

Case No: CL2021000532
Neutral Citation Number: [2022] EWHC 729 (Comm)

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

The Rolls Buildings
Fetter Lane
London EC4A 1NL

Friday, 4 March 2022

BEFORE:

HIS HONOUR JUDGE PELLING QC
(Sitting as a High Court Judge)

BETWEEN:

MICHAEL WILSON AND PARTNERS LIMITED

Claimant

- and -

**JOHN FORSTER EMMOTT
AND OTHERS**

Defendants

MR DALBY SC appeared on behalf of the Claimant
MR KIRBY QC appeared on behalf of the First Defendant
MR DOUGHERTY appeared on behalf of the Second Defendant

JUDGMENT
(Approved)

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1. JUDGE PELLING: The issue that I now have to determine concerns what should be done in relation to an application made by application notice, dated 22 February 2022, issued by the claimant in relation to the constitution of these proceedings.
2. As originally constituted, the second defendant in these proceedings was Michael Lyndon Beverley Robinson, who sadly died after commencement of these proceedings.
3. This caused the solicitors acting for the estate of the second defendant amongst others, to issue a without notice application, which I determined on paper on 14 February 2022.
4. By the order that I made on that occasion I directed that Mr Mark Robinson be appointed to represent the estate of Mr Michael Robinson, deceased, in these proceedings:

"In his capacity as an executor of the estate of Michael Robinson, in substitution for Michael Robinson."

5. The order rehearsed, by way of recital, that the application was:

"... the application of the executors of Michael Lyndon Beverley Robinson, deceased, dated 11 February, made without notice pursuant to CPR 19.43 and CPR 19.8(1)(b)."

6. The application that was issued by MWP on 22 February sought the following relief:

"Set aside and/or vary ex parte without notice order of HHJ Pelling QC 14.02.22, sealed 15.02.22, served 22.02.22, second/third defendants provide all documents to MWP per paragraph 2 and CPR 3.1(7) related law."

7. CPR 3.1(7) is a provision which permits a court to set aside an order previously made. The relevant case law suggests that that is a power which should be exercised, broadly, only where either the order concerned has been made by mistake or obtained by fraud.
8. The evidence in support of the application is contained in paragraph 10 of the application notice. It is in these terms and it is necessary, regrettably, that I set it out in full:

"MWP was very belatedly informed after hours on 31 January 2022 of the death of the second defendant on 14 December 2021. It is trite law that upon his death, by operation of law, the deceased also automatically and immediately ceased to be a director and officer of the third defendant. An AT LLP ceased to act for him. MWP has significant claims as against the estate and proprietary claims. Notwithstanding these incontrovertible facts AT and their counsel improperly sought to continue to act listing hearings et cetera, and failed to inform MWP and to file a notice of change, as they should have done. Long after close of business on 15 January 2022, MWP was provided, by email only, with the ex parte without notice order. Such was only served on MWP on 22 February 2022. AT/MBR/CMR have unreasonably, and in breach of duty, sought to keep MWP in the dark, have failed and refused to even begin to deal with and properly address the real and serious issues MWP has raised, and have refused, point blank, to provide all or any documents to MWP as to the ex parte application, hearing, and order, even though MWP is entitled to the same, and where such are also not available on the CE filing system. Such a cloak and dagger approach, and obstructive behaviour and attitude reflects and typifies the conduct of the defendants throughout the costs fraud that they have conducted and afflicted on MWP from 2006 to date, as fellow stakeholders. Accordingly, MWP seeks to set aside or vary the ex parte without notice order of HHJ Pelling QC 14.02.22, sealed on 15.02.22, served 22.02.22, and an order requiring the second and third defendants to provide all documents of correspondence to MWP, and to address and deal with the real and serious issues MWP has raised, in accordance with its rights as set out in paragraph 2, and under CPR 3.17 related law to award indemnity costs in favour of MWP with an interim payment on account."

9. Thus it is, that on the basis of this material, MWP was informed of the death of the second defendant on 31 January 2022, and appears to have been provided, initially, with the order on or about 15 February, that is to say, on the day in which it was sealed.
10. The present application is dated 22 February 2022, and was sealed on 23 February 2022, and thus was made very shortly after the sealing of the original order. MWP relies upon the fact that in paragraph 2 of the order, I had directed there that any application to vary or set aside should be made by no later than 4 pm, seven days after service of the order.

11. MWP maintains the order was served on 22nd. Assuming that to be so, any application to set aside could have been made any time up to seven days after that date. I do not see how it could be served before it was sealed however.
12. As is apparent from the terms of the order, there are two issues that were in play. The first was whether or not the order should have ever been made, which is the substance of the application to set aside or vary the without notice order, and secondly an application for access to the documents that were relied upon in support of the application.
13. So far as the first of these points is concerned, it is common ground between the parties that, first of all, the appointee is the executor under the will of the deceased, and secondly, that as such, he has duties and is able to be appointed to represent the estate of the deceased in litigation. The authority that was identified as supporting that proposition is in *Re Lovett* [1876] LR 3 Ch D 198, a decision of the then Vice Chancellor. The key point for present purposes appears in the report at page 208 where the then Vice Chancellor said in the clearest terms that a claim was properly filed against the executors before probate had been taken out by them because the claim was in relation to assets belonging to the estate.
14. In those circumstances, and returning to the application, the suggestion that the order should be varied or set aside was one without substance as long as it could be said that the appointee was the executor of the estate of Mr Robinson, deceased, as the order rehearses both in the recital and in paragraph 1 of the order.
15. This leads Mr Dalby, on behalf of the claimant, to submit that that is all well and good, but there was an entitlement to see the documents that supported the application. Those had not been forthcoming before the application was issued, and in those circumstances, whilst no substantive point any longer arises, MWP should have the costs of and occasioned by the application.
16. In my judgment that goes significantly too far in the circumstances of this case. First of all, as is apparent from the terms of the evidence filed in support of the application, it was advanced in intemperate and unforgiving terms, including as it does the

suggestion at the end that there should be an indemnity costs order in favour of MWP. In particular, if the position was, as MWP insists, that the order was only served on 22 February, then any application to set aside could have been brought up to seven days thereafter, and thus did not have to be issued, as it was, on 22 February 2022. In fact, the documentation was forthcoming, as I understand it, on the 25th.

17. The application sought disclosure of the documents in support of the application, but it also sought an order to set aside or vary the order previously made. The application to set aside or vary the order previously made had no prospect of success for the reasons that I have identified as is now common ground. Thus, that part of the application was bound to fail in any event. So far as the disclosure of the documents is concerned, in my judgment, the application was made prematurely on the basis of what is set out in the body of the evidence.
18. By the same token, the defendants could have supplied the material to Mr Wilson rather more promptly than in fact they did, and so, in my judgment, whilst Mr Wilson has enjoyed a modest amount of success because the documents were forthcoming, as it happened, after the application was served, that does not lead to the conclusion that I ought to make an order for costs in his favour having regard to the principal relief sought which was to set aside or vary the ex parte order.
19. In those circumstances I make no order as to the costs of the occasion by that application.

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This transcript has been approved by the Judge