IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Case No: D90BM014

Neutral Citation Number: [2019] EWHC 889 (QB)

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 13 March 2019

Before:

MR JUSTICE MARTIN SPENCER

B E T W E E N :

SALLY BRAYSHAW — Claimant/Respondent

- and -

(1) PARTNERS OF APSLEY SURGERY
(2) THOMAS O'BRIEN — Defendants/Applicants

MR J. LEVINSON (instructed by Irwin Mitchell LLP) appeared on behalf of the Claimant/Respondent.

MR P. STAGG (instructed by CMS Cameron Mckenna Nabarro Olswang LLP) appeared on behalf of the First Defendant.

THE SECOND DEFENDANT/APPLICANT appeared in Person.

J U D G M E N T

MR JUSTICE MARTIN SPENCER:

1 This is an application by Thomas O'Brien, the second defendant, to set aside an order which I made on 30 November 2018, following the trial in which Mrs Sally Brayshaw, the claimant, sought damages from Mr O'Brien and the partners of Apsley Surgery for various breaches of duty alleged. The full background is contained in the judgment which I handed down on 30 November and therefore need not be repeated for present purposes.

2 The applicant says that he was unaware of those proceedings. He was unaware of the trial and he first became aware that there had been a trial and that there had been an order against him when this was drawn to his attention through the local press and, in particular, the Stoke-on-Trent Sentinel, which reported the trial and the judgment in some detail. He, therefore, promptly, made an application to set aside the judgment on 13 December 2018, which he supported with a statement. He filed a further statement on 3 March 2019 and, in response, Mr Christopher Hurlston of the claimant's solicitors, Irwin Mitchell, filed a statement on 7 March 2019. The applicant served a third statement on 8 March 2019 and then Mr Hurlston served yet a further statement on 12 March 2019 in which he exhibited a statement from one of the first defendants, Mrs Marilyn Marathe, dated 11 March 2019 and also an email from the GMC to Irwin Mitchell in relation to events in 2017.

THE LAW

3 Part 6.9 of the Civil Procedure Rules provides that,

> "Where a claim form is not served personally or on the defendant's solicitor or at an address provided by the defendant, then the claim form must be served as provided for in part 6.9(2)."

In the case of an individual, as with this applicant, it must be served at his usual or last known address.

4 Part 6.9(3) requires that,

> "Where the claimant has reason to believe that the defendant is no longer resident at the address identified in 6.9(2), then reasonable steps must be taken to ascertain the defendant's current address. If the claimant is unable to do so then, by 6.9(4)(b) and 6.9(5), he must consider whether there is an alternative way of effecting service and, if so, make an application under 6.15 to do so."

5 However, under 6.9(6), if the claimant is unable to ascertain the defendant's current address and no alternative method of service is available, then the claim form may be served at the usual or last known address.

6 CPR 39.3(1) provides "The court may proceed with a trial in the absence of a party." Sub-paragraph 3 provides,

> "Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside. ((4) provides an application under para. (2) or para. (3) must be supported by evidence.)"

7 Paragraph 39.3(5) provides,

> "Where an application is made under para (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant (a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him; (b) had a good reason for not attending the trial; and (c) has a reasonable prospect of success at the trial."

8 Prior to the advent of the Civil Procedure Rules, the courts enquired whether a judgment was regular or irregular and a similar concept arises under the Civil Procedure Rules. If a claimant has failed to comply with the provisions of 6.9, then the order or judgment is, in effect, irregular and the defendant against whom the judgment is made has an absolute right to have the judgment or order set aside. If, however, the claimant has complied with 6.9 so that service has been valid, then the judgment or order is regular, in which case we are into the territory of CPR 39.3 and it is necessary for the claimant to satisfy the court on evidence of the three aspects of 39.3(5).

9 The first question I therefore have to decide is whether the claimant took reasonable steps to ascertain the applicant's address. In this regard, Mr Hurlston has, in his statement, explained how, when Irwin Mitchell were instructed by the claimant, efforts were made to ascertain the applicant's address through an in-house investigator, one Derek Boughey, and also by engaging the services of a professional investigator called Sarah Martin Investigations. Although Mr Hurlston is not prepared to disclose the contents of the report to Irwin Mitchell by Sarah Martin Investigations on the basis of legal professional privilege, he does disclose an invoice from that organisation totalling some £3,882 setting out some of the investigations that were carried out and for which a charge was made.

10 On the basis of that and the evidence of Mr Hurlston as to the efforts made by Irwin Mitchell to ascertain the applicant's address, Mr Levinson submits that there was compliance with part 6.9 and therefore proper service of the proceedings and subsequent documents upon the applicant. In that regard, his submissions are supported by Mr Stagg, who represents the first defendant.

11 As the judgment shows, part of the important background to this case is the fact that the applicant, then a registered medical practitioner, was subjected to a Medical Practitioners Disciplinary Tribunal and his name was erased from the register as a result of their decision in January 2015. The first defendants, the Partners of Apsley Surgery, made an application to the court for disclosure of the documents which were before the Medical Practitioners Tribunal Service in order to defend themselves against these proceedings by the claimant, Mrs Brayshaw. That application came before DJ Lumb on 6 June 2017 and the district judge made an order that the GMC shall disclose and give inspection to the first defendant the documents set out in a schedule and, further,

> "(2) the documents marked with a D in the schedule be redacted as necessary to ensure the content is limited to that which will likely support the case of the first defendant or adversely affect the case of one of the other parties to the proceedings and to ensure the content is limited to that which is necessary in order to dispose fairly of the claim."

12 This reflected the application notice dated 12 December 2016, made by the first defendant, which included the following,

> "We request that the court make an order for the GMC to disclose to the second defendant" (that must, of course, be a misprint for the first defendant) "the following: (a) all correspondence to and from the second defendant (Dr O'Brien) and the GMC during the GMC's investigation of the second defendant; and (b) the witness statements of the claimant and of and/or on behalf of the second defendant (Dr O'Brien).
>
> Because the second defendant did not give evidence at the Fitness to Practise hearing, the relevance of this application is likely obvious. What the second defendant told the GMC throughout the GMC's investigation regarding his interactions with the claimant, where the interactions took place, who was present, etc., is paramount to the first defendant's ability to defend itself as the first defendant has no other means of obtaining this information and as the first defendant has little to no first-hand knowledge of the allegations made by the claimant."

13 Thus, the application made it clear that all the first defendant needed to know was the detail of the interactions between the second defendant and the claimant, where the actions took place, who was present, et cetera. None of that required the GMC to disclose the second defendant's address or contact details. What was sought was historical only. Therefore, in accordance with the order that DJ Lumb made, the GMC redacted those details which they held about how the second defendant could then be contacted.

14 In his witness statement, Mr Hurlston said at para. 11,

> "On 6 August, Tom Fletcher, a solicitor at Irwin Mitchell who was previously dealing with the matter on behalf of the claimant, wrote to the GMC requesting disclosure of various documents that formed part of the evidence of their investigation. This included copies of the text messages and emails exchanged between the claimant, Dr O'Brien, and Tina O'Brien."

At 12,

> "The GMC provided their full response to this request on 16 September 2015 and disclosed to us the witness statements of the claimant and Dr Jorsh, the claimant's treating psychiatrist, who first notified the GMC of the concerns about Dr O'Brien. The exhibits to those statements included some of the emails and text messages sent between the parties.
>
> Unfortunately, the GMC took the decision to redact the relevant details which might have given an alternative way of contacting Dr O'Brien. As will be seen later in this statement, the disclosure of documents by the GMC was tightly controlled and subsequently subject to a court order, which required documents to be redacted."

15 This was a reference to the application to which I have already referred which was made by the first defendant and which Mr Hurlston dealt with at para. 25 of his statement. There he said,

> "In any event, an order for disclosure was approved by the Birmingham District Registry on 6 June 2017. Disclosure was limited to certain documents identified in a lengthy schedule prepared by the GMC. Documents were also ordered to be redacted to ensure that content was limited to that which was necessary to fairly dispose of the claim."

16 Thus, as it appears to me, at no stage was the GMC asked specifically to disclose to the claimant's solicitors the information which they had concerning the contact details of Dr O'Brien, nor was any application made to the court asking the court for an order that they do so. It seems to me that, just as the first defendant was able to make an application to the court requiring the GMC to make disclosure of documents held in their possession so as to enable the first defendant properly to defend itself against these allegations in this case, so too the claimant could and should have made an application to the court for an order that the GMC disclose the second defendant's contact details in order to allow him to be served with the proceedings. It may be that in the first instance the court would have ordered or requested the GMC first to write to the second defendant and ask whether he had any objection to disclosure of his contact details. But, in any event, I have no doubt that, had an application been made to the court which was supported by evidence to the effect that the GMC had contact details which would allow the proceedings to be served on the second defendant, the court would have made an order requiring the GMC to disclose those details for the limited purpose of allowing service of the proceedings.

17 In those circumstances, in my judgment, reasonable steps were not taken by the claimant pursuant to CPR6.9 to ascertain an address for service of the second defendant. Of course, in instructing their internal investigator and the professional investigator to make enquiries, the solicitors acted reasonably, but, in my judgment, in the light of their knowledge of the involvement of the GMC earlier that year in 2015, what was done was not sufficient.

18 In those circumstances, I find that this judgment is irregular and the second defendant has a right to have it set aside because he was not served with the proceedings when he had a right to be served with the proceedings and it was within the means of the claimant to ascertain his address for service. What in fact happened was that all documents relating to these proceedings were served again and again at an address which the claimant knew perfectly well the second defendant had left sometime previously and would never come to his attention. I agree with the comment made by the second defendant, this applicant, in his statement that there seems little point in them continuing to serve at an address which they knew he was not living at.

19 In my judgment, the claimant should certainly have taken this issue back to the court and sought the court's guidance and direction on this matter. Instead, it simply served at the last known address and filed certificates of service.

20 If I am wrong about that, then I consider the issue under part 39.3. It is common ground that the applicant acted promptly. Mr Levinson submits that the applicant cannot show that he had a good reason for not attending the trial and he points to the commentary that the **White Book** at para. 39.3.7.2 where it says,

> "If a defendant says they were ignorant of a hearing, it is normally necessary to ask why that was so. The mere assertion that a party was unaware of the hearing date is unlikely to be sufficient to constitute a good reason. It is usually relevant to enquire whether the party was aware that

> proceedings had been issued and served. Once a party is aware that proceedings have been served, they have to be taken to expect to receive communications personally from the opposing party and/or the court. That includes notifications of hearing dates."

21 However, in my judgment, that does not assist Mr Levinson because it assumes that the party is at least engaged with the proceedings in that they know that they are a party and have been issued and served with the proceeding so that they would be expected to take steps to keep themselves appraised of hearing dates. That does not apply here where the second defendant did not even know about the proceedings or that he was a party at all.

22 Where Mr Levinson and Mr Stagg join forces is in submitting that the claimant is unable to show that he has a reasonable prospect of success at the trial. In this regard, they refer to paras. 62 to 66 of my judgment and, in particular, para. 66 where I found that the second defendant had been negligent by reason of his knowledge of the claimant and the risk to which he subjected her by embarking upon the course that he did with his wife in introducing the claimant to their doctrine of Christianity without the medical safety net which it was foreseeable she would need, given her history.

23 I agree with Mr Stagg and Mr Levinson that there is nothing in the evidence which the applicant has provided to the court in his three statements or in the submissions he has made to me today to indicate that those findings were erroneous, they having been based upon my assessment of the facts, despite my general rejection of the evidence of Mrs Brayshaw, who I found to be unreliable and lacking credibility. Thus, the findings of fact were generally benign towards the applicant and that, I hope, emerges from my rejection of the claims against him of intentional infliction of harm and harassment. As I found in my judgment, far from intending harm, Mr O'Brien and his wife treated Mrs Brayshaw with kindness and acted out of the best motives, albeit, as I found, it was misguided. Had I therefore been considering the matter under part 39.3, I would not have acceded to this application on the basis that the applicant failed to satisfy 39.3(5)(c).

24 As it is, on the basis that service and the proceedings were irregular, I am going to set aside the judgment against the second defendant, but the question remains whether, therefore, the whole of the judgment should be set aside or simply that part of it which relates to the second defendant. Mr Levinson submits that either everything should go or nothing should go and, if I am setting aside the judgment against the second defendant, so also should I set aside the judgment in favour of the first defendant. He submits that at any retrial the findings in relation to the factual matrix may be significantly different and such as to support the claim for vicarious liability against the first defendants. Mr Stagg submits that this is fanciful, given the basis upon which I found in favour of the claimant against the second defendant at the trial and, in any event, I should and do have a discretion and power to order only part of the judgment and order to be set aside and not the whole of it. He submits that the first defendant was properly served, took full part in the proceedings, defended itself at great cost and obtained judgment in its favour, and it would be wholly unfair and unjust now for the first defendant to face the prospect of having to go through the whole process again with little or no prospect of recovering their full costs, never mind the costs of the first trial.

25 I totally agree with Mr Stagg in relation to those submissions. In my judgment, I do have a power only to order part of the judgment to be set aside and it would, in my judgment, be wholly unfair on the first defendants to have to face these proceedings again. I therefore

limit the setting aside of the judgment to that part which relates to the judgment against the second defendant, but I do not set aside the judgment which I gave in favour of the first defendant.

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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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