs order). However, for reasons that I will explain, that order has no impact on this judgment.
3. On 3 March 2020 Ms Negahbani's solicitors, Sears Tooth, asked me to make an order stating that the appeal had been dismissed pursuant to my order of 19 February and to make consequential orders. In the light of the fact that I knew that an application for permission to appeal had been made, I waited for the outcome of that application before taking any further steps. On 10 March, the Court of Appeal (King LJ) refused permission to appeal and a stay in respect of the LSPO order; she stayed the appeal on the costs order to await a transcript. On 12 March, solicitors for Mr Sarwar, Withers, wrote to me asking to adjourn the appeal on 16-17 March until £67,920 had been paid and the Court of Appeal had determined the outstanding application for permission to appeal on the second costs order.
4. In the light of these competing applications, and the fact that the appeal date was imminent, I ordered the parties to attend an oral hearing at 9.30am on Friday 13 March so that I could hear submissions on what order(s) I should make and whether the hearing on 16-17 March should go ahead. I note in this chronology that Mr Sarwar had not by the time of the hearing on 13 March made an application for relief from sanction in respect of the order of 19 February even though he had been in breach of that order since 4pm on 26 February (two weeks earlier); and had not paid anything towards the LSPO. I am very grateful to Mr Lyon and Mr Langford, for Mr Sarwar and Mr Trowell QC for Ms Negahbani for attending at such short notice.
5. Mr Lyon did not apply for relief from sanction, he simply asked me to adjourn the appeal hearing and said that his solicitors would be in a position to pay the full amount of the LSPO by Monday 16 March. He said that the money was being received in three tranches, and no money had yet been paid to Ms Negahbani. The three tranches were £10,000 on 9 March, £16,420 on 12 March and a further amount in Swiss francs 28,000 and £15,000 which could be paid by the following Monday (16 March).
6. Mr Trowell QC argued that the appeals had been automatically dismissed; there was no application for relief from sanction and no evidence to support such an application; and no grounds to do anything more than allow the order of 19 February to stand.
7. I reached the conclusion that Mr Trowell was correct and the appeals had been automatically dismissed. I also considered whether the appropriate course was to

adjourn the matter, as argued by Mr Lyon, and I considered whether it would be appropriate to grant relief from sanction (applying the well-known Denton factors) if I ordered an application to be made. For the reasons set out below, I decided that this was not an appropriate course.

8. This application is part of a long-running struggle by Ms Negahbani to obtain financial support from Mr Sarwar. The issue arises out of a relationship and alleged marriage between the parties in Dubai, and a child, M, who was born in November 2012. M is now 7 years old. Mr Sarwar has, through this litigation and litigation in Dubai, denied both that he is M's father and that he and Ms Negahbani were married. It is not necessary for me to rehearse the entire history of the litigation or the dispute.
9. The relevant part for present circumstances starts with Ms Negahbani's commencing proceedings in Dubai for a declaration of marriage and of paternity. She commenced proceedings in the UK in August 2013 for a declaration of parentage under the Children Act 1989. In March 2017 Mr Sarwar issued proceedings against Ms Negahbani in the Queen's Bench Division for misuse of private information. In November 2017 Ms Negahbani issued a petition for divorce and in February 2018 made an application for financial remedies. Mr Sarwar applied to strike out the divorce proceedings. The proceedings came before HHJ Harris on 30 May 2018 and she made orders for a declaration of parentage, maintenance pending suit and an LSPO.
10. In September 2018 HHJ Harris made a direction requiring Mr Sarwar to attend all further hearings. On 11 October 2018 she made a further order that if he did not attend the next hearing on 9 November his application re marital status and Answer would be struck out. Mr Sarwar failed to attend and the matters were accordingly struck out. This is the subject matter of "Appeal 4" which is one of the appeals which were due to be heard on 16 March 2020. On 5 December 2018 HHJ Harris made a decree nisi. This is the subject matter of "Appeal 5". Mr Sarwar appealed both orders.
11. On 20 December 2018 HHJ Harris made a financial remedy order ordering Mr Sarwar to pay. Mr Sarwar appealed this order (Appeal 6).
12. In total Mr Sarwar has sought to appeal six orders and Moor J considered the applications for permission to appeal at an oral hearing on 2 July 2019 where the parties were represented by the same counsel as appeared before me. The first appeal was against a judgment of HHJ Harris in the Central Family Court as to M's paternity. Moor J refused permission to appeal as having no prospect of success. Therefore, it is now established, with no further right of appeal, that Mr Sarwar is the lawful father of M.
13. The second appeal was in respect of interim maintenance payments to be made by Mr Sarwar to Ms Negahbani in respect of M. Moor J refused permission to appeal, but it is worth noting that one of Mr Sarwar's arguments was that he did not have the ability to pay. Moor J rejected this argument pointing out that Mr Sarwar had spent something like £800,000 in legal costs on proceedings in the Queen's Bench Division for what can broadly be categorised as defamation. The third appeal concerned an issue of disclosure that has no relevance to the present matter.

14. Appeals 4 and 5 are those which Moor J granted permission on and were to be heard on 15-16 March. Appeal 4 was an appeal against HHJ Harris' decision to strike out Mr Sarwar's Answer to the divorce petition and his application for a declaration that there was no marriage. Appeal 5 relates to the pronouncement of the decree nisi. Mr Sarwar has said that there was never a marriage in this case. Moor J said "I take the view that he does have a reasonable prospect of success, given that he has for so long said that there was no marriage and there has never been, in fact, a proper determination of that in this court". He therefore granted permission to appeal on appeals 4 and 5. Appeal 6 was against the consequent financial remedy order. Moor J adjourned this because "in many respects it lies or falls within the decisions on [appeals] four and five".
15. Moor J decided to impose conditions on the grant of permission to appeal. He noted that Mr Sarwar never attends court in this jurisdiction; and had not complied with the order of HHJ Harris on 30 May in respect of financial support and that Ms Negahbani had had no support for their son for over six years. Moor J said that he had no doubt that Mr Sarwar was in contempt and it was a deliberate and continuing contempt, see paragraph 21 of the judgment (J21). He therefore ordered that Mr Sarwar pay interim maintenance of £91,500 and £160,300 of legal services funding by 31 July 2019. The appeals would not be set down for hearing until the sums were paid.
16. Whilst these proceedings were going on in the English Courts there have been various applications and appeals in Dubai. After Moor J's decision on permission to appeal, the Dubai Supreme Court have restored the decision of the First Instance court that the marriage between the parties was Sharia compliant and the child is "affiliated with" Mr Sarwar.
17. The matter came before me on 19 February and I made the orders referred to above. The chronology in respect of what happened next is set out above.
18. Mr Trowell argues that the appeals now stand automatically dismissed pursuant to my order of 19 February. Secondly, that there is no application for relief from sanction and no evidence to support any such application. He points to FPR 4.5 and 4.6, which state;

4.5

(1) Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.

....

Relief from sanctions

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –

(a) the interests of the administration of justice;

- (b) whether the application for relief has been made promptly;*
 - (c) whether the failure to comply was intentional;*
 - (d) whether there is a good explanation for the failure;*
 - (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol(GL) ;*
 - (f) whether the failure to comply was caused by the party or the party's legal representative;*
 - (g) whether the hearing date or the likely hearing date can still be met if relief is granted;*
 - (h) the effect which the failure to comply had on each party; and(i) the effect which the granting of relief would have on each party or a child whose interest the court considers relevant.*
- (2) An application for relief must be supported by evidence.*

19. Thirdly, Mr Trowell argues that even if I were to treat the email application for an adjournment as effectively an application for relief from sanction, (a) there is no evidence as required by r4.6(2); and (b) in any event the tests for granting relief from sanction are plainly not met here. He did say, when asked, that although it would be difficult, Ms Negahbani's legal team would be able to go ahead with the appeals on 16 March if that was my order.
20. Mr Lyon accepts that there is no application for relief from sanction and no evidence before the court supporting such an application. However, he argues that the appropriate course is to adjourn the appeals on 16 March. He says that it has taken time for Mr Sarwar to raise money due under the LSPO and this had had to be done in three tranches. Withers will be in a position to pay the money by the morning of 16 March but no sooner. He says that no application for relief has been made because originally Mr Sarwar's lawyers were concentrating on the appeal and then, when permission to appeal was refused, they have been trying to raise the money to meet the terms of the LSPO. He also argues that the fact that Moor J found that there was a reasonable prospect of success on the appeals is important in terms of deciding what happens next. Again, in answer to a question from the Court, Mr Lyon said that Mr Sarwar's team would not be in a position to go ahead on Monday because they had not fully prepared the appeal and they would have difficulties in putting together a bundle in time.

Conclusions

21. The appeals have been automatically dismissed pursuant to my order of 19 February 2020. They were dismissed on 26 February when the LSPO was not paid and no stay had been granted. This is important because Mr Sarwar and his lawyers chose to leave the application for permission to appeal until the last day and did not apply for a stay before the order came into effect. Mr Sarwar also chose not to pay the LSPO, or even

put the money in his solicitor's account so that the court could be confident it would be paid if there was no stay. Although Mr Lyon argues that Mr Sarwar could not raise the money to pay the LSPO, I note that according to Mr Lyon the money could now be raised by 16 March. Further, as Moor J noted, Mr Sarwar did manage to pay legal costs of some £800,000 in respect of the failed Queen's Bench action, and that HHJ Harris had found that Mr Sarwar "has ready access to funds on a very extensive scale, regardless of whether assets are held in his name or that of the companies". She also referred to "the findings of myself and Warby J as to the husband's gross dishonesty and willingness to manipulate the legal processes drives me to the clear and compelling conclusion that the husband's presentation is false and bogus and that he is a man of very substantial worth." For these reasons I do not accept that Mr Sarwar was not able to meet the terms of the LSPO by 26 February if he had chosen so to do.

22. Mr Lyon's application to adjourn is, in my view, misconceived. There is nothing to adjourn unless an application for relief from sanction is made. Again, the fact that no application was made was entirely one of choice by Mr Sarwar. There was time after King LJ refused permission to appeal to put in an application with a short witness statement, but this was not done. The suggestion that Withers were concentrating on getting the money to pay the LSPO rather than applying for relief is far-fetched. Withers must have been well aware that an application for relief needed to be made, but did not do so.
23. For completeness, I did consider whether I should adjourn in order for an application for relief to be made, and then for the appeals to go ahead. Mr Lyon did not ask me to take this course, because he made it entirely clear that he did not want the appeals to go ahead on Monday. However, if I had concluded that relief from sanction was appropriate then this is the course I would have taken in order to allow the appeals to go ahead. I am very cognisant of the fact that Ms Negahbani has orders in her favour made in 2018 and further delay is plainly detrimental to her.
24. Mr Trowell made submissions to me as to whether the tests set out in *Denton v TH White* [2014] 1 WLR 3926 would be met. There is considerable overlap between the factors for the Court to consider in *Denton* and FPR4.6.
25. The first stage in *Denton* is to consider whether the breach is serious or significant. In my view it plainly is. The breach is the failure to pay the LSPO, the effect of which is to seriously inhibit Ms Negahbani's lawyers' ability to prepare for the appeal hearing. In practical terms the effect of the breach has been to put Mr Sarwar in a position where he now says that it is impossible for him to be ready for Monday and doubtless, if I had insisted that the appeal went ahead on Monday, he would have argued that his right to a fair trial had been compromised. The delay to the final determination of this matter is important. Ms Negahbani has an order dated December 2018 that Mr Sarwar should pay her £5.4m, and none of that has been paid. There has been almost 9 months between Moor J's decision on permission to appeal and the hearing in March 2020, but Mr Sarwar now says he is not ready to go ahead.
26. In terms of the seriousness of the breach, it is relevant that Mr Sarwar has routinely breached orders that he attend court, failed to file evidence and is in breach of a number of court orders.

27. The second Denton stage is why the breach occurred. It is plain that it has occurred through a deliberate choice by Mr Sarwar. Mr Lyon says that Mr Sarwar can now comply with the LSPO, and I can see no reason why he could not have done so at the proper time. This conclusion is compounded by the fact that Mr Sarwar has been able to raise very large sums of money to pay legal fees when he has chosen to do so. It is also the case that Mr Sarwar has not filed a witness statement supporting the application for an adjournment on the grounds of inability to raise the money for the LSPO.
28. The third Denton stage, is to consider all the circumstances of the case. In my view the relevant circumstances here are as follows. Firstly, Mr Sarwar has a history of not complying with court orders as referred to above. Secondly, the failure to comply with the LSPO has the effect of seriously impeding Ms Negahbani's ability to prepare for the appeals. Thirdly, the subject matter of the appeals were themselves orders made after an unless order, the refusal to attend court. Fourthly, Mr Sarwar has at all material times been represented by experienced and highly expert solicitors and therefore can be assumed to have acted in full knowledge of the potential consequence. Fifthly, the course of conduct suggests that Mr Sarwar has acted to deprive Ms Negahbani of money to which she is entitled and to make it extremely difficult for her to litigate her claim in a fair and expeditious manner. Sixthly, the merits of Mr Sarwar's appeal are "generally irrelevant" in this type of application, see Lord Neuberger in *Global Torch v Apex Global* [2014] 1 LSR 4495 at [29] unless the defence was so strong as to justify summary judgment. In any event, there has been a material development since Moor J's decision on permission to appeal, by reason of the decision of the Dubai Supreme Court.
29. In terms of the factors under FPR4.6, I can deal with these briefly; (a) the administration of justice plainly requires that court orders be complied with, and in particular that Ms Negahbani's rights as set out under earlier orders are dealt with expeditiously; (b) there is no application for relief and therefore it certainly has not been made expeditiously; (c) in my view, the failure to comply was intentional; (d) there is no good explanation, see above; (e) there has been a history of non-compliance; (f) there is no reason to believe the default was caused by the legal advisors; (g) according to Mr Lyon the hearing date for the appeal could no longer be met; (h) the effect on Ms Negahbani has been extreme, both in terms of her ability to fight the appeals but also in terms of the prolonging of the litigation and (h) prolonging the litigation can only harm Ms Negahbani.
30. For all these reasons there is in my view no reason to do any more than order that the appeals are dismissed and I will make the appropriate consequential orders.

Postscript

31. After I wrote the above judgment I received on 18 March an application for relief from sanction which had been lodged by Withers on 17 March. It was accompanied by a witness statement of Mr Copson, Mr Sarwar's solicitor, which largely confirmed the matters I have set out above. Mr Copson recorded the chronology and also stated that on 13 March his office was closed to staff because of the coronavirus.
32. In the application Mr Copson emphasises the importance of the appeals because they go to the heart of the marital status issue, and thus the child's position. He argues that

no account had been taken by the Court of the up to date financial position of the Respondent, as set out in his statement of 5 January 2020. In that statement he refers to difficulties within the family business including major litigation in Pakistan.

33. Mr Copson argues that the sanction is a breach of his right to a fair trial and the Applicant being wrong to have refused to agree to adjourn.
34. I have considered this application carefully, but concluded that it does not alter the conclusions I have reached above. I do not accept that Mr Sarwar could not raise the funds, that he has now managed to raise earlier. It is clear from the history of this matter that Mr Sarwar has only chosen to engage with proceedings, and pay money when it is strongly in his interests to do so. But when it is in his interests he manages to find the funds. In any event, his failure to make the application for relief at the correct time, and instead leave it to a point where the appeal could no longer be heard, is wholly unacceptable litigation conduct.
35. There is no question of his right to a fair trial being removed. Fair trial rights, both at common law and article 6, are properly subject to the appropriate conduct of litigation. A litigant who deliberately breaches court orders stands at risk of his applications being struck out. For these reasons I refuse the application for relief from sanction which has now been made.