



Neutral Citation Number: [2022] EWHC 1188 (QB)

Case No: QA-2021-000077

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 May 2022

Before:

SIR ANDREW NICOL

Between:

(1) PREMIER EXPORTS LONDON LTD

(2) RELIANCE WHOLESALE LTD

- and -

PIYUSH RAJWANI

**Claimants/
Respondents**

**Defendant/
Appellant**

Gabriel Buttimore (instructed by **Teacher Stern LLP**) for the **Claimants/Respondents**
Alexander Payton (instructed by **direct access**) for the **Defendant/Appellant**

Hearing dates: 25th November 2021

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.

.....
SIR ANDREW NICOL

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on Friday 20 May 2022.

Sir Andrew Nicol :

1. This is a ‘rolled-up hearing’ of permission to appeal from a county court judgment and, if permission is granted, for the appeal itself. A rolled-up hearing was ordered to take place by Stewart J., who also granted a stay on the Judge’s order pending the outcome of today’s hearing. For convenience I shall refer to ‘the appeal’, ‘the Appellant’ and ‘the Respondents’.
2. The application and appeal concern a judgment of HHJ Tracy Bloom given at Oxford County Court, sitting at Luton after a three-day trial of the action. In brief, the Claimants claimed for money lent to the Defendant. The Defendant did not dispute that the money had been lent, but he maintained that the outstanding amount of the loan was to be set off against monies owed to him, the Defendant, because of his employment by them and, in particular, a bonus to which he said he was entitled. The Appellant had been employed by the Respondents (or one of them) from 2011-2018 as a member of the sales team.
3. HHJ Bloom found that the money was owing and there was no contractual entitlement to a bonus. She gave judgment for the Claimants.
4. On the appeal, Mr Payton would seek to argue:
 - i) That the Judge held the appellant’s witnesses to a different standard than she had applied to the respondent’s witnesses.
 - ii) She gave insufficient weight to a lie which Kieran Samani, one of the Respondents’ witnesses, had told about a central issue, namely his claim that the appellant had embezzled the money when he had known that the money had been lent to the appellant.
 - iii) The judge failed to give adequate weight to the fact that the respondent’s business was run in an informal manner.
 - iv) The judge failed to give any or any sufficient weight to the WhatsApp messages which supported the appellant’s case that a bonus scheme was in place.
 - v) The Judge wrongly took account of other proceedings between the respondent and two of the Appellant’s witnesses. There was no evidence of those proceedings and the Appellant’s witnesses stood to gain nothing from the proceedings. Indeed, since the witnesses were shareholders in the respondent, they were acting contrary to their interests.
 - vi) The Judge failed to take account of the respondent’s witnesses vested interest in the outcome of the proceedings.
 - vii) There is fresh evidence which ought to be admitted and which is supportive of the appellant’s case.
5. Through Mr Buttimore, the respondents resist the appeal and submits that the judgment is sound for the reason which the Judge gave. So far as the application to adduce fresh evidence is concerned, the respondent would wish to rely on the further

witness statement of Kieran Samani. Since this was served later than the time allowed for by Stewart J. the respondent needs relief from sanctions in order to do so.

6. The test for whether relief from sanctions should be granted is now well understood. There is a threefold test:
 - i) Whether the breach was serious or significant;
 - ii) the reason for the breach;
 - iii) Whether in all the circumstances relief should be given.
7. As far as the second issue is concerned, the respondent's solicitor, Mr Donoghue of Teacher Stern LLP, has candidly accepted that he had failed to diarise the date by which evidence should be served and had misunderstood Stewart J's order: he had thought that the respondent had 14 days to file evidence in reply, not 21 (as was in fact the case).
8. The candour of the solicitor is appreciated, but in my view this error was not serious or significant. The Appellant has, with equal candour, accepted that, despite the delay, he has had sufficient opportunity to consider Mr Samani's statement. In those circumstances, I do not regard the error as serious or significant and, as *Denton v White* indicated, it will be rare for relief to be refused in such circumstances. I will grant relief from sanctions, as Mr Payton fairly and realistically accepted that I should. I will take the statement into account.

The fresh evidence

9. These were a number of internal documents originating from the Respondents. They were:
 - i) An employee database sent under cover of an email from Isha Samani, the head of HR for the Respondents. This indicated that, in addition to his salary, the Appellant was due a 'bonus' (as did most of the other members of the sales team). The term 'bonus' was not enlarged upon.
 - ii) A second copy of the employee database sent under cover of an email dated 31st January 2018.
 - iii) A third copy of the employee database sent under cover of an email dated 31st May 2018 by Rajesh Samani, who was the father of Kieran Samani and who also had given evidence for the Respondents at trial.
 - iv) A budget report dated 18th October 2017 which showed that the Appellant, in addition to his salary of £42,816 had been budgeted to receive a bonus of £25,000.
 - v) Another copy of the budget report which was sent by Kieran Samani in an email on 18th October 2017. Kieran Samani had also given evidence for the Respondents.

- vi) A copy of a contract (or rather draft contract) for the Appellant sent by Isha Samani to Prabha Selva which shows the ‘bonus calculator’ being used to calculate his bonus.
10. The default position is that an appellate court ‘will not receive ... (b) evidence which was not before the lower court’ – see CPR r.52.21(2).
 11. As the White Book says at para 52.21.3,
 - ‘In *Terluk v Berezovsky* [2011]] EWCA Civ 1534, the Court of Appeal stated that the authorities show that the primary rule is given by the discretion expressed in r.52.21(2)(b) coupled with the duty to exercise it in accordance with the overriding objective; consequently the *Ladd v Marshall* [1954] 1 WLR 1489 CA criteria are no longer the primary rules constitutive of the court’s power to admit fresh evidence; however those criteria occupy the whole field of relevant considerations to which the appeal court must have regard in deciding whether in any given case the discretion should be exercised to admit the proffered evidence.’
 12. Thus, the *Ladd v Marshall* principles remain important. They are:
 - i) The evidence could not have been obtained by reasonable diligence for use at the trial.
 - ii) The evidence must be such that, if given, it would probably have had an important influence on the result of the case, though it need not be decisive.
 - iii) The evidence must be such that as is presumably to be believed; it must be apparently credible though it need not be incontrovertible.
 13. In this case Mr Buttimore accepted that the proposed new evidence satisfied the third criterion. He disputed that any of it satisfied the first two criteria.
 14. Mr Payton acknowledged that the employee databases did not distinguish between a bonus which was discretionary and a bonus to which the employee had a contractual entitlement. He accepted that, for the appellant to have succeeded, he had to show that the bonus was of the contractual entitlement type. However, he submitted that the documents would have had a significant impact on the trial judge’s assessment of the witnesses’ credibility. One of the issues at trial was whether there had been *any* bonus scheme. These documents showed that there was *a* bonus scheme (as the Appellant had said, but the Respondents in their evidence had denied) and the documents would thus have enhanced the Appellant’s credibility. Furthermore, the budget reports showed the Respondents making allowance in the budgets for payment of bonuses. That only made sense if they expected to pay bonuses.
 15. Mr Buttimore responded that the documents showed no more than that there had been discussions about the introduction of a bonus scheme (and indeed one which made use of the bonus calculator). So much had been acknowledged by the Respondents at trial. However, the adoption of a bonus scheme had never taken place. The budget reports were no more than allowances for potential bonuses (if such were actioned and adopted by the Respondents): the budget reports were different from accounts.

The fresh evidence did not include any evidence that such bonuses had been paid to any employee. The contract now produced was only a draft. It did not purport to have been signed by anyone on behalf of the Respondents, nor had it been signed by the Appellant. The fresh evidence would have had no influence, let alone an important influence, on the result of the trial.

16. The new documents were produced by Mr Bavesh Dobariya. He had received the documents in his former capacity as a director of Premier (the 1st Respondent). Mr Dobariya was not a party to the claim. He therefore had no duty of disclosure. He was only a witness. The Appellant was dependent on his co-operation. Mr Dobariya gave evidence that after he ceased being a director, he was required to return any hard copies of the documents in his possession. There were electronic copies on his computer. After the trial, he had been able to recover these, although only with software which he had had to purchase.
17. Mr Payton argued that in the circumstances, the documents could not with reasonable diligence have been obtained for use at trial. Besides, he argued, it was only at trial that the Respondents' case became that there was no bonus scheme at all. It was only then that the documents which tended to show the existence of some bonus scheme became relevant.
18. Mr Buttimore argues that the documents could, with reasonable diligence, have been obtained for trial. It is plain that Mr Dobariya did have electronic copies. Although software was required to access them, this could (and for the appeal was) purchased for a relatively modest sum. Although Mr Dobariya was a witness and not a party, he could have been asked whether he still had any documents or access to documents which spoke at all of a bonus. That seems not to have happened.
19. In my judgment, none of these documents would have had an important influence on the result of the case. As the Judge made clear, what the Defendant had to show was, not only the existence of a bonus, but that it was a bonus to which he was contractually entitled. It was only then that the bonus could be offset against the outstanding amount of the loan (if those were the agreed terms). As Mr Payton acknowledged, none of the new documents went that far. I accept Mr Buttimore's submission that the 'contract of employment' was no more than a draft. There is no evidence that it was ever adopted by either the Appellant or the Respondents. I have considered Mr Payton's argument regarding the credibility of the witnesses, but I do not consider that in this respect the documents would have had an important influence on the outcome of the case. There were many other reasons why the judge found that the defence should be rejected. I am not persuaded that she would have been deflected from that view even if she had had sight of these additional documents.
20. I was not persuaded by Mr Buttimore's argument that the Appellant also failed on the first *Ladd v Marshall* test. There is no suggestion that the Appellant had access to these documents. He and his witness may have been closely aligned in their interests, but it was the witness who had the means of obtaining the electronic versions of the documents, not the Appellant. The cost of obtaining access to the documents may have been modest, but that is beside the point: the Appellant was dependent on his witness's willingness and ability to incur this expense and it seems the witness only did so after the trial.

21. However, this does not matter: the *Ladd v Marshall* criteria are cumulative. They have all to be satisfied. It is fatal to the application to rely on fresh evidence if even one cannot be passed. That is the case here. For the avoidance of doubt, I have considered whether in light of the overriding objective, the fresh evidence should be admitted, even though one of the *Ladd v Marshall* tests cannot be satisfied. In my judgment it should not.
22. Mr Buttimore had a further argument. He submitted that the appellant was, in effect, accusing the Respondents of having achieved judgment in their favour by fraud. However, the nature of their fraud was insufficiently pleaded in the Appellant's notice and, so far as it could be relied upon, the outcome would be that I should remit the case to the trial judge to determine whether indeed the judgment had been obtained by fraud.
23. Mr Payton did not dispute the propositions of law advanced by Mr Buttimore, but he said that a determination of whether the judgment had been obtained by fraud would be an unnecessary distraction and expense. Accordingly, he withdrew any such implicit accusation regarding the Respondents' conduct. He was content for the application to admit the fresh evidence to be decided on the basis that there had not been a deliberate concealment of the documents he wished to adduce.
24. Nonetheless, for the reasons which I have given, I reject the application to rely on any of the fresh evidence.
25. I turn to the other grounds of appeal. All of these take issue with the trial judge's findings of fact. That is a notoriously difficult task. I acknowledge that, in appropriate circumstances it can be achieved and findings of fact can be set aside, but an appellant must show that the judge either misdirected herself in law or reached a conclusion that was not open to her on the evidence. In my judgment, the Appellant in this case does not come close to doing either. I would respectfully pay tribute to the care and attention which this judge gave to her assessment of the evidence. The outcome was, of course, unwelcome to the appellant, but in my view the conclusions to which she came were certainly open to her on the evidence before her. She did not misdirect herself in any respect. I accept the points made in response by Mr Buttimore.
26. The Respondents have entered a Respondents' Notice that argues that there was an additional ground for rejecting the Appellant's contention that he was entitled to set off the alleged bonus against the outstanding balance of the loan. This related to the bonus allegedly attributable to the year 2017-18. The Appellant quantified the bonus for this year as £13,090.22. Mr Buttimore's point was that, on the Appellant's own case, the bonus for 2017-18 was not payable until July 2019. However, by then, again on the Appellant's own case, the contract of employment had been terminated. Indeed, it was common ground that the contract of employment had come to an end by July 2019, although the Respondents' case was that it was the Appellant who had been in breach which they had accepted while the Appellant argued that it was the Respondents who had been in fundamental breach of contract which he had accepted. However, Mr Buttimore's point was that, on either view, the contract and its primary obligations had come to an end. There could be no continuing obligation to make contractual payments. If either party was entitled to a remedy it was to damages. Yet, the Appellant had not claimed damages for breach of contract, and, had he done so, the court would have had to resolve which party had been in breach of contract.

27. Mr Buttimore did not allege that it was an abuse of process for a claim of this nature to be brought in the county court rather than the Employment Tribunal (where the Appellant had brought a claim for wrongful dismissal). Mr Buttimore recognised that such a submission would have had to be made at a much earlier stage in the litigation. Nonetheless, he maintained that the point taken in the Respondents' Notice was sound and was an additional reason (though only to part of the counterclaim) why the appeal could not succeed.
28. The Judge did not have to address this argument, since she rejected the Appellant's case on more fundamental grounds. Since I am unpersuaded that any of the Appellant's grounds are reasonably arguable or that there is some other compelling reason why permission to appeal should be granted, it is not strictly necessary for me to consider the Respondents' Notice.
29. Had it been necessary, I would not have been inclined to accept the argument in the Respondents' Notice. It seems to me that there was force in Mr Payton's reply that, even though the bonus was not payable until the July of the following year, entitlement to it accrued during the year in question. For the year 2017-18, the Appellant had been working for the Respondents through to the end of their financial year (i.e. September 2018) and so the bonus had accrued and was payable in July 2019.

Conclusion

30. For the reasons which I have given none of the grounds of appeal are reasonably arguable and there is no other compelling reason why permission to appeal should be granted. I refuse permission to appeal.