Neutral Citation Number: [2022] EWHC 1602 (Comm)

Case No: CC-2019-BRS-000018

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN BRISTOL
CIRCUIT COMMERCIAL COURT

Bristol Civil & Family Justice Centre
2 Redcliff Street
Bristol
BS1 6GR

Date: 22/06/2022

Before :

HH JUDGE RUSSEN QC

(sitting as a judge of the High Court)

- -

Between :

DEBORAH GIDDENS	**Claimant**
- and -	
(1) BRIAN FROST	**Defendants**
(2) THE FROST PARTNERSHIP	
(3) GEORGE RONALD FROST	

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John Virgo (instructed by **Wards Solicitors LLP**) for the **Claimant**
Andrew Dinsmore (instructed by **Greenberg Traurig**) for the **First and Second Defendants**

Judgment on Consequential Matters

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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.

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time of its handing down is deemed to be 10.00am on Wednesday 22 June 2022.

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HH JUDGE RUSSEN QC

HHJ Russen QC:

1. This is my judgment on the consequential matters arising out of my judgment dated 12 May 2022: [2022] EWHC 1022 (Comm) ("**the Judgment**"). I will continue to use the definitional terms adopted in the Judgment. The matters in question are: (1) the costs of the preliminary issue; (2) the application by BF and TFP (together "**the Defendants**") for permission to appeal; (3) a stay of the costs order pending the determination of the intended appeal; (4) a stay of the proceedings pending the determination of the intended appeal; and (5) the costs relating to this judgment.

2. This judgment contains my decision on those consequential matters following a determination on the papers. In his skeleton argument dated 24 May 2022 mentioned below, Mr Dinsmore said that the applications for permission to appeal and for a stay pending appeal were of critical importance to the Defendants and that there should be an oral hearing on these consequential matters. A remote hearing of 2 hours, with 1½ hours pre-reading was suggested. Mr Virgo's responsive note dated 4 June 2022 invited me to determine the applications on paper.

3. In my judgment, these consequential matters are entirely suited to a determination on the papers as such matters are as often than not so determined following the handing down of a written judgment. The parties have taken advantage of the opportunity to explain in writing their position on the various issues which relate to matters that are fresh in my mind and addressed in the Judgment. Those substantive matters were themselves aired at a hearing which lasted only a day. A determination on the papers is consistent with the overriding objective. That objective favours the consequential matters being determined without the further costs of an oral hearing being incurred.

4. I have considered the following documents in reaching my decisions:

    i) the Claimant's Preliminary Note on Consequentials dated 10 May 2022 with draft Order attached;

    ii) the Defendants' Application Notice, draft Order, Grounds of Appeal and Skeleton Argument, each dated 25 May 2022;

    iii) the Claimant's Note on Consequentials dated 26 May 2022 and Form N260 Statement of Costs attached;

    iv) the Claimant's Responsive Note to the Defendants' Applications for a Stay and Permission to Appeal dated 4 June 2022;

    v) the Defendants' Costs Submissions dated 9 June 2022 and draft Order attached;

    vi) the Claimant's Responsive Note to the Defendants' Note on Costs dated 9 June 2022; and

    vii) Mr Dinsmore's email dated 14 June 2022.

Costs of the Preliminary Issue

5. As the successful party under the Judgment, DG seeks an order that BF and TFP pay her costs of the preliminary issue summarily assessed in the sum of £45,331.40 including VAT. That sum is compared with the figure of £71,883 in the Defendants' statement of costs (ignoring a separate sum of £33,912 in relation to specific disclosure).

6. The Defendants recognise DG's entitlement to costs, on the standard basis, but challenge the level of costs claimed for a number of reasons. Those are set out in detail in their submissions dated 9 June 2022. Mr Virgo responded in detail by his submissions of the same date. I bear in mind that the costs of the Defendants' application dated 11 March 2021 which led to the Order dated 14 July 2021 (both of which are mentioned below) were reserved. One of the points made by the Defendants is that costs were increased as the result of the DG's breach of her duty to preserve disclosure.

7. Having reflected upon the rival written submissions, I propose to make a discount in the DG's recoverable costs to reflect that last point; the Defendant's point that aspects of her disclosure can be said to have gone beyond disclosure relating to the preliminary issue of limitation (as directed by paragraph 6 of the Order dated 25 September 2020 also mentioned below); the fact that some costs were incurred in preparing witness evidence which either related to the March 2021 application (stemming from the DG's failure to preserve documents) or which was not deployed at the trial of the preliminary issue; and, finally, the adjustments conceded at paragraphs 4.4 and 4.6 of the Mr Virgo's submissions. My summary assessment reflects the factors identified in CPR 44.4 (in particular the need for costs assessed on the standard basis to be reasonably incurred and a party's conduct) and also the point made by Mr Dinsmore, by refence to *DVB Bank SE v Vega Marine Ltd* [2020] EWHC 1704 Comm, at [33], that the summary assessment of costs was not intended to be a 100% costs recovery regime.

8. I accordingly summarily assess DG's costs payable by the Defendants in the sum of £38,400 including VAT.

Permission to Appeal

9. BF and TFP wish to appeal the Judgment on the following 3 grounds:

> *"1. There was a serious procedural, or other, irregularity in reaching judgment without expert evidence on the plausibility of Ms Giddens' account which was unjust because it led the Court to err in its conclusion that Ms Giddens did not deliberately delete her emails.*
>
> *2. The Court's conclusion that Ms Giddens had not deliberately deleted her emails was unsupported by evidence and involved a demonstrable failure to consider relevant evidence.*

> *3. The Court erred in its conclusion that Ms Giddens did not know of the alleged breaches, and could not have known through the exercise of reasonable diligence, prior to 26 November 2016."*

10. In formulating and advancing all three grounds of appeal the Defendants rely upon the language of CPR 52.21(3) and the judgment of Lord Reed in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 W.L.R. 2600 where, at [67], he identified the circumstances in which an appeal court will interfere with a trial judge's finding of fact by saying:

> *"It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."*

11. The first two grounds arise out of my acceptance of DG's evidence in concluding that she did not deliberately delete her emails (the Judgment at [122]). The first is based upon the contention that DG can only have benefited from the absence of expert evidence pertaining to the plausibility of her account of their inadvertent deletion through a serious procedural (or other) irregularity. I noted the absence of such expert evidence both at the hearing and in the Judgment (at [118]-[119]). The second ground rests upon the absence of any other evidence to support DG's case on this point, aside of course from the account given in her witness statement and testimony, and the contention that I failed to consider other relevant evidence.

12. Although the first two grounds are related, the Defendants emphasise that they are separate grounds of appeal and that it would be open to me to grant permission on the second even if it was refused on the first. That said, the Defendants do not identify what supporting evidence DG might have adduced, aside from expert IT evidence, in averting the second ground of appeal. The other evidence which it is said I demonstrably failed to consider is also not identified in that ground but the supporting skeleton argument (at paragraph 9.2) states that I placed too little weight on the way the explanation for the missing emails emerged.

13. In support of their first ground the Claimants say that my determination of the point without "*the necessary expert evidence*" was a serious procedural, or other, irregularity.

14. In my judgment, the key question here is whether this is an appeal point available to the Defendants who say the result was unjust because the irregularity "*denied the Defendants a key piece of evidence in proving their case*."

15. DG had the legal burden (i.e. the ultimate persuasive burden) of establishing that either section 32 or section 14A of the Limitation Act 1980 applied so as to overcome the ordinary 6 years limitation period (the Judgment at [128]). However, the Defendants had the evidential burden of making good the factual allegation that she had deliberately deleted her emails so that the court should not be persuaded of her case (the Judgment

at [40ff]). The observation in Mr Dinsmore's Skeleton Argument that it was "*open to the Claimant to deploy such evidence but she did not seek to do so*" overlooks this fundamental point. When I remarked at the hearing that his submission about their deliberate deletion of emails might require something more than the taking of judicial notice, because it assumed something that an IT expert *might* not accept, my assumption was that this was very much a shortcoming in the Defendants' case. DG was fully entitled to resist the allegation made against her by reference to her witness statement alone. That is not only obvious from the fact that the Defendants bore the evidential burden in making it good but also because as a matter of principle (even if not how I would have come to apply such a finding in this case) a finding that a party has deliberately destroyed evidence does not inevitably mean that the party fails on the issue to which the lost evidence related: see the Judgment at [43]-[44].

16. In my judgment, the first two grounds of appeal which the Defendants now wish to pursue simply reflect an evidential deficiency in their case and the risk to them that DG would come across as the honest and truthful witness which I found her to be. This is despite the fact that they were alive to the importance of expert evidence in relation to her emails. I note that, significantly, Mr Dinsmore's skeleton argument in support of the application for permission states that the Defendants now intend to apply for permission to adduce expert IT evidence (on the issue of deletion) pursuant to CPR 52.21(2).

17. On 11 March 2021 the Defendants issued an Application Notice which reflected their concern that DG had failed adequately to comply with my Order dated 25 September 2020. That Order had been made by consent and provided, at paragraph 6, that the parties should give extended Model D disclosure (with Narrative) by reference to a number of sub-issues which went to the preliminary issue. The first of them was the sub-issue as to what steps DG had taken to inquire into or monitor her investment in the period between 1 August 2012 and 26 November 2016. The fourth was the issue as to why she only logged into the Pension Gateway in July 2014. Those issues emerged from DG's Reply dated 30 June 2020 which said that she made no enquires as to her pension investment prior to November 2016 and that she first made use of the access to the Pension Gateway in July 2014.

18. The Defendants' application of March 2021 was made in response to the letter dated 28 January 2021 from Wards Solicitors LLP (referred to in the Judgment at [53]-[54]) which stated that DG had in October 2019 accidentally deleted approximately 2 years' worth of emails from 2016-2017. The Application Notice expressed the Defendants' two main concerns. The first was "*that documents relevant to the claim have been lost and that inadequate steps have been taken to seek to recover them*". It went on to say that "*the Claimant has not taken adequate steps to recover the data that she deleted*." The second concern was that "*the circumstances and timing of the deletion has not been properly explained.*" This, together with DG's change of position in relation to the missing emails, was "*a real cause for concern*". The draft Order attached to the application proposed that the first cause for concern (the recoverability of deleted emails) should be addressed by expert evidence from a qualified forensic IT expert and that the second should be addressed by DG making a witness statement setting out in the full the circumstances of the deletion, including how it happened.

19. The result of the Defendants issuing that application was that the parties agreed the terms of an Order which was made with their consent and my approval on 14 July 2021.

It was not necessary for it to make provision for a witness statement addressing the issue of deletion because DG had, by that stage, made her witness statement dated 19 March 2021. Paragraphs 38 and 39 of the statement addressed her deletion of emails and paragraphs 40 to 43 addressed her inability to recover them. The July 2021 Order therefore only therefore only made provision for the instruction of Mr Alistair Ewing of Compute Forensics for the purpose of examining DG's laptops, Hotmail and Dropbox accounts and portable hard drive with a view to recovering the deleted emails and conducting searches by reference to date ranges and keywords.

20. This is the background to the limitation upon scope of the forensic IT expert evidence noted in the Judgment at [118].

21. If there was a procedural irregularity in the trial of the preliminary issue then it must have taken root at the time of the July 2021 Order. A procedural irregularity does not arise simply because the judge reaches a conclusion on the evidence which is available at trial that one party does not like. The question is, therefore, whether the absence from that evidence of any expert evidence from an IT expert (relating to deletion) of the kind which the Defendants would now like to put before the Court of Appeal signifies the existence of a serious procedural or other irregularity.

22. I cannot see that it does. Although the court needed to be satisfied that the expert evidence of Mr Ewing, which was before it at the trial, was reasonably required to resolve the issue of recoverability, neither party suggested that IT expert evidence going beyond that issue was required. I recognise that sometimes at a CCMC the court may suggest to the parties that some (or further) expert evidence would appear to be required for the resolution of an issue in their case when they have not themselves contemplated it. Such cases will be rare because the parties generally have a much better grasp than the judge of the issues in the proceedings and the evidence which is required to support their respective cases. However, I find it difficult to accept that the court's "failure" to prompt one or both parties to adduce expert evidence not previously contemplated by them should be categorised as a procedural irregularity for the purpose of a proposed appeal.

23. In this case, it was for the Defendants to make the suggestion that IT expert evidence was reasonably required for a fair determination of the issue of deletion. They did not do so even though they had received DG's witness statement on the point some months previously. Mr Virgo also made the point that Mr Ewing was jointly instructed by the parties and it was open to either of them to ask him about the process involved in any deletion of emails, but neither party did so.

24. I note that the Defendants' submission that this was a case of deliberate destruction of evidence, so that I should resolve any doubt on the preliminary issue against DG, was based firmly upon an authority which post-dated the March 2021 application and DG's witness statement by 11 months: see the Judgment at [41]-[43]. I do not know whether earlier or greater focus on this aspect might have caused the Defendants to consider the need to have forensic IT evidence directed to their second concern, as well as their first, but the fact is that there was no such evidence before me at the trial of the preliminary issue.

25. It was therefore inevitable that the Defendants' challenge to the credibility of DG's case in relation to the deletion of the emails, at the trial of that issue, would rest entirely upon

cross-examination of DG over the explanation in her witness statement, including by reference to what had previously been said on her behalf about the missing emails.

26. The Defendants' third ground of appeal is that I was wrong in the conclusions I reached about the absence of DG's actual or constructive knowledge for limitation purposes. This is linked to the first two, in that it is said that success on the third ground would follow from success on either of those, but it goes wider than the issue concerning the deletion of emails. It is also said that I placed too little weight on the fact that Ms Beatty was not called to give evidence and that I should have placed more weight upon DG's ability to access her Government Gateway account in September 2013 (with its overstatement of her pension value given her cash receipt) and none upon her explanation as to how she found the article about Wendy Smart in November 2016.

27. In the Judgment (specifically at [90]-[91], [102]-[109] and [116]-[122]) I considered the evidential points which the Defendants now wish to pursue on an appeal, though obviously in the absence of the further expert evidence they would propose to adduce in support of it. Having addressed what I believe to be the misconception behind the complaint about my own finding reached in the absence of such evidence, I am not persuaded that the Defendants have a real prospect of establishing that they come within any of the grounds summarised in *Henderson v Foxworth* on which the Court of Appeal might act to interfere with a finding of fact. The Defendants' second and third grounds in particular smack of an attempt to have something akin to a re-trial in the face of the conclusions I reached by reference to DG's veracity as a witness (see the Judgment at [91], [112]-[113], [122] and [126]-[127]) tested as she was by reference to the evidence as it stood before me.

28. If the proposed appeal lacks a real prospect of success then I cannot see there is any compelling reason why the appeal should proceed. Mr Dinsmore's skeleton argument in support of the appeal pointed out that the limitation point has the potential to dispose of the whole claim and he also suggested that the appeal could be dealt with in the Court of Appeal within half a day. The first point is obviously correct and is the reason why the issue of limitation was identified as appropriate for trial as a preliminary issue. However, the fact that a preliminary issue is potentially dispositive of the proceedings does not mean that the loser on the issue should be entitled to a second bite of the cherry, no matter how efficient the Court of Appeal might be in addressing it.

29. I therefore refuse the Defendants' application for permission to appeal. Any application to the Court of Appeal should be made by an appellant's notice filed within 21 days of this judgment.

Stay

30. In his submissions dated 4 June 2022 Mr Virgo recognised that, if permission to appeal was refused by me but the Defendants undertook to renew their application for permission to the Court of Appeal, then it would be appropriate to stay the proceedings and the enforcement of the costs order in DG's favour until the Court of Appeal disposes of the application for permission or the appeal itself if permission to pursue it is granted.

31. I will direct that the proceedings, and the enforcement of the costs order, are to be stayed pending the outcome of the Court of Appeal's decision on any appellant's notice filed by the Defendants within the 21 day period specified above.

Costs relating to this Consequential Judgment

32. The parties' Forms N260 filed for the trial of the preliminary issue did not extend to the costs of preparing the written submissions identified in paragraph 4 above. A significant element of those costs relates to the procedural consequences of the Judgment (as it presently stands) though some relate to the Defendants' unsuccessful application for permission to appeal.

33. Having regard to DG's acceptance that there should be stay of the proceedings (and the enforcement of the costs order in her favour) pending any application by the Defendants to the Court of Appeal, I have concluded that the appropriate order in relation to the costs incurred since the handing down of the Judgment is (1) that the costs of and caused by the Defendants' application dated 25 May 2022 and the Defendants' application for permission to appeal shall be DG's costs in any event and (2) that the remaining costs of and caused by this judgment on consequential matters shall be costs in the case.