

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

Royal Courts of Justice  
Strand  
London  
WC2A 2LL  
Thursday, 9 February 2017

Before:

**Mr Justice Soole**  
Between:

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Between:

**Michael & Ors**

**Claimants**

**v**

**Phillips & Ors**

**Defendants**

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(Official Shorthand Writers to the Court)**

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**Mr S Hornett (instructed by Barker Gillette) appeared on behalf of the Claimant  
Mr S Beresford (instructed by Geldards (Derby)) appeared on behalf of the First, Second and Third  
Defendants**

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**HTML VERSION OF JUDGMENT (AS APPROVED)**

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Mr Justice Soole:

1. This is the pre-trial review of this action concerning the sale of a minicab business and related issues which is due for trial in a window commencing 27 February this year with a six day estimate. The pre-trial review was ordered by Green J by his order of 3 February. The order was in consequence of his decision in a judgment of the previous day whereby he struck out the defendant's defence and counterclaim and debarred the first and second defendants from defending the claim.
2. The essential issues which I have to determine are first whether the claimants should be permitted to re-amend their Particulars of Claim in a number of respects and secondly, whether in consequence of the order debarring the first and second defendants from defending the claim they should in any way be entitled to participate in the trial as the claimants contend.
3. I need not rehearse the substance of the dispute or the long and substantial procedural history because they are fully set out in Green's J judgment of 2 February. Sufficient to say that the judge

found there had been a severe breach of an unless order made against the first defendant, breaches of previous orders for the disclosure and preservation of documents and that there had been the destruction of documents together with what the judge described as conduct forming part of a broader strategy of refusing to provide disclosure.

4. These were severe breaches requiring, as he held, the severe remedy of debarring the first and second defendants from defending the claim. There is no such disability against the third defendant, Mrs Phillips, who was not in breach of any order and who is fully entitled to participate in the claim against her. That claim against her and her husband concerns a freehold property at 142 South Street, Romford and a claim under the **Pallant v. Morgan** principle arising from the purchase of that property.
5. As to the amendments, they consist of a number of deletions of previous contentions, tidying up amendments and amendments to the claim on quantum. Those amendments essentially stem from a combination of the late disclosure of documents by the first and second defendants and from the consequential expert report obtained and served on time by the claimants. There is also an amendment in the claim concerning 142 South Street to add a constructive trust basis of claim in addition to the **Pallant v. Morgan** basis. That amendment is a further or alternative legal way of putting matters and involves no new facts.
6. Mr Stephen Beresford, counsel for all three defendants, opposes the application to amend. As to the new point of law against Mrs Phillips, he says it that is a matter that has not been affected by disclosure and could and should have been raised at an earlier stage.
7. As to the amendments concerning quantum, he does not dispute that those have arisen from the disclosure or from the expert report, but submits that the grant of permission for those amendments would itself raise questions which have to be determined on the separate matter of the consequences of the debarring order. If these amendments were made and the first and second defendants were in the usual way able to participate, then they would be able to deal with them. However, if there is to be no participation then these new matters will place his clients at a disadvantage. In short, he says that the question of these amendments is linked to the question of participation in the trial. If there is to be no participation then there should be no amendment.
8. In my judgment, it would be a curious consequence if a party who was in severe breach of court orders and had been debarred from defending was in a better position as against such proposed amendments than a party who had duly complied with court orders and was entitled to participate in the trial. I should therefore approach the matter simply by considering whether they would cause any difficulty to the first and second defendants in a normal trial. I should add that Mr Beresford does not submit that this is a case of very late amendments which face the additional obstacles emphasised by recent case law, notably the **Mills & Reeve** case.
9. There is a very good and clear explanation why the proposed amendments in respect of quantum have not been made before and that is because of the conduct of the defendants. I conclude that they ought to be allowed, as of course should be the amendments which delete or which merely tidy up.
10. As to the point of law, no new facts are involved and I see no reason not to allow the claimants to put their case by reference to a different legal concept.
11. I turn to the question of the consequences of the debarring order. Mr Stuart Hornett, counsel for the claimants, emphasises its terms "The first and second defendants are debarred from defending the claims herein." His essential and primary submission is that those words mean what they say and that therefore there is no basis for the first and second defendants to participate in the forthcoming trial. 'Claims' include matters of both liability and quantum.
12. The consequences of a debarring order for the conduct of a trial have been referred to in a number of recent cases, in particular **Thavatheva Thevarajah v. Riordon and Others**, which was before the Court of Appeal on two occasions at [2014] EWCA Civ 14 and [2015] EWCA Civ 41. Mr Hornett points in particular to paragraph 25 and 26 of the latter decision where the court recited an exchange between the claimant's counsel (Mr Bailey) and the judge below (Sales J), in which counsel had said that the consequence of being debarred from defending was:

"They are not in a position to contest anything that we say; they are not entitled to participate. However, that does not mean, of course, I can have any order I want, I am going to have to demonstrate to the court on my pleadings and on my evidence that I am

entitled to the relief that I seek. That is the primary issue for your Lordship."

13. Sales J had ordered that the defendants were not entitled to participate on matters of liability, but were permitted to participate fully on of quantum. There was no appeal from that order but Tomlinson LJ observed that "Mr Bailey's first instincts were correct, although later in the hearing, and confusingly, he equated the position with that which obtains when judgment in default is sought" (para 26).
14. In the first instance decision of **Apex Global Management v. F I Call Limited and Ors [2015] EWHC 3269**, Hildyard J conducted a trial at which the defendants had been debarred from defending. The effect of the order was that they were not entitled to participate on matters either of liability or quantum.
15. Mr Beresford points to the observation of Peter Smith J in **Gad Rubin and Anr v. Parsons and Ors [2016] EWHC 237 (Ch)** that in circumstances where a defendant had been debarred from defending:

"At such a hearing, although the Respondents are debarred from defending, that means that they are debarred from relying on any evidence but they have a right in my view to require the Petitioners to prove their case."
16. Mr Beresford submits that the effect of the authorities is that a distinction is to be drawn between liability and quantum. He accepts that his clients are not entitled to participate in the trial on liability, but submits that there is no such bar in respect of quantum. They are at least entitled by cross-examination and submissions to challenge the cogency of factual and expert evidence that is put forward. However he accepts that they are not entitled to put forward an alternative factual case. He adds that, anecdotally, this is the understanding of many practitioners at the Bar.
17. Mr Beresford made a number of submissions pointing to anomalies that could occur if there were not some ability to participate. For example, he pointed to questions which could arise on costs if, for example, there had been a Part 36 or Calderbank offer. Likewise the defendant should be able to point out some mathematical error rather than wait to raise the matter by way of appeal to the Court of Appeal.
18. As to costs, Mr Hornett responds that they are not part of the claim or the trial and so participation can properly be permitted. In the draft order put before the court "non-participation" is extended beyond the trial to at any subsequent accounts and enquiries." Mr Hornett was rightly willing to delete that extension and leave that matter to the trial judge.
19. In my judgment, there is no good reason to draw a distinction between issues of liability and quantum. The order debars the first and second defendants from defending the claim. A claim involves issues of both liability and quantum. I can see no principled distinction between the two. In some cases the issues of liability may be relatively straightforward whereas the issues of quantum are extremely complicated. It would not make sense if, notwithstanding a debarring order the defendant was nonetheless able to participate in what was really the meat of the claim. Nor can the matter be dealt with by the more limited form of involvement that Mr Beresford proposes. Challenges to the cogency of factual and expert witnesses by cross-examination and submission are a major participation in the trial and would be contrary to what the court has decided should not happen. There would be great difficulties for the trial judge in determining where the boundaries lay between such questions and submissions and putting forward an alternative case.
20. The authorities do not provide support for any such distinction. From the limited available extracts of Sales's J judgment it is not clear how the distinction arose in that particular case. There is nothing in the Court of Appeal decisions to support a general distinction.
21. The **Apex** trial is an example of where a debarring order meant what it said and precluded participation in both liability and quantum. As to **Rubin** the judge's remarks, "but they have a right in my view to require the Petitioners to prove their case", were saying no more than that. Where defendants are debarred from defending, the claimants must still prove their case to the satisfaction of the court. The only exception is in those circumstances where default judgment is permitted. That is not this case.
22. My conclusion is that the first defendant should not be permitted to participate in the trial on either liability or quantum. In the light of the concession by Mr Hornett, I think it right to limit that order to the trial and not to extend it to any subsequent accounts and enquiries. The trial judge can then decide

what is the best way forward if he or she decides that further accounts or enquiries are necessary.

23. As to costs, in principle I consider that these are part of the 'claim', as exemplified by paragraph 12 of the prayer for relief. However, Mr Hornett made it clear that the claimants were willing to place costs in a different category. On the basis of that sensible and pragmatic concession, I would exclude the issues of costs from the terms of the order.