



Neutral Citation Number: [2023] EWHC 478 (Ch)

Case No: PT-2019-000205

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 7/3/2023

Before:

MASTER CLARK

Between:

SHILL PROPERTIES LIMITED

Claimant

- and -

ANNE BUNCH

Defendant

Phillip Gale (instructed by **Clarke Mairs LLP**) for the **Claimant**
Nigel Woodhouse (instructed by **Simons Rodkins Solicitors LLP**) for the **Defendant**

Hearing date: 20 February 2023

Approved Judgment

I direct that this approved judgment, sent to the parties by email on 7 March 2023, shall be deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

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Master Clark:

1. This is my judgment on the following applications heard at the PTR in this claim:
 - (1) the claimant’s application dated 7 October 2022 seeking an extension of time for the filing and service of its trial witness statements until 13 October 2022; and its

- oral application to further extend that time until 14 February 2023 (and corresponding relief from sanctions);
- (2) the defendant's application dated 7 October 2022 seeking an extension of time for the filing and service of her trial witness statements and a witness summary until 10 October 2022 (and corresponding relief from sanctions); and her oral application to be permitted to rely upon revised trial witness statements, redrafted to comply with CPR PD 57AC.

Parties and the claim

2. The claimant, Shill Properties Limited, is an investment company. The defendant, Anne Bunch, is the owner of 7 Gunstor Road, London N16 8HF ("the Property").
3. The claimant's case is that on 7 December 2018, the parties entered into a contract of sale of the Property ("the Contract") by exchanging contracts pursuant to Law Society formula B (telephone exchange).
4. By her solicitors' letter dated 7 February 2019, the defendant indicated that she was not willing to complete the Contract, alleging that it had been procured by undue influence and/or duress.
5. The claim was commenced on 12 March 2019. It seeks specific performance of the Contract and various consequential losses. The defendant's original Defence (dated 28 June 2019) alleged that she lacked capacity to enter into the Contract, alternatively did so under duress. Those defences are no longer maintained.
6. By her now Re-Amended Defence, the defendant raises two defences:
 - (1) the Contract is void for non compliance with s.2 of the Law of Property (Miscellaneous Provisions) Act 1989, in a number of respects;
 - (2) the Contract was procured by a misrepresentation that the claimant was a "cash buyer".

Procedural history

7. The procedural history, so far as relevant, is as follows.
8. Following service of the original Defence, the claimant applied for summary judgment. On 5 August 2021 I handed down judgment dismissing the application. At the consequential hearing on 9 September 2021, I gave directions in the claim including for:
 - (1) each side to disclose by 24 September 2021 their conveyancing solicitors' file and communications between the solicitors and the estate agent dealing with the sale, Fine & Country (para 3);
 - (2) filing and service of an Amended Defence by 8 October 2021;
 - (3) compliance with what was then the Disclosure Pilot, and disclosure by 28 January 2022
 - (4) exchange of witness statements by 25 February 2022;
 - (5) trial on the first available date after 7 June 2022.
9. On 17 September 2021, the trial was fixed for 21 June 2022. On 11 October 2021 the claimant confirmed the parties' agreement to extend the times in my order of 21 September 2021. The revised date for para 3 of the order was 22 October 2021. The

claimant failed to meet this deadline; on 5 November 2021, the defendant applied for an unless order.

10. On 11 January 2022, Deputy Master Arkush made an order on that application, revising the timetable so that:
 - (1) disclosure under para 3 of the September 2021 order was to take place by 14 January 2022;
 - (2) extended disclosure take place by 7 June 2022;
 - (3) witness statements were to be exchanged by 29 July 2022.
11. As will be apparent, the effect of the claimant's default was that the trial listed on 21 June 2021 had to be vacated. It was relisted to take place on 25 October 2022.
12. On 26 May 2022, on applications by both sides, I ordered that Extended Disclosure take place in late June 2022, witness statements be exchanged on 21 September 2022 and there be a PTR on 10 October 2022.
13. On 25 August 2022, Simon Aaron of the defendant's solicitors emailed James Godden of the claimant's solicitors to say that the defendant's daughter had expressed concern about her capacity. On 15 September 2022, Mr Godden asked Mr Aaron to confirm the position as to the defendant's capacity. Mr Aaron replied to say that he had visited her at home and did not note any marked deterioration in her capacity; and that he was not troubled about capacity.
14. Mr Godden replied on 4 October 2022 to say he noted Mr Aaron's judgment as to capacity. The deadline of 21 September 2022 for exchange of witness statements having passed, he proposed 7 October 2022.
15. On 6 October 2022, Mr Aaron wrote again to say he had had a further discussion with the defendant's daughter, who had told him that what he had experienced was not typical. He also explained that the defendant wished to make some amendments to her draft statement, and that since she did not use the internet, there were logistical problems in having her statement ready for 7 October 2022.
16. On 7 October 2022, the defendant's solicitors served a witness statement (of Nichola Henshall) and a witness summary in respect of the evidence of Nicholas Pelmont. They also issued her application for relief from sanctions in respect of the late service of these and the defendant's own witness statement, which was served on Sunday 9 October 2022 (with an effective date of service of 10 October 2022).
17. On the same day, the claimant's solicitors issued their application notice seeking:
 - (1) an order that the defendant's solicitors arrange an assessment of her capacity;
 - (2) permission to adduce and rely upon further documents disclosed on that day;
 - (3) relief from sanction and permission to serve its witness statements by 13 October 2022.

That application was supported by a witness statement of Mr Godden, setting out that the claimant's failure to prepare its witness statements in time was due to discussions about mediation and as to the defendant's capacity. At paragraph 38 he said:

“I would expect, subject to our witnesses’ availability to have signed witness statements ready for exchange by 13 October.”

18. At the PTR on 10 October, the claimant’s position was that the trial should be adjourned to clarify the position as to the defendant’s capacity by obtaining a further psychiatric report, because of the risk of wasted costs if it transpired in the course of the trial that she lacked capacity. The defendant’s position was that her solicitor had satisfied himself that she had capacity and the trial should go ahead. I decided that a further report should be obtained, and vacated the trial. The PTR was relisted for 20 February and the trial for 18 April 2023.
19. On 14 February 2023, 3 working days before the relisted PTR, the claimant served the witness statements of its 2 trial witnesses.
20. On 17 February 2023, the defendant filed and served revised versions of her trial witness statements, amended to comply with PD 57AC and, in the case of the defendant’s statement, containing some amendments and additions. No application notice was issued in respect of these changes but the defendant’s counsel applied orally for permission to rely upon the revised statements.

Legal principles

21. CPR 32.10 provides:

“If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission.”

22. CPR 3.9 provides:

“3.9— 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 of the case, so as to enable it to deal justly with the application, including the need—
 - (a) for litigation to be conducted efficiently and at proportionate cost; and
 - (b) to enforce compliance with rules, practice directions and orders.
- (2) An application for relief must be supported by evidence.”

23. The principles applicable to an application under CPR 3.9 are of course found in the well known decision in *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3296, and are conveniently summarised at para.3.9.3 of the White Book:

“[A] judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the “failure to comply with any rule, practice direction or court order” which engages r.3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate all the

circumstances of the case, so as to enable the court to deal justly with the application including r.3.9(1)(a)(b).”

Claimant’s application

24. As noted, the claimant’s application notice seeks on its face an extension of time for filing and service of its witness statements until 13 October 2022. That date is long gone. The claimant’s counsel nonetheless applied to extend time until 14 February 2023 (and grant relief in respect of the failure to serve until that date).
25. Equally, the claimant has not filed any evidence since Mr Godden’s witness statement of 7 October 2022 in support of the application. The result is that the court has no explanation at all for the 4 month period of delay in serving the statements.
26. Turning to the application of the *Denton* guidance, in this case plainly the breach is serious and significant, and the claimant’s counsel did not seek to argue otherwise.
27. Insofar as the period between 21 September and 7 October is concerned, the reasons put forward by Mr Godden are not in my judgment good reasons. The fact that the parties are negotiating or seeking, as here, to arrange a mediation is not a good reason for not progressing preparation of witness statements in order to comply with a court order. As to the issue that arose as to the defendant’s capacity, this was capable of disrupting finalisation of her witness statement, but should not reasonably, in my judgment, have had any impact on preparation of the claimant’s witness statements.
28. So far as the period from 7 October 2022 to 14 February 2023 is concerned, as noted, no reason or explanation has been provided.
29. I turn therefore to all the circumstances of the case. The claimant’s counsel relied upon the following factors. First, he said, the defendant was in the same position as needing to seek relief from sanctions. I deal with the defendant’s application below, and I reject the submission that her position is the same as the claimant’s.
30. The second factor relied upon by the claimant was that the trial would not be imperilled by the granting of relief and there was no discernible prejudice to the defendant. This factor is to be weighed in the balance, but is not sufficient in itself to justify the grant of relief. Similarly, the fact the refusal of relief would result in the claimant being unable to make out its case is not sufficient to justify granting relief - that consequence is implicit in the application of the sanction in CPR 32.10.
31. The factors relied upon by the claimant are to be counterbalanced in my judgment against the following:
 - (1) the claimant’s previous breaches
 - (i) its complete failure to engage with providing the disclosure required by para 3 of my order of 21 September 2021 (“the first breach”);
 - (ii) its failure to carry out proper searches for documents so that it failed to comply with its disclosure obligations when giving Extended Disclosure (“the second breach”) – so that it had in its application of 7 October 2022 also to seek relief from sanctions in respect of that failure;
 - (2) the fact that the first breach resulted in the trial listed on 21 June 2022 having to be vacated and re-listed;

- (3) there is no evidence before the court that, despite the statement in Mr Godden's witness statement that the claimant's witness statements would be ready on 13 October 2022, the claimant took any significant steps towards complying with its obligations until the very last minute;
- (4) assuming the court were willing to accede to an extension of time until 13 October 2022 (and corresponding relief from sanctions), as sought in the claimant's application notice, the claimant's informal application to further extend time to 14 February 2023 was not made promptly, and there is no evidence to support that application.

32. I have considered carefully whether the refusal of relief would be a disproportionate response to the breach, and concluded that the gravity and significance of the matters listed in paragraph 31 above mean that it would not. I therefore dismiss that part of the application.

The defendant's applications

33. I turn therefore to the defendant's applications.

34. As to the application dated 7 October 2022, I consider that the delay of 16 days in filing and serving the statements is serious and significant, albeit at the lower end of seriousness. However, there was in part a good reason for this delay. The correspondence shows that the defendant's daughter was obstructing Mr Aaron's access to her. As to all the circumstances, the application was made promptly, and there have been no previous defaults in compliance with court rules or orders by the defendant. I would grant relief from sanctions in respect of that failure.

35. As to the defendant's application to rely on her revised witness statements, CPR PD 57AC provides at para 5:

"Sanctions

5.1 The court retains its full powers of case management and the full range of sanctions available to it and nothing in paragraph 5.2 or paragraph 5.3 below confines either.

5.2 If a party fails to comply with any part of this Practice Direction, the court may, upon application by any other party or of its own motion, do one or more of the following –

- (1) refuse to give or withdraw permission to rely on, or strike out, part or all of a trial witness statement,
- (2) order that a trial witness statement be re-drafted in accordance with this Practice Direction or as may be directed by the court,
- (3) make an adverse costs order against the non-complying party,
- (4) order a witness to give some or all of their evidence in chief orally."

36. The defendant's application for permission to rely on her revised statements is therefore also an application for relief from sanctions. She may also require permission under

CPR 32.10 since the witness statements she seeks to rely upon were not served until 17 February 2023.

37. The wholesale disregard of CPR PD 57AC must in my judgment be considered serious and significant. The only reason for this, put forward by counsel, namely that the defendant's solicitors do not normally practise in the Business and Property Courts, is plainly not a good reason. I turn therefore to all the circumstances of the case. Firstly, with minor exceptions, the substance of the witness statements remains the same, so that the defendant has been in substantial compliance with the order of 26 May 2022 since 10 October 2022. Secondly, the sanctions set out in para 5 of the Practice Direction are directed towards inclusion rather than exclusion of evidence – even the reference to refusing to give permission for reliance on a witness statement refers to a non-compliant witness statement. Here, I am being asked to give permission to rely upon compliant statements.
38. In this case, had the defendant not taken the necessary steps to render her trial witness statements compliant, then I would have made an order under para 5.2(2) that she do so. In my judgment, it would be disproportionate and contrary to the purpose of the Practice Direction not to allow her to rely upon them. I will therefore grant her permission to do so. As to the additions to her statement, they are relatively minor and I would therefore also grant relief in respect of them.