

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand
London
WC2A 2LL
Friday, 13 May 2016

B e f o r e :

MR JUSTICE SOOLE

BETWEEN:

ANNE ALEXANDER HOTELS	Claimant
- and -	
ANNE BLAKE-COULTER & ORS	Defendants

**(Transcript of the Handed Down Judgment of
WordWave International Limited
Trading as DTI
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)**

**MR GREGWILLIAMS (instructed by Dexter Montague LLP) appeared on behalf of the Claimant
MR DUNCAN MACPHERSON (instructed by Sillett Webb Solicitors) appeared on behalf of the
Defendants/Applicants**

HTML VERSION OF JUDGMENT AS APPROVED BY THE COURT

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1. MR JUSTICE SOOLE: This is an application for permission to appeal and, if granted, the appeal against the decision of Her Honour Judge Owens on 16 October 2015 whereby she refused an application by the defendants under CPR 39.3(3) to set aside the judgment made in their absence by His Honour Judge Tolson QC at the trial of this action on 27 July 2015. There is also before me an application for permission to appeal the order of His Honour Judge Tolson. However, the parties now agree that, since this was made at the trial of a Part 7 claim allocated to the multi-track, the jurisdiction for such an appeal rests with the Court of Appeal.
2. Her Honour Judge Owens dismissed the application on the basis that the defendants were unable to satisfy the second of the three conditions imposed by 39.3(5), namely a good reason for not attending the trial.

3. This case concerns a property called the George Hotel in Pangbourne. This is a 23-bedroom hotel with bar, restaurant and function rooms. For some years the hotel was run by the first defendant who, if I may, I will call "Mrs BC", with her husband Mr Lionel Coulter. Mr Coulter incorporated the claimant company ("the company") to hold the ten-year lease dated 3 August 2010 of the hotel from the lessors, Unique Pub Properties Gamma Limited. Mr Coulter was a businessman with many years' experience of the hotel trade. The second and third defendants are their sons. The third defendant, Alex, was 17 years 11 months old at the date of the hearing on 27 July 2015. Very sadly, Mr Coulter was diagnosed with cancer in 2011 and died on 22 May 2013. Mrs BC struggled to run the hotel on her own. For various reasons, including the floods in 2013, the business took a downturn and the company fell behind on the rent. In addition, it faced a claim in the employment tribunal.
4. She was recommended to Mr Rajinder Sohpal ("Mr S") for advice in this respect which he provided. She saw him as a form of legal adviser but he is essentially a businessman and there is no suggestion that he held himself out as having any legal qualifications. He advised her on the employment case and assisted her with the rent claim by the lessors, attending court with her on an occasion. The court ordered that the lease would be forfeit unless the company paid £42,921 by 12 May 2014.
5. Mrs BC thus had a dire need to raise this money. On 12 May 2014, she entered three agreements with Mr S's company, Mary Moss Limited ("MML"). The overall effect was that she sold MML the sole share in the company for £50,000, the bulk of which was to meet the rent due to the lessors, transferred to Mr S the benefit of the directors' loan to the company totalling £510,000 and entered a long-term guest stay agreement ("LTSA"), for her and her sons to occupy an apartment on the top floor of the hotel for a maximum of five years commencing 12/5/14.
6. The agreement for the sale of the share was a professionally drawn formal document and its terms anticipated the LTSA, referring to it as "a guest agreement to be entered between them". By contrast, the LTSA was a relatively informal document. On its face, its terms identified the consideration for the accommodation as the sum of £20,000 payable within 12 months (clause 11). At the head of the agreement it was stated, "It is agreed that subject to the conditions below, Anne Blake-Coulter and her two sons will enjoy long-term accommodation rights at the top floor, George Hotel, for a maximum period of five years commencing on 12 May 2014."
7. The conditions below included clause 5:

"The hotel will respect the privacy and quiet enjoyment of the accommodation by Mrs Blake-Coulter and her two sons in the areas agreed and they in turn will respect the same for the hotel and its other guests."

Clause 6:

"Mrs Blake-Coulter and her two sons shall allow reasonable access for an inspection and clean once per month, by arrangement."

Clause 8:

"Mrs Blake-Coulter and her two sons shall maintain the accommodation in a good state of repair, order and cleanliness, subject to the monthly clean arranged by the hotel."

Clause 13:

"The bank account will be used solely for depositing money and no money shall be drawn or spent from the account by Mrs Coulter or anyone else."

Clause 18 provided:

"A breach of these conditions shall result in the termination of the five year long stay agreement and will result in eviction."

8. The defendants contend that this agreement is in substance a lease; the company says that it is a contractual licence. Mrs BC also says that there was in effect an oral collateral agreement that Mr S would provide her with the £20,000 sum payable under clause 11 which was needed to pay off the company's overdraft with HSBC. This is disputed. I should add that the agreement for the sale of the share imposed on Mrs BC a non-competition clause for 12 months and a non-solicitation clause for three years, in each case commencing 12 May 2014.
9. The relationship between Mr S and the defendants rapidly deteriorated. By letter dated 15/8/14, the company's solicitors purported to terminate the LTSA pursuant to clause 18 on the basis of alleged persistent and continuing breaches of its terms. These included allegations of nuisance and antisocial behaviour in the apartment by the defendants and their guests (clause 5), repeated occasions of water damage (clause 8) and drawing money from the company bank account (clause 13). The letter required them to vacate the apartment within 21 days. By a further letter on 1 September 2014, the company required the defendants to vacate within seven days rooms 8 and 9 of the hotel which they were occupying and which were alleged to be outside the LTSA.
10. On 19/9/14 the company issued the claim form in this action seeking possession of the apartment. The Particulars of Claim repeated the allegations of breach and damage. By paragraph 5 it was said that the breaches "cannot be remedied". The defendants, as litigants in person, served home-made defences denying the breaches. They did not take any point that the LTSA constituted a lease nor therefore that the provisions of section 146 of the LPA were applicable.
11. On 21/10/14 the claim came before District Judge Perry under CPR 55. He gave directions which included that the claim against Alex be stayed for 14 days for the appointment of a litigation friend as he was a minor. On the same day, the claimant's solicitors wrote to the defendants enclosing a certificate of suitability of litigation friend part completed and advised them to have this completed and filed with the court. On 30 October 2014, Mrs BC emailed the solicitors to confirm the appointment of a Mr Tengra, an accountant, as litigant friend. Thereafter, the parties proceeded on the mutual assumption that litigant friend had been appointed. In fact, as is now accepted, this was not served. The certificate had never been completed or at least never filed. Accordingly, there was no valid appointment.
12. Subsequently, various directions were made, eg for witness statements and disclosure. On 29/1/15 there was a CMC which Mrs BC attended. On 26/2/15 she sought and was granted an extension of time to serve her witness statement. That statement served on 6/3/15 now described the LTSA as a "long term tenancy".
13. The trial was listed for 22/4/15. The day before it was taken out of the list because of judge unavailability. The court notice, 21/4/15, stated that the trial was "to be relisted as a fixture on the first open date. Parties to provide dates to avoid up to the end of October 2015". Mrs BC said that she understood that the trial had been adjourned to October 2015. On 14/5/15 the court issued a notice with a new trial date of 27 and 28 July. Mrs BC said she did not receive this. There were problems with post at the hotel. She believed court letters were being withheld so that she could not attend the hearing. But in any event, the post was getting mixed up when delivered at the reception.
14. On 29/5/15 the company's solicitors sent Mrs BC a letter which, in its second sentence noted the new trial date. Mrs BC said that she never received this letter. On 10/6/15, the claimants issued an application notice within the proceedings. Box 7 on this document identified the new fixed trial date. Mrs BC said that she received this only after the hearing, which I understand to mean the trial. She therefore did not attend the hearing of the application which took place on 25/6/15.
15. At that hearing the court granted the company's application to re-amend the Particulars of Claim. This added the claim that Mrs BC was now in breach of the obligation to pay £20,000 within 12 months and sought damages in that sum. The claim for possession still depended on the breaches which predated the termination letter.
16. On 17/7/15 the solicitors sent her by email and hard copy a letter which enclosed an index to the supplementary bundle. Under the heading of the index it stated, "Supplementary trial bundle index (27/28 July 2015)". The index identified the 14/5/15 notice of hearing. Her witness statement does not

deal with this letter and email. On 21/7/15 Mrs BC had a consultation with a solicitor called Mary Kilner concerning what is described as "a very much related matter". Mrs Kilner's evidence, (18/8/15) is that at this meeting Mrs BC told her that the hearing of the trial was to be in October and that she, Mrs Kilner, was subsequently told by Mr Tengra that this also had been his understanding.

17. On 22/7/15 the original supplementary trial bundles were delivered by hand to Mrs BC with a covering letter. She signed for their receipt. Mrs BC acknowledges this but says she thought the bundles were for the trial in October. On 23/7/15 the claimant's solicitors sent by hard copy and email of the following day a letter which enclosed the skeleton argument for trial. That skeleton noted the trial dates in its heading and in its first paragraph. Mrs BC says she did not receive the letter until after the hearing date for the same reasons as before, but does not refer to the email.
18. The trial took place before His Honour Judge Tolson QC on 27/7/15 in the absence of the defendants. As appears from the transcript, three witnesses were present for the claimants at court. However they were not called. The hearing lasted 15 minutes and essentially consisted of counsel (not Mr Williams) explaining what was sought and how the money claims were calculated. As to the claim for possession, the judge asked whether a notice to quit was required. The answer was that it was not because the LTSA was a contractual licence.
19. Judgment was then entered for possession against all defendants, including rooms 8 and 9, and for the money claims. These totalled £60,000-odd, including £1,345 against Alex for alleged damage to the property. The claimant's costs were summarily assessed at £17,500.
20. Pausing there, it appears from the transcript that before entering judgment, the judge did not take the course either of requiring the claim to be proved, ie by evidence being called (see: practice direction 39A paragraph 2.2) or of striking out the defence (see: CPR 39.3(1)(c) and the practice direction paragraph 2.3). As to Alex, the judge evidently proceeded on the basis shared by the parties that the formalities for the appointment of the litigation friend had been complied with. This leads to a preliminary point concerning the order against Alex. As a matter of fact and law he had no litigation friend. This was evidently no fault of the claimant company. However, the consequence of the absence of the litigation friend is that an order made against Alex whilst still a minor is of no effect "unless the court orders otherwise" (CPR 21.3(4)).
21. Counsel agree that faced with this fact I must, independently of the appeal, consider whether I should "order otherwise". Mr Williams points to the commentary and case law which shows that the position may be regularised retrospectively if everyone has acted in good faith and there has been no disadvantage to the party who should have had the protection of a litigation friend (see: White Book paragraph 21.3.1). The question of good faith is not in dispute. Mr Williams submits that there has been no manifest disadvantage to Alex Coulter. In particular he says there is no reason in the circumstances to conclude that a litigation friend would in fact have attended the trial. He also points out that Alex was only a month short of his majority.
22. I do not agree that the non-attendance of a properly-appointed litigation friend was unlikely. In any event, I consider that that question and Alex's proximity to 18 to be irrelevant. He was entitled to the protection of a litigation friend. There were very significant disadvantages for him in the order that was made, namely the loss of his home and an order for £1,345 damages. I therefore make no order.
23. I return to the narrative. On 10 August 2015, Mrs BC received the order made at the trial. She and her sons instructed the solicitor who now represents them. This application was issued on 18 August 2015, ie, eight days after receipt of the order. It was supported by witness statements from Mrs BC, Alex and from Mary Kilner and opposed by witness statements from Mr S and the company's solicitor, Mr Munir.
24. The application was heard by Her Honour Judge Owens on 16 October 2015. As to requirement (a), ie, prompt application, the judge accepted that this was satisfied. On the evidence Mrs BC first knew of the order on 10 August and applied eight days later. As to the second limb of "good reason for not attending the trial", the judge was not satisfied. In particular, she noted that the court notice dated 21 April did not state that the trial was to be in October; and that the witness statements of Mrs BC made no reference to the emails to which I have referred; and that the emails and their attached

contents provided her with clear notice of the new trial dates. She also found that their evidence on the non-receipt of the post was unsatisfactory.

25. The judge's conclusion was that "I am not persuaded on the evidence in front of me that they [ie the defendants] were unaware of that hearing", ie the trial. She was not satisfied that they had not received the postal communications, but in any event was satisfied that the emails and receipt of trial bundle "would have notified the defendants of the listing of the matter".
26. Counsel for the defendants, Mr Duncan MacPherson, who did not appear below, submits that the judge's decision was wrong. He founds his submissions on the principles set out in a number of Court of Appeal cases, namely **Regency Rolls Ltd v Carnall** [2000] EWCA Civ 379; **Brazil v Brazil** [2002] EWCA Civ 1135; **Estate Acquisition and Development Ltd v Wiltshire** [2006] EWCA Civ 533; **Bank of Scotland v Pereira** [2011] EWCA Civ 241; and **Kenny v Abubaka** [2012] EWCA Civ 1962. Unfortunately, these decisions were not brought to the attention of Her Honour Judge Owens. In addition, Mr MacPherson relies on a very recent Court of Appeal decision to similar effect, namely **TBO Investments Ltd v Mohun-Smith** [2016] EWCA Civ 403.
27. With the advantage of Mr Macpherson's careful analysis, I would summarise the principles to be derived from these decisions as: (1) as CPR 39.3(5) makes clear, all three of its conditions must be satisfied before the order can be set aside. (2) If they are satisfied, the court has a residual discretion in the matter, but it would be a very exceptional case where the court did not set aside the order. (3) Each of the requirements, including good reason, must be interpreted so as to comply with the overriding objective and Article 6. Although this applies generally to the CPR, it is particularly important in respect of 39.3 because, if the application fails, the applicant will have had no opportunity for an adjudication of the case on the merits. (4) The decision as to what is a good reason is very fact-sensitive and the court should not generally adopt too rigorous an approach when assessing the conduct of the applicant and the evidence adduced. (5) As to good reason, the first task is to identify the true reason for non-attendance and then, looking at the matter in the round, to decide whether this is a good reason, ie, sufficient to entitle the applicant to invoke the discretion of the court. (6) Identification of the true reason in a case where the applicant asserts that he was unaware of the hearing date, and this is accepted, requires that the court must then ask and answer the question why he was unaware. (7) The importance of the case to the applicant is not a relevant factor until the three threshold requirements have been satisfied and the court has to consider whether to exercise the discretion in favour of the applicant, at which point it will be a very relevant factor. (8) However, and although the merits of a defence and good reason are separate concepts, the overriding objective and Article 6 may necessitate, at least in a case where the reason is "close to the line" of acceptability, account to be taken of the substantive merits of the Defence. In this sense there has to be an holistic approach. (9) Although the appellate court should be slow to interfere with a lower court's decision, it should do so and consider the matter afresh if the court has not had regard to the guidance from the case law and the importance of the overriding objective to deal with cases justly.
28. Although the cited decisions demonstrate some differences between members of the Court of Appeal as to when the merits should come into play, in my view the most recent decision, **TBO**, demonstrates in the judgment of the Master of the Rolls, the importance of taking account of the merits where the applicant has reasonable prospects of success at the trial (see paragraph 24). I therefore conclude that it is necessary for the court on such an application to have all three conditions in mind when considering the matter, rather than dealing with these matters sequentially. A sequential approach gives rise to the risk that the overriding requirement of justice will not be achieved.
29. Furthermore, I see nothing in these decisions which impedes the court from taking account of the merits when considering what was in fact the true reason for the failure to attend. It is inherently more likely that a party with a meritorious defence will wish to attend than someone with a hopeless case, albeit there are, of course, many examples of attendance in the latter circumstance. If so, the failure to attend is more likely to be the consequence of error rather than deliberate decision.
30. In the present case, the judge below heard argument on the merits. However, given the language of 39.3(5) and in the absence of citation of these important authorities, she understandably adopted a sequential approach. In the light of those authorities, my conclusion is that that approach was flawed

and that I should undertake the assessment afresh. For that purpose I will start with the overall merits of the Defence.

31. Counsel for the claimant company, Mr Williams, has challenged this with skill and vigour, but I consider the defendants to have reasonable prospects of success in defeating the claim. In particular on the bases that (1) as a matter of substance, the LTSA constituted a lease rather than a licence, the agreement providing exclusive possession for the consideration of a premium (see: **Street v Mountford**). (2) In that case, and assuming without deciding that clause 18 constituted a forfeiture clause, there was no section 146 notice. (3) In any event, even if a licence, there is a clear factual dispute as to whether the defendants were guilty of the conduct alleged and in any event whether this placed them in breach of the clauses relied on. (4) As to the claim of £20,000, the 12-month period expired after the purported termination notice and accordingly would have provided no basis for possession; and the claim of damages in that sum gave rise to a properly arguable defence of failure to mitigate by re-letting/licensing.
32. The defence as to rooms 8 and 9 is more questionable given the language of the LTSA. However, given the relatively informal nature of the arrangement and the overall history of the matter, I consider that the ambit of the licence/demise is sufficiently open to argument.
33. With those conclusions in mind, I turn to the question of good reason. In the usual way, there was no cross-examination of the applicant and none was sought. In consequence, the judge had to reach conclusions as to the true reason for the failure to attend from the evidence before her, including inferences therefrom, and then to determine whether that was a good reason. As already noted, the judge concluded that the defendants were in fact aware of the hearing date.
34. Mr Macpherson submitted that the court should not reject evidence in the absence of cross-examination. As a matter of principle, I consider that goes too far. In an appropriate case, the court is entitled to reject evidence in affidavits and witness statements as incredible, as happens, eg, in summary judgment applications from time to time. However, I accept that it is a strong finding to make in the absence of cross-examination and that the court should be cautious before rejecting an applicant's evidence in a verified witness statement that he was not aware of the hearing date.
35. In any event, I consider that account should have been taken of the history of Mrs BC's conduct of the litigation and the strength of the case in considering whether it was likely that, in actual knowledge of the hearing date, Mrs BC chose not to attend. In this case, Mrs BC's home was at risk and she had been actively involved in the litigation, missing only the hearing on 25 June 2015 because, on her account, she had not received the notice of application. In my view, it is inherently unlikely that she would have chosen not to attend the trial. The prospects of success do not support, in my view, Mr Williams' submission that this was a case of defendants averting their eyes from the inevitable.
36. The judge understandably took account of the fact that the court notice did not state that the trial was in fact adjourned to October. However, Mrs BC is not a lawyer and I consider such a misreading to be understandable. Furthermore, the evidence of Mary Kilner, to which the judge did not refer, was that Mrs BC on 21/7/15 told her of her understanding that the trial was to be in October. That was after the letter of 17/7/15. I acknowledge that the absence of a response to the allegation concerning emails is an important factor in the analysis and adds to the difficulty of the decision. However, looking at the matter in the light of all the evidence, I do not think that the inference can be drawn that Mrs BC and her sons had actual knowledge of the hearing date or that her evidence to the contrary should be rejected. I am satisfied that they were not aware of the new trial date. I accept the evidence that she did not receive the court notice or the letters which she denies receiving and that, from what she did receive, she did not, for one reason or another, become aware of the new trial date.
37. All that said, the evidence from the emails and the signed receipt of the supplementary bundle is that, by at least 22 July, Mrs BC had material from which she could readily identify the new trial date. If so, the inference must be that either she did not read the references to the new trial dates or did not appreciate their significance.
38. It is at this point that I consider the court must not be too rigorous in its analysis of what Mrs BC should have done. It should take account of the prospects of success in the action and the overall

requirement of justice. This decision is undoubtedly "close to the line", but in my view, when proper account is taken of the overriding objective and Article 6, it is right to conclude in this particular case that the reason for non-attendance, namely the failure to read or understand the significance of the reference to new trial dates, is a good reason. The three conditions being satisfied, I would then unhesitatingly exercise my discretion in favour of setting aside the order made by the judge on 27 July so that there can be a trial on the merits of the dispute.

39. For these reasons, I grant permission to appeal the order of Her Honour Judge Owens and allow the appeal.