Neutral Citation Number: [2021] EWHC 380 (QB)

Case No: 3YS05378, M19Q107, M19Q181

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Date: 23rd February 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

MR JAMES ANTHONY MCCARTHY	**Claimant**
- and -	
THE CHIEF CONSTABLE OF MERSEYSIDE POLICE	**Defendant**

- -
- -

Darren O'Keeffe (instructed by Weightmans LLP) for the Defendant
The Claimant did not appear and was not represented

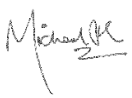
Hearing date: 23.2.21

Judgment as delivered in open court at the hearing

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Introduction

1. By an application dated 7 December 2020 and served on 11 December 2020 the Claimant seeks to set aside an order of Johnson J made on 26 November 2020. That order refused an application dated 17 November 2020 to set aside an order of Freedman J dated 4 November 2020. The order of Johnson J went on to strike out applications for permission to appeal and a hearing which had been fixed for 1 December 2020 was vacated.

Background

2. This litigation has a long and tortuous history. For the purposes of today's application and its resolution it is not necessary to go back to the beginning and recount the entire chronology. The story can be picked up on 21 December 2018 when DJ Moss gave directions at a case management conference hearing. A trial was subsequently listed (1 April 2019) to take place in the county court on 7-10 October 2019. In due course that trial was vacated. HHJ Bird made an order on 26 June 2019 following a hearing on that date which included within it an order for costs against the Claimant. On 25 September 2019 HHJ Bird, following a hearing that date, made an order which included a further order for costs against the Claimant. That order of 25 September 2019 also contained a case management direction as to the 'factual matrix' to be used by two experts dealing with a causation issue. The costs orders and factual matrix direction were the subject of applications for permission to appeal to the High Court. Permission to appeal against the order of 26 June 2019 was refused by Farbey J on 8 October 2019. Permission to appeal against the order of 25 September 2019 was refused by Turner J on 21 November 2019.

3. The Claimant wished to renew the applications for permission to appeal at an oral hearing, in this Court. On 12 December 2019 the Court notified the parties of a hearing to take place on 28 February 2020. There were a number of subsequent adjournments. On 22 October 2020 the hearing of the two renewed applications was listed to take place on 1 December 2020. Under the CPR PD 52B paragraphs 6.3 and 6.6 the appeal bundle was due within 35 days of filing of the appeal and any late document – for example a skeleton argument – was required to be filed and served as soon as practicable but no later than 7 days before the hearing. This Court made specific directions, against a backcloth of previous orders, by order of Freedman J on 16 October 2020. That order directed the appellant's appeal bundle to be filed and served by 4pm on 30 October 2020 and a skeleton argument be filed and served by 4pm on 9 November 2020. As I have already said, 6 days later (22 October 2020) the hearing was listed for 1 December 2020.

4. On 30 October 2020 – the deadline under Freedman J's order for the appeal bundle – the Claimant's solicitor made an application for an extension of time and variation of that order. In that application she sought a new deadline of 9 November 2020 for the bundle and 27 November 2020 for the skeleton argument.

5. That application was dealt with by Freedman J, 5 days later, on 4 November 2020. In his order of 4 November 2020 Freedman J recorded: that the Claimant had failed to comply with the previous directions; that the Claimant had given no explanation and

pointed to no change of circumstances; and that no explanation had been given for the timing of the application on 30 October 2020 (the date on which the appeal bundle was due). Freedman J emphasised the essential need for the materials to be filed and served in good time prior to the hearing. He made clear that there was no reason in his judgment for any extension of time. He decided to deal with the position by making an 'unless order' and spelling out the consequence of non-compliance. He gave until 4pm on 17 November 2020 both for the bundle and the skeleton argument and directed that, in default, the renewed applications for permission to appeal would be struck out and debarred. He emphasised the appropriately strict nature of the sanction and the last opportunity that was being afforded.

6. On 17 November 2020 the Claimant's solicitor filed an application to set aside Freedman J's 'unless order' of 4 November 2020. That application referred to a conversation with the Court the previous day on which the substance of the order of Freedman J on 4 November 2020 had been communicated to the Claimant's solicitor. The position taken in the application to set aside the order was this: that the order of 4 November 2020 had not been served on the Claimant's solicitor and she had been unaware of it until 16 November 2020. In those circumstances, she asked that the Court lift the 'unless order' and allow further time for the bundle and skeleton argument.

7. By email on 25 November 2020 the Claimant's solicitor told the Court that she was sending a bundle to the court for the hearing on 1 December 2020, and she has produced records of that bundle having been received by the Court on 26 November 2020.

8. In his reasoned order dated 26 November 2020, Johnson J refused the application dated 17 November 2020. He refused any further extension of time. He struck out the two renewed applications for permission to appeal and declared they be debarred. He vacated the hearing on 1 December 2020. The application before me today is to set aside that order of Johnson J on 26 November 2020.

Mode of hearing

9. The mode of hearing was a remote hearing by Microsoft Teams. I am quite satisfied that that mode of hearing was appropriate, justified and proportionate in the context of the pandemic. I am satisfied that the mode of hearing involved no prejudice to the interests of any party. I am also satisfied that it promoted the open justice principle. This case and its start time, together with an email address usable by any member of the press or public, were all published in the Court's cause list. This was a public hearing. The hearing has been recorded. This ruling will be available in the public domain.

Proceeding in the absence of a party

10. There has been no attendance today by or on behalf of the Claimant. That is no surprise in the light of events of yesterday, to which I will come. I have considered CPR 23.11 together with the interests of justice and the overriding objective. I have the power to proceed in the absence of the Claimant. I also have the power to adjourn this hearing and direct that it be relisted. I am satisfied that there is no unfairness to the Claimant, in proceeding with the hearing today in the absence of the Claimant and any representative.

11. This hearing was clearly notified to, and known about by, the Claimant's solicitor. On 28 January 2021 notice of the hearing today was posted out to the parties. The case was allocated 90 minutes of court time, to provide the oral hearing that was sought of this application.

12. Yesterday morning at 10:01 I sent a case management email to all lawyers in the case, to promote the efficiency of this remote hearing. I wanted to ensure that I had all the materials that I needed and to give the parties an opportunity to identify essential pre-reading by the Court.

13. At 10:22 yesterday the Claimant's solicitor Ms Sophie Khan – of the Claimant's solicitors Sophie Khan & Co –sent an email to me, requesting that today's hearing be adjourned. She asked that the hearing be relisted to take in to account her available dates in March 2021. She said this: "Unfortunately, due to an existing hearing commitment, a four-day inquest, commencing tomorrow, 23 February 2021, I will be unable to represent the [Claimant]. I have taken steps to source alternative Counsel to represent the [Claimant] at the hearing listed before you tomorrow. However, none are prepared to work under a Conditional Fee Agreement".

14. That email made no reference to previous events subsequent to the issuing of the application dated 7 December 2020 and the notification of today's hearing date on 28 January 2021. What had in fact happened was that on 8 February 2021 Ms Khan had telephoned the Court and spoken to a member of Court staff, referring to a 'pre-existing commitment' and requesting an adjournment. She was told during that conversation that she would need to make a formal application if she was pursuing a request for adjournment, absent consent from the Defendant.

15. No application was made or pursued. Instead, 9 days later, on 17 February 2021 the Defendant filed and served a skeleton argument in response to the application. Again, nothing further was done, until the email yesterday at 10:22. Once that email was received the Court staff replied reminding Ms Khan of what had occurred on 8 February 2021. She responded by providing an application notice seeking an adjournment at 11:29 yesterday. Meanwhile the Defendant had made clear that it resisted any adjournment. I made an Order, which I circulated by email at 12:44 yesterday, refusing the application to adjourn. I will set out here the reasons which I gave for that refusal:

> ***Notification of the hearing tomorrow (23.2.21) was posted out by the Court on 28.1.21. On 8.2.21 the claimant's solicitor advocate (Ms Khan) telephoned the Court and requested that the hearing be adjourned as she was "not available" for the hearing tomorrow: The Court's Mr Daniels told her that she would need to make an application to adjourn the hearing unless the defendant consented. Ms Khan made no application. 9 days later (17.2.21), D's skeleton argument was filed and served. No bundle was filed by Ms Khan. No skeleton argument was filed. Having received a case-management email from me this morning (1001), Ms Khan requested that I adjourn – by email at 1022 – referring to a "pre-existing commitment" tomorrow and the absence of alternative counsel. Reminded by the Court of what she was told on 8.2.21, she filed an application (1129 today). Adjournment is opposed. I am fully satisfied that it is not appropriate in the interests of justice, having regard to the overriding objective, that I adjourn. This was C's opportunity to have a hearing (Turner J 19.1.21) of an application (7.12.20) to set aside the strike out (Johnson J: 26.11.20) of applications for PTA two interlocutory costs orders, in light of an unless order (Freedman J: 4.11.20). The application is hopelessly late. The delay is wholly unexplained. No evidence has been produced, including of anything done after 8.2.21. Costs have been incurred by D. The reasons at §§11-12 provide me with relevant context, including Johnson J's criticism of C's solicitor for seeking to excuse previous defaults by reference to "pre-existing Court and diary***

> ***commitments". Ms Khan will have known and foreseen that this hearing could not be approached in the way in which it has been; and that the response – if it was – would be robust.***

16. There was no response from Ms Khan during yesterday to further emails about the hearing today, until 20:18 yesterday evening when she emailed me and my clerk to say that she had nothing material to add to what she had previously said. She apologised for being out of the office in the afternoon. She confirmed that she was attending an inquest today and had been unable to source alternative Counsel for the hearing today. She said in her email that 'all efforts have been made over the last 2 weeks' to do so.

17. It is inexplicable that an email should be sent by a solicitor direct to a judge relating to a hearing but not copied in to the lawyers on the other side, the more so when the judge had specifically set up an email group involving all lawyers for the purposes of communications about the hearing. I was able to ensure this morning, when I saw yesterday evening's email of 20:18, that it was provided to the Defendant's representatives.

18. In my judgment, there is no basis at all for adjourning today's hearing. In my judgment, it would be wrong in principle to do so, absent some cogent piece of evidence or development, in circumstances where an adjournment was requested yesterday, then formally applied for yesterday, and was refused yesterday for reasons given by the Court. But I am satisfied, even if the matter is to be looked at entirely 'afresh', that there is no basis today for an adjournment.

19. What is so striking is the inactivity – in relation to engaging the Court and, with transparency, the Defendant – following the conversation between Ms Khan and a member of the Court staff on 8 February 2021. There is no basis at all on which Ms Khan could have contemplated that the Court would simply accede to a last-minute attempt to adjourn, in circumstances where there has been inactivity and lack of engagement, where the Defendant has done its work to prepare the hearing and file its skeleton argument, where adjournment is raised at the very last minute, with little if anything by way of supporting evidence, and with nothing by way of explanation still less good reason for inactivity and lack of communication following 8 February 2021.

20. Having regard to the interests of justice and the overriding objective I am quite satisfied that the appropriate course is to deal with this application today on such substantive merits as it has.

<u>The application: preliminary points</u>

21. The grounds of application are set out clearly in the application notice. There has been every opportunity to file further written submissions – most obviously a skeleton argument – which the Court could consider today. The only skeleton argument produced for today is that filed and served last Wednesday (17 February 2021) by Mr O'Keeffe for the Defendant. I turn to the substance of the application.

22. Mr O'Keeffe has abandoned today a point made in his skeleton argument which had invited the Court to imply 'totally without merit' (TWM) certification into Johnson J's order (26 November 2020) with the consequence that this Court would lack jurisdiction to deal with this application. In my judgment, Mr O'Keeffe was correct and wise not to pursue that point. I would not have implied TWM certification into an order. Johnson J

would have certified the application had he intended to do so. The mechanism under the rules for TWM certification, with its consequences, depends on a formal and explicit certification.

23. Mr O'Keeffe raised the question whether this application is out of time, and lacks any good reason to extend time, in circumstances where the rules required that it be issued within 7 days of service of the order of Johnson J (made on 26 November 2020) which is sought to be impugned. The application refers to the order of Johnson J and its date and there is no suggestion anywhere that it came to the attention of Ms Khan belatedly. Having said that, I prefer to deal with the application before me on its substantive merits and will put to one side the questions of when the order was in fact served and whether the application was within 7 days of service. Very fairly, Mr O'Keeffe raised the point against himself – in circumstances where the Claimant is not in attendance or represented at this hearing – that he does not have a secure evidential platform to know precisely on what date the order of Johnson J was served.

24. Next, I can put to one side two of the references made in the application before me to what are said to be errors in the chronology set out by Johnson J in his reasoned order of 26 November 2020. One is said by Ms Khan in the application to be an omission of a reference to an application for permission to appeal out of time. The other is said to be a misstatement as to which party had sought directions at a particular point in the chronology. It is plain and obvious that nothing could possibly turn on either of those matters. To the extent that they were an error, or an omission, they are plainly matters of no materiality.

Whether the hearing was "in jeopardy"

25. The application relies on what is characterised as the absence of any 'jeopardy' to the hearing fixed for 1 December 2020. In his reasons for making his order on 26 November 2020, Mr Justice Johnson said: "the hearing on 1 December 2020 is now in jeopardy". In the application Ms Khan says that that was erroneous, emphasising that a bundle had been sent the previous day and was received by the Court on 26 November 2020. In those circumstances, says Ms Khan, there was no "jeopardy" to the hearing. She also submits that Johnson J may not have been aware that the bundle was being provided.

26. There is absolutely nothing in this point. The reference to the bundle being provided to the Court was contained in the same email that responded to a request that Johnson J had himself made, because he wished to see the two appeal notices. Johnson J was perfectly entitled, and indeed plainly correct, to recognise that the hearing was in jeopardy.

27. The appeal bundle, required by the rules, had been the subject of a specific court imposed deadline of 30 October 2020. At no stage between Freedman J's order of 16 October 2020 and 25 November 2020 had any bundle been provided to the Court. Moreover no bundle was ever provided to the Defendant, including on 25 November 2020 or any day prior to that or subsequent to that. Johnson J made his order on Thursday 26 November 2020, rightly recognising the "jeopardy" in which the hearing the following Tuesday 1 December 2020 had been placed by the Claimant's continued defaults. A skeleton argument had been required at 4pm on 9 November 2020. Like the bundle, the default in providing it was never the subject of any adequate explanation, still less good reason. No skeleton argument was ever provided, including when the

application of 17 November 2020 was made. At the time of Johnson J's order, no skeleton argument had been supplied.

28. The jeopardy was plain. The suggestion of its absence is hopeless.

The 'factual matrix' direction

29. Next, it is said in the application that Johnson J was wrong to describe the subject matter of the applications for permission to appeal as being "concerned with two interlocutory costs orders". The correct position, says Ms Khan, is that the applications related not only to those two interlocutory costs orders but also to the 'factual matrix' direction of HHJ Bird.

30. Mr O'Keeffe convincingly submits, in his skeleton and oral submissions, that absolutely nothing could have turned – or could now turn – on the inclusion of the challenge to the 'factual matrix' direction within the second renewed application for permission to appeal. The 'factual matrix' direction was a case-management direction. It was the subject of a reasoned refusal of permission to appeal. It related to the preferred wording to be used in an agenda for experts. That wording, and any prejudice arising from it, would be tempered by the opportunities that will arise for CPR Part 35 questions and cross-examination of experts. Johnson J's observations about proportionality and the subject-matter of the proposed renewed applications for permission to appeal apply, in my judgment, with much the same force to the 'factual matrix' case-management direction component as to the interlocutory costs components. The existence of that 'factual matrix' component, in my judgment, made no difference to Johnson J's decision or substantial reasoning and is incapable of making any substantial difference in consideration of the application before me.

Non-service of the order of 4 November 2020

31. That leaves what, to what mind, is the essential substantive point raised on the application. The Claimant, through Ms Khan, says in essence that Johnson J's order should be set aside because it constituted, in effect, the Court's enforcement of an 'unless order' dated 4 November 2020, which order was not in fact served on the Claimant or Ms Khan after it was made. In those circumstances, what is said on behalf of the Claimant is that it is unfair for the default in compliance with that order to trigger the striking out of the renewed applications for permission to appeal and the debarring order.

32. Johnson J was well aware, and made explicit in his reasons that he was well aware, of what the Claimant through Ms Khan was saying about non-service of the order of 4 November 2020. The judge considered that feature of the case and plainly took it into account. He put it alongside the other features of the chronology and the way in which the renewed applications had been pursued. He put it alongside the undoubted 'jeopardy' to the hearing on 1 December 2020. He was satisfied that the lack of knowledge of Freedman J's 'unless order' in the period between 4 November 2020 and 16 November 2020 was not a proper basis, having regard to fairness, the interests of justice and the overriding objective, for allowing any further extension of time. He was satisfied that the just and proportionate course was to strike out the applications and make the debarring order.

33. In my judgment, that course was not only plainly open to Johnson J, but it was plainly correct. Viewed in terms of the authorities cited by Mr O'Keeffe – namely Collier v Williams [2006] EWCA Civ 20 at paragraph 37 and Tibbles v SIG Plc [2012] EWCA Civ 518 at paragraph 39 – there is in this case no material error or material change in circumstances or substantially different material to justify setting aside Johnson J's order. But even if I were to look at the matter entirely 'afresh', putting to one side Johnson J's conclusion and his reasons, in my judgment the order that he made in the circumstances of this case was plainly the just and proportionate order.

34. From the Claimant's perspective, and that of Ms Khan as his solicitor, emphasis is placed on the lack of service – and therefore the absence of knowledge – of Freedman J's order of 4 November 2020. But that feature needs to be put alongside the following facts and circumstances.

35. Ms Khan knew that the hearing had been listed for 1 December 2020. She knew that this Court had ordered, on 16 October 2020, that the bundle be filed and served by 4pm on 30 October 2020. She had not complied with that direction, nor given any warning of an inability to comply. She had simply waited until the last day (30 October 2020) and then made an application for an extension of time. She knew that that application was then in the hands of the Court. She knew it would be dealt with promptly by the Court. She knew that the deadline, unless varied, for the skeleton argument was 4pm on 9 November 2020. And she knew that the deadline which she herself was seeking from the Court for the bundle was 9 November 2020. She knew that the skeleton argument, if not produced on 9 November, would need an extension of time.

36. Ms Khan did nothing to produce any documentation, whether a bundle or a skeleton argument, including on 9 November 2020. There is no evidence of any step taken by her to communicate with the Court, to find out what the position was in relation to the application that she had made. No step was taken, notwithstanding the timing and the importance. No step was taken, notwithstanding that the hearing date of 1 December 2020 was looming large. Ms Khan did not even provide the bundle by the date which she was seeking as an extension of time, namely 9 November 2020. Ms Khan tells this Court that what happened was that she 'returned to the office' and then made a telephone call to the Court, on 16 November 2020. In the light of that course of conduct, that passivity, and that inaction – quite independent of service of the court order of 4 November 2020 – in my judgment, there was and would have been a proper basis for Johnson J on 26 November 2020 to conclude that the order which he made was appropriate, even leaving aside lack of service of the order of 4 November 2020.

37. But the position is even worse. In the conversation on 16 November 2020 with the Court staff, Ms Khan had then found out what had happened with her application of 30 October 2020. She discovered that, although Freedman J had recorded that there was no good reason for any extension of time, he had given final deadlines for the bundle and skeleton of 17 November 2020. That was 4pm the following day. Ms Khan saw the court order of 4 November 2020 itself on the morning of 17 November 2020. It was in those circumstances that Ms Khan took no step to provide a bundle to the Court, still less to the Defendant. She took no step to provide a skeleton argument. Instead she decided to take the course of issuing yet another application, on the final day set by a Court deadline, to set aside the directions that had been made. In other words she was doing exactly what she had done on 30 October 2020 on the day of, and in relation to, the bundle deadline that had been set 14 days earlier (16 October 2020).

38. Worse than that, having made her application on 17 November 2020, Mr Khan then took no step between that date and Thursday 26 November 2020: to provide a bundle to the Defendant; to provide a bundle promptly to the Court; and to supply any skeleton argument to anybody. This, moreover, was in the face of a practice direction which, as I have explained, makes clear that late documents – including a skeleton argument – must be provided "as soon as practicable and, in any event, no less than 7 days before the hearing": CPR PD52B at paragraph 6.6.

39. Putting this knowledge, action and inaction alongside what is said – and Johnson J accepted, as do I – as to non-service of the order of 4 November 2020, the order of Johnson J was fully justified, proportionate, consistent with the overriding objective and plainly correct.

Conclusion

40. For all these reasons and in the circumstances, the application of 7 December 2020 fails on its substantive merits and is dismissed. The order of Johnson J of 26 November 2020 stands. The Claimant's applications for permission to appeal against the orders of HHJ Bird dated 26 June 2019 and 25 September 2019 are struck out. The Claimant is debarred from proceeding with the application for permission to appeal against those orders. Johnson J's order that the Claimant bear the costs of and occasioned by the application for permission to appeal stands. I will hear submissions from Mr O'Keeffe as to whether there is any consequential matter arising.

TWM Certification

41. Mr O'Keeffe invites me to conclude and record that the application of 7 December 2020 was 'totally without merit' (CPR 23.12). He does not go on to submit that it would be appropriate to make a civil restraint order. I am satisfied that the application was indeed 'totally without merit'. It was "bound to fail" and "totally devoid of merit" (White Book paragraph 23.12.2). I am therefore obliged in my Order to record that fact, as I will do. In those circumstances, I am also obliged to consider whether it is appropriate to make a civil restraint order. Having done so, I am satisfied that it is not appropriate to do so.

Costs

42. Mr O'Keeffe asks for a costs order which he says should be on the indemnity basis. I am satisfied that the Defendant should have its costs of today. Mr O'Keeffe has not however persuaded me that they should be on the indemnity basis. He characterised as unreasonable the Claimant's failure to communicate with the Defendant in relation to this application. That is indeed indefensible. However, I am satisfied that the robust way with which the Court dealt yesterday and today with the question of adjournment, ensuring that this application be dealt with today on its substantive merits, and allowing the Defendant's position to be advanced and – ultimately, in the event – vindicated was an appropriate response to the way in which the application had been sought to be advanced. I am not persuaded that there was "some conduct or circumstance" involving "unreasonableness" which justice calls to be reflected in a costs order on other than a standard basis.

43. Mr O'Keeffe invites the Court to allow a period of 21 days with liberty to apply to seek that those costs be paid by the Claimant's solicitors personally (CPR 46.8). The only

order sought today is liberty to apply within 21 days if so advised. I am satisfied that there is sufficient concern in this case to give the Defendant that liberty to make that application. The Defendant will want to give mature reflection to the question of whether to pursue that application. I am acutely conscious as the White Book commentary emphasises of the protections, including the procedural protections, that arise on the part of any legal representative facing such an application. I have not been asked today, even provisionally, to make any finding so far as any trigger for wasted costs is concerned and it would not be right or fair to do so. The judgment that I have given speaks for itself.

44. Finally Mr O'Keeffe asked me to order that the Defendant have the costs of the hearing on 16 October 2020 before Freedman J, which Freedman J reserved. I am not prepared to make any costs order in relation to those costs. Johnson J specifically dealt with them and ordered that they remained reserved. The invitation to this Court to make an order today was not foreshadowed in Mr O'Keeffe's skeleton argument nor in any communication with the Claimant's solicitor. In those circumstances, I am not satisfied that it would be fair to deal with that matter, even provisionally.

23.2.21