Neutral Citation Number: [2022] EWHC 1057 (Ch)

Case No: BL-2022-000179

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch)

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
London, EC4A 1NL

Date: 28th April 2022

Before:

MR. JUSTICE MILES

- -

Between:

(1) BLUE SIDE SERVICES S.A.
(2) CHERRY SERVICES LTD
(3) CORELLI CAPITAL AG

Claimants

- and -

BMF HOLDINGS LIMITED

Defendant

- -
- -

The Claimants did not appear and were not represented

Mr Alex Riddiford (instructed by Simmons & Simmons) for the **Defendant**

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APPROVED JUDGMENT

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Mr Justice Miles:

1. This judgment concerns an application made by the Claimants on 22 March 2022 seeking an order under CPR 39.3(3), CPR 3.1(7) or otherwise, to set aside or vary an order made by me on 18 March 2022. That order dismissed summarily and struck out the claims of the Claimants in these proceedings in their entirety.

2. At the hearing on 18 March 2022 of the Defendant's strike-out and summary judgment application the Claimants did not appear and were not represented.

3. The Claimants have also issued an application dated 22 April 2022 to adjourn today's hearing.

4. That application was signed on behalf of the Claimants by a Mr. Andreou Artemiou, who claims to be a director of the Claimants. No evidence has been provided to substantiate that he is indeed a director of the Claimants.

5. The background to this matter is fully set out in my judgment of 18 March 2022 which is reported at [2022] EWHC 714 (Ch). A reader of this judgment is assumed to be familiar with that one and I shall not unnecessarily repeat its contents here.

6. I start with the application of 22 April 2022 to adjourn today's hearing. Today's hearing has been listed in the court's diary for some time. The application to adjourn was dated 22 April but was not sealed until 25 April 2022. It was provided on the same day to the directors of the Defendant but not to its solicitors on the record.

7. In earlier correspondence between my clerk and persons purporting to represent or act for the Claimants, it was explained that anyone who purported to represent the Claimants as an officer or director of the Claimants would be required to provide evidence showing their status and ability to represent the Claimants. No such evidence has been provided in respect of Mr. Artemiou.

8. The application notice contains the evidence relied on in support of the application to adjourn.

9. It first complains that the court required an earlier application by the Claimants to adjourn the hearing on 18 March 2022 to be determined at a hearing (rather than on the papers). The application notice for the present adjournment also complains that the court required the substantive (setting aside) application now before me to come on at a hearing, notwithstanding that the Claimant was contending that it could not appear. In this regard on 7 April 2022, a message from my clerk stated that the Claimants had failed to explain why they were unable to attend a hearing; that the court considered that the application needed to be addressed reasonably expeditiously; and that the application would therefore be heard this week.

10. It is asserted by Mr Artemiou for the Claimants that this response was "extraordinary, extreme and unbalanced". I reject that suggestion. It was and is desirable that this matter should be determined with reasonable expedition. Finality is an important feature of civil processes. The Claimants had an opportunity to attend at the hearing on 18 March and did not take it. By the application of 22 March 2022, they are seeking so far as possible to avoid the consequences of the court's order of 18 March

2022 and keep the position open for as long as they can without a final resolution. There was and is nothing out of the ordinary or surprising in the court requiring that the hearing of the 22 March 2022 application should be listed with reasonable expedition.

11. The application notice seeking an adjournment goes on to assert that the listing of an application on this date is "not suitable for the officers of the Claimants to travel and attend in person in England as this is unfair, unconscionable and wholly unnecessary". But no details have been provided to show why the officers of the Claimants are unable to travel to attend this hearing. The application has been signed in the name of Andreou Artemiou, who claims to be a director of the Claimants. There is no evidence that he is out of the jurisdiction and the evidence before the court in the long history of this and related litigation suggests that he resides in England. No evidence has been given as to the other officers of the Claimant companies or their current whereabouts. No evidence has been given as to any other commitments they might have. And nothing has been said about any steps taken by the Claimants to obtain legal representation from lawyers within the jurisdiction. One would commonly expect, in commercial proceedings of this kind, that a company would be represented by solicitors within the jurisdiction, but the Claimants are silent. There is therefore no proper evidential basis on which the court could conclude that the Claimants are unable to attend this hearing by their officers or by lawyers.

12. The application notice goes on to say that it would be just and proportionate for the hearing of the substantive set aside application to be listed after the Court of Appeal has ruled on various matters of "law, construction, or principle" previously before me. This is a reference to a pending appeal in the committal proceedings of Mr Rizwan Hussain. I do not accept that this factor would justify an adjournment. The Defendant is, it seems to me, entitled to seek finality in the present proceedings and while the application of 22 March remains outstanding, they do not have that. There is no proper basis for awaiting the decision of the Court of Appeal in the committal application, which is in separate proceedings to which the Claimants are not parties.

13. The application notice also complains that I am guilty of the appearance of bias or a degree of prejudgment or an ingrained inability to disabuse my judicial mind as to "extraneous considerations, predilections or preferences". No details are given of these complaints and they cannot sensibly be addressed beyond saying that I reject any such suggestion. I have already given two previous detailed rulings in related proceedings in which I have declined to recuse myself and the same reasoning applies.

14. In short, there is no merit in the application to adjourn. The Claimants are simply seeking to keep the matter alive for as long as possible without properly participating in the proceedings. They chose not to appear on 18 March to defend themselves against the application to strike out their claim and they have chosen not to appear again today. I dismiss the application and certify it to be totally without merit.

15. I turn then to the substance of the application of 22 March 2022.

16. CPR 39.3(3) is part of a rule concerned with a failure to attend at trial.

17. Subparagraph (3) provides that where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.

18. Subparagraph (4) provides that an application under (2) or (3) must be supported by evidence.

19. Subparagraph (5) provides that where an application is made under (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant (a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him; (b) had a good reason for not attending the trial; and (c) has a reasonable prospect of success at the trial.

20. It is well established that the provisions of CPR 39.3(3) to (5) represent a specific procedural remedy with its own self-contained code of applicable principles, albeit subject to a consideration of the relief from sanctions provision found in CPR 3.9, which in turn reflects the overriding objective.

21. CPR 39.3(3) is not directly applicable to the present case as it only applies where a party does not attend at trial and the court gives judgment or makes an order against him. As noted in the commentary in the White Book (para 39.3.1) the word "hearing" includes a trial but does not say that the word "trial" includes a hearing.

22. Strictly speaking therefore CPR 39.3(3) is not directly applicable. However, as I shall explain in a moment, it is relevant by way of analogy as it sets out minimum jurisdictional requirements that would have to be satisfied in order to persuade a court which has heard an application and struck out a claim to reopen the application and entertain an application to set aside.

23. These can be seen to be minimum requirements since under CPR 39.3(5) and (3) the court retains a discretion whether to set aside an order even where the jurisdictional hurdles are met. It is for this reason that the courts have held that it is also relevant to consider the relief from sanctions provision under CPR 3.9. I will come back to the specific requirements in CPR 39.3(5) in a moment.

24. Before that, I turn to CPR 3.1(7). This gives the court the power to vary or revoke an order.

25. A distinction has been drawn in the caselaw between interim and final orders for the purposes of CPR 3.1(7). *Sangha v Amicus Finance Plc* [2020] EWHC 1074 (Ch) at [24] to [25], shows that a decision to strike out a claim or give summary judgment is treated as a final order for the purposes of CPR 3.1(7).

26. In the *Sangha* case, at paras. 35 to 36, Zacaroli J summarised the position in this way at [35] to [36]:

> "35. Three things are clear from this passage. First, in relation to a final order, it is not sufficient to show that there was a change in circumstances or that the facts were misstated at the time of the original decision. Second, the importance of finality is a critical consideration in an application to set aside a final

> order. Third, the circumstances in which it might be appropriate to set aside a final order will be very rare.
>
> 36. Precisely what needs to be established (aside from the examples given by Hamblen LJ in the paragraph quoted above) in order to set aside a final order was not spelt out in *Terry v BCS*. In the *Prompt Motors* decision (above), HHJ Paul Mathews said, at [31] that he doubted whether anything less than fraud would do. In *Madison v Various* (above), Hildyard J, having noted the uncertainty in the authorities as to whether Rule 3.1(7) applies at all to final orders and concluding that it does, said that 'it will be the truly exceptional case where it might be exercised.'"

27. Drawing some threads together, I consider that in a case concerning a final order made on a strikeout or summary judgment application, though CPR 39.3(3) does not directly apply the test set out in 39.3(5) is nonetheless relevant by way of analogy if the court is being asked to exercise its discretion to set aside the order under 3.1(7).

28. It therefore seems to me that, at least as a framework for analysis, the court should consider whether the jurisdictional requirements contained in CPR 39.3(5) are satisfied.

29. If they are, the court will go on to consider broader questions of justice and the overriding objective, including by reference to the criteria in CPR 3.9.

30. Returning now to the requirements of 39.3(5), there is no dispute that the application was brought promptly.

31. But it seems to me that the Claimants had no good reason for failing to attend the hearing on 18 March 2022:

    i) The Claimants chose voluntarily not to attend the hearing.

    ii) I dealt with the Claimants' failure to attend at [23] to [31] of the 18 March 2022 judgment. As I explained there, none of the grounds then advanced properly explained their non-attendance or justified the adjournment of that hearing.

    iii) Since then the Claimants have provided no evidence to explain their non-attendance. The second witness statement in the name of Andreou Artemiou said nothing on the subject; indeed, it gave no grounds at all for the application. The third witness statement in the name of Andreou Artemiou set out a number of arguments dealing with the merits of the decision of 18 March 2022 but said nothing to explain the failure of the Claimants to attend at the hearing of 18 March 2022. The Claimants have therefore given no explanation for their failure to attend.

    iv) The only argument actually advanced by the Claimants is that the court ought to have determined the earlier adjournment application without a hearing. But that is not a proper basis for failing to attend at the hearing on 18 March 2022.

I dealt with the adjournment application at that hearing itself (rather than on the papers) because I considered that fairness demanded that the Defendant should have an opportunity to make submissions on it. The application to adjourn the 18 March 2022 hearing had no merits at all.

v) The Claimants of course understood on 18 March 2022 that if the adjournment application was unsuccessful, the court would necessarily go on to determine the merits of the application on 18 March 2022 and the Claimants chose not to attend.

32. This is therefore not merely a case where the Claimants have failed to advance a good reason for not attending the hearing on 18 March 2022. With their eyes open they exercised an election not to attend. I am entirely therefore satisfied that the second jurisdictional requirement of CPR 39.3(5) has not been met.

33. The Defendant has made full submissions as to the third jurisdictional requirement, namely whether the Claimant has a reasonable prospect of success at the trial. I do not wish to prolong this judgment and waste judicial resources by spending further time on this point, given my conclusion on the lack of good reason for not attending the hearing. It suffices to say that I have carefully considered all of the points made in the third witness statement in the name of Andreou Artemiou, which sets out the arguments of the Claimants on the merits, and the responsive submissions advanced by counsel for the Defendant. I am entirely satisfied that nothing said in the third witness statement affects or is capable of affecting the conclusions that I reached in the judgment of 18 March 2022. That judgment contains detailed reasons for concluding that the claims are and were legally unintelligible. I remain of the view that there is nothing in the claims and that they have no realistic prospect of success.

34. Looking at the matter through the prism of CPR 3.1(7), as the case law I have summarised shows, an application to set aside a final order will only succeed in exceptional or very rare circumstances. Finality is a critical consideration and it is not sufficient to show there has been a material change in circumstances or that the facts were misstated at the time of the original decision. (There have in fact been no such changes or misstatement of the position.) I have already explained that the Claimants took a deliberate decision, with their eyes open, not to attend on 18 March. That was their opportunity to oppose the application to strike out or dismiss the claims. They did not take do that and, to my mind, it is entirely inappropriate for them now, after the event, to seek to a second bite of the cherry. The hearing of the application on 18 March 2022 was not a dress rehearsal.

35. It is indeed an abuse of the process of the court for a party who has lost a hearing at which they had a full opportunity to attend (but which they did not take) thereafter to seek to set aside the order simply by advancing further arguments on the merits.

36. For these reasons it seems to me that there is no proper basis under either CPR 39.3 or CPR 3.1(7) on which the court could properly set aside the order of 18 March 2022 and, for all the reasons I have given, I shall dismiss the application of 22 March 2022. I shall also certify that the application was totally without merit and record that it constitutes an abuse of the process of the court.

37. The court is required in these circumstances to consider whether to make a civil restraint order. It seems to me that it is appropriate, on the facts of this case, to make a civil restraint order against these Claimants. I have concluded that the conduct of the case by the Claimants in making the current applications has been abusive. I have also now certified four times that either the proceedings or applications within them were totally without merit. I am satisfied that the Claimants have persistently issued claims or made applications which are totally without merit. I also consider, as I say, that the conduct of the Claimants is abusive and I consider that unnecessary judicial resources have been wasted by the need to conduct this hearing; and that unnecessary resources have been wasted by the Defendant in having to deal with the applications of 22 March and the other applications. It has been necessary for the Defendant to prepare for this hearing and attend, no doubt at some significant expense. The court should of its own motion make an extended civil restraint order in respect of these Claimants. It does not seem to me that a limited civil restraint order is sufficient: the Claimants are determined to bring abusive applications before the court and then not even attend to support them.

This judgment has been approved by Miles J.