IN THE COUNTY COURT AT CENTRAL LONDON Claim No G10CL323

B E T W E E N:

1. MR PETER CONNOLLY
2. MRS ELIZABETH CONNOLLY

Applicants/Defendants

and

MANOLETE PARTNERS PLC

Respondent/Claimant

Judgment

This is the judgement of the Court and I direct that no further transcript need be prepared.

1. This is the hearing of an application dated 5 November 2020, made by the applicants/defendants, to set aside a default judgment dated 29 September 2020.
2. The factual background is that the applicants were directors of, and two of the main people working, in a company, Peter Connolly Scaffolding Limited, which provided scaffolding to the construction industry.
3. In his witness statement dated 5 November 2020 Mr Peter Connelly says that he was far more comfortable dealing with scaffolding than running a company and/or its administrative affairs. For those purposes he sought professional advice as and when necessary. Nonetheless he recognised that the profits of the company accrued mainly to him and his wife albeit after several years also to a third shareholder and director who had previously been solely a salaried employee. He acknowledges that he became aware in 2017 that the company had financial problems in that it owed a large sum to HMRC in respect of VAT. That caused him to take advice from Begbies, in the guise of their Mr Lee. Mr Connolly’s evidence is that Mr Lee advised that the company should commission Begbies to undertake a pre-packaged process of administration, with a new company rising Phoenix-like from the ashes to continue the scaffolding business.
4. There is a dispute as to what took place at the meeting on 7 November 2019 and it was common ground at the hearing before me that in an interlocutory hearing of this nature it is not appropriate for there to be an attempt to make findings of fact on such disputed factual issues.
5. The main historical background is that the company had been incorporated in January 2008 and until the salaried employee, Mr Lunt, became a director and shareholder in the company, it was in effect a husband and wife company. Mr Lunt became a director and shareholder sometime in 2012 and Mr Connolly says that Mr Lunt then wanted the remuneration arrangements recorded in writing. To that end contracts of employment were drawn up in January 2013 for all three participants in the business, recording differential salaries according to their differential roles in the company. It is also Mr Connolly’s evidence that these salaries were considered modest and, at least in his case, the level of salary was fixed so as not to take him into the higher rates of income tax, but to keep it within the basic rate so far as PAYE was concerned.
6. In March 2017 dividends were paid to the three shareholders with further dividends being paid in August 2017. On 5 October 2017 bonuses were declared although not then paid/credited against the Directors’ respective loan accounts.
7. There is no dispute that a meeting took place at Begbies offices on 7 November 2017 which was attended by Mr Connolly, Mr Lunt, Mr Stonefield (the company accountant) and Mr Lee (of Begbies). Mr Connolly says that at that meeting there was a discussion as to whether the declared, but unpaid, bonuses could be paid and that Mr Lee gave the directors to understand that there was no proper reason why they should not be paid. Although there is no witness evidence from Mr Lee as part of this interlocutory hearing, the position taken by the respondents is that it is denied that he gave the directors cause to believe that the declared bonuses could be paid notwithstanding the proposal that there should be a pre-packaged administration of the company in circumstances where Mr Lee was acting on the hypothesis that the company was insolvent.
8. During the hearing there was discussion as to whether, if the evidence given by Mr Connolly is correct on this issue, it might feed an estoppel against the respondent (on the basis that it took the cause of action, by assignment, subject to equities). The position taken by the respondents is that no such estoppel can arise and that if there is any cause of action available to the directors, it lies against Begbies and/or Mr. Lee in negligence.
9. On 22 December 2017 the company was placed into administration and the firm of Ward Hadaway, solicitors, was appointed to act for and behalf of the administrators. On 5 November 2018 those solicitors sent a Letter before Action to each of the applicants setting out various claims which, it was asserted, meant that the applicants were indebted to the company, and thus to the assignee, in a sum of around £200,000. The applicants consulted their own solicitors, Mounteney, who, it seems, did not feel competent to deal with insolvency matters and so advised the applicants to take alternative legal advice.
10. Ward Hadaway wrote again on 15 July 2019 and 12 November 2019 before writing to, Mounteney, solicitors, on 29 May 2020 incorrectly asserting that proceedings had been issued and enclosing a draft Claim Form and draft Particulars of Claim, whilst asking those solicitors if they had authority to accept service.
11. On 29 May 2020 Mounteney replied to say that they did not have authority to accept service.
12. A Claim Form was issued on 27 July 2020, with Particulars of Claim, for service by the respondent’s solicitors. Before any attempt at service took place the Court made an Order on 4 August 2020 (without a hearing) transferring the claim from the High Court to the County Court (at Central London).
13. Up to this point it is clear that the applicants were aware, from the fairly aggressive correspondence sent by Ward Hadaway, that proceedings might well be served against them. It is unclear to me whether the Order of 4 August 2020 had been sent to the applicants by the court or whether the applicants only saw it when they received such documents as were sent to them by the respondent’s solicitors under cover of a letter of 6 August 2020.
14. It is to that letter of 6 August 2020 that I now turn. It is in the same terms as the previous letter dated 12 November 2019. Mr Connolly, in his evidence, says that he was confused by the content of the letter when taken with the various enclosures (unspecified upon the face of the letter). I put the matter in that way because there is positive evidence from Mr Connolly that only certain documents were enclosed with that letter whereas the respondents, by their witness Laura Keegan (witness statement dated 15 February 2021), casts unnecessary aspersions upon Mr Connolly’s veracity when she contends that documents which he says were not included under cover of the letter of 6 August 2020, were almost certainly included because she describes a system that was operated by her practice which, inferentially, she asserts was fool-proof. In this interlocutory application there is no material available to me capable of putting Mr Connolly’s veracity in doubt and I do not regard evidence of system sufficient to overcome his positive evidence relating to what was and was not included in the envelope enclosing the letter of 6 August 2020.
15. Mr Connolly’s evidence is that he received the letter of 6 August 2020 with its enclosures. There is common ground that one of the enclosures was a sealed Claim Form (but with no signed Statement of Truth), one of the enclosures was the Particulars of Claim and other enclosures included notes on how to complete various documents. The evidence is that there was no Response Pack, as required. The case advanced on behalf of the respondents is that those omissions do not matter when it comes to considering the mandatory ground for setting aside a default judgement under CPR 13.2 because CPR 22.2(1) expressly provides that the absence of a Statement of Truth does not invalidate proceedings but that the recipient can apply to set aside, in this case, the Claim Form, under CPR 22.2(2). There is no such application.
16. I have also been taken to authorities, which I need not detail, to the effect that the absence of a response pack does not invalidate service (if otherwise valid) although when I come to consider the discretionary grounds for setting aside a default judgement under CPR 13.3, the absence of a Response Pack is a factor which I am entitled to take into account when exercising my broad discretion under that rule.
17. An ancillary point was raised concerning there being a redacted version of the Assignment of the relevant causes of action to the respondents as Annex A to the Particulars of Claim which, in my judgement, takes the matter no further. That is because there had been, I am told, previous written notice of the assignment within the meaning of section 136 Law of Property Act 1925. Dr Wilkinson did not contend that that was not so.
18. Several arguments have been advanced by the applicants. I will take each of them in turn.
19. First it is said that there has not been valid service of the Claim Form and/or Particulars of Claim because although it is accepted that they were contained within the enclosures under cover of the letter of 6 August 2020, the overall effect of the various documents contained within that envelope was so confusing as to lead an objective observer to the conclusion that proceedings were not being served.
20. Dr Wilkinson took me to the formulation put forward by Mr Justice Christopher Clarke in Asia Pacific (UK) Ltd v Hanjin Shipping Company Limited [2005] EWHC 243, at paragraph 33 where the learned judge said “*where a claim form is delivered to the recipient in a manner provided for by the rules it is, in my view, served unless it is made clear by the person who delivers it that, whilst he is delivering the form by such a method he is not in fact serving it.”*
21. In each circumstance where an issue arises as to whether there has or has not been service, it must, of necessity, be fact sensitive. Dr Wilkinson placed reliance upon the evidence that the Claim Form and the Particulars of Claim were part of a large volume of documents contained within the same envelope. In his evidence Mr Connolly does not say that he did not read them or that he did read them; simply that he was confused by what he had received. There is no evidence from Mrs Connolly.
22. In my judgment the documents were sent and received. Indeed, the applicants do not dispute that to be the correct position. However, it is argued on their behalf that any objective recipient would not have understood that they were being served with legal proceedings quite regardless of whether they knew that, in the past, such proceedings may have been issued. It is one thing to issue proceedings; it is a quite separate matter to serve them.
23. The case advanced by the applicants is one with which it is easy to have every sympathy. That is because the letter of 6 August 2020 is, on any objective reading of it, utterly misleading. Mr Gale seemed to suggest that the misleading nature of the letter could be substantially disregarded on the basis that it was a copy of earlier correspondence sent to the applicants. I do not see the logic of that position. Any reasonably competent firm of solicitors should have made it explicitly clear in a covering letter, if they chose to send one, that the Claim Form and the Particulars of Claim were being served upon the addressees. Mr Gale pointed out that that is not strictly necessary because it would be sufficient service if the envelope had contained nothing more than the Claim Form and the Particulars of Claim and, presumably, he would add for good measure, preferably the Response Pack. That is so but if solicitors choose to send a covering letter they cannot then mislead the recipient and yet contend that it should be ignored when the issue of whether there has been good service falls to be considered.
24. In section1 of the letter the respondent’s solicitors say that the letter is a *“formal letter of claim in accordance with the practice direction on pre-action conduct.”* They then go on to say that failing to acknowledge the letter or a failure to provide a substantive response to it “*could lead to proceedings being issued against you without further notice.”* Quite why a firm of solicitors would make that assertion when proceedings had been issued and, according to what has been said today, were then being served, has not been the subject of any submissions by Mr Gale. That is because, I apprehend, there were no sensible submissions that were capable of being made in respect thereof.
25. In section 8 of the letter headed “Next Steps” the solicitors reiterate that the applicants were required to provide an acknowledgement to the letter within 14 days and, if the claim was to be disputed, should provide a substantive response within 28 days. In paragraph 8.4 they said explicitly “*Failure to provide either an acknowledgement or a substantive response within the timeframe set out above could lead to proceedings being commenced against you without further notice.”*
26. If that letter had been received by reasonably competent solicitors I entertain little doubt that upon perusing the enclosures, which included a sealed Claim Form and Particulars of Claim, they would have realised that the letter was a cut and paste job which had not been appropriately revised in the way that it necessarily ought to have been revised. In this case the letter of 6 August 2020 with its enclosures was sent to the applicants directly because the respondent’s solicitors knew that no solicitors were authorised to accept service on behalf of the applicants, albeit that they might not then have known that the applicants did not, at that stage, have solicitors acting for them who felt competent to deal with insolvency matters.
27. Thus I have to approach the issue of whether there has been valid service in the context of this being purported service upon non-professional recipients. If I follow the approach taken by Mr Justice Christopher Clarke the starting point is that the envelope containing the letter of 6 August 2020 did contain the sealed Claim Form and the Particulars of Claim. Thus the issue that I have to decide is whether the covering letter contra-indicated that service was being effected. In my judgment it is not necessary for it to be decided that there has not been valid service, for a covering letter to state in unequivocal terms that the documents are not being sent by way of service. In my judgment the proper approach is to look at the covering letter in its totality and to read it as an objective reader, then knowing the relevant factual background, would read it. In my judgment service is not effected if there is a contra-indication, sufficient to lead an objective reader to the conclusion that service was not then being effected, even though that may fall short of an unequivocal statement that the documents are not sent by way of service.
28. When I approach the matter in that way Mr Gale says that I should also have regard to the fact that several days later Mr Connolly took advice from direct access counsel and in his email seeking to set up the retainer, referred to the fact that a claim was being made against him. Each counsel sought to rely upon the tense used in that email in support of the submission that it had importance in the context of the issue that I must decide. There could be some merit to that suggestion if the letter had been written by a highly articulate person well-versed in the capability of the English language to be used with precision. With no disrespect to Mr Connolly, I rather doubt that he falls into that category. Indeed, with the advent of ever increasing electronic communication, respect for and precise use of the English language seems to be in decline.
29. I confess to finding the conclusion that I should reach on this particular issue, to be finely balanced. It is for the applicants to persuade me on the available evidence that there has not been valid service because there was a sufficient contra-indication in the letter of 6 August 2020 to lead them to believe that service of the enclosed Claim Form and Particulars of Claim was not intended. I am just so persuaded. If the respondent’s solicitors send such a wholly inappropriate and misleading letter any doubt about its effect or import should, in my judgment, be resolved in favour of the applicants and it is on that basis that I am just persuaded to conclude that there was not valid service and that accordingly the default judgement should be set aside under CPR 13.2
30. If, however, I was wrong in my foregoing conclusion, I would, without hesitation, set aside the judgement under CPR 13.3. That is a discretionary ground which provides that the court can set aside a default judgment on two different bases. The first is that the applicants have a real prospect of successfully defending the claim. The second is that it appears to the Court that there is some other good reason why the judgment should be set aside. Even if, notwithstanding the content of the letter of 6 August 2020, there was valid service, it is my judgment that its content was so manifestly misleading and inappropriate that right and justice demands that the judgment based upon service (assuming such to be valid) accompanied by such a misleading covering letter, should be set aside. I arrive at that conclusion because I am entirely satisfied that the effect of the covering letter was such as to lull the applicants into believing that there was no imminent threat of a judgment being entered against them if they desisted from taking the procedural steps required by the Civil Procedure Rules. On the contrary, the letter specifically invited them to react in a manner which, if adopted, would have been quite different to the usual need to file an acknowledgement of service and thereafter to file a Defence in accordance with the rules.
31. It hardly needs stating that it is manifestly unjust to mislead recipients of legal documents and then to seek to take advantage of that inappropriate conduct for the benefit of one’s own client.
32. Dr Wilkinson points out in paragraph 18 of his Skeleton Argument that in Rajval Construction Ltd v Bestville Properties Ltd [2011] CILL 2994 the court considered the absence of a Response Pack to be a sufficient reason to exercise its discretion to set aside a default judgement. That does not set a legal precedent given that it was simply an illustration of an approach taken by a court on the facts of that case. However, in my judgment, it gives some indication to those who serve or purport to serve proceedings, of the importance of abiding by the requirements of the CPR. It does not lie well in the mouth of those who themselves fail to comply with the requirements of the CPR to seek to take substantial advantage of an arguable failure of another party to do likewise.
33. Additionally Dr Wilkinson says that his clients have a real prospect of defending the proceedings in accordance with their pleaded case, as set out in the draft Defence. I am conscious that it is not for me to conduct a mini trial but simply to ask the question whether, if the various averments made by the applicants are made out, they would have more than a fanciful prospect of succeeding at trial. One of the main planks of their defence is reliance upon the Duomatic principle, because they say that monies that they received from the company, although paid as dividends and/or bonuses, were in reality salary and would have been packaged as such but for advice which they had received.
34. Mr Gale argues that by reference to the relevant company’s accounts it was, at all relevant times, insolvent and so the applicants were not entitled to pay themselves dividends and/or bonuses (to the prejudice of creditors). As a matter of principle he is correct. The applicant’s response is that they rely upon the Management Accounts which show a different position and show that, at least to a significant or substantial extent, dividend and/or bonus payments were permissible. That is substantially an issue of fact, although it may well involve the need for expert evidence. It is certainly not a matter upon which I can make any relevant findings. I can do no more than identify that by reference to the Management Accounts the point is arguable and cannot be said to be fanciful.
35. Mr Gale also makes the point that the pleaded estoppel or cross-claim defence does not work because any cross-claim or counterclaim would lie at the behest of the company; not the applicants. He is correct about that. Nonetheless the respondents took their assignments subject to equities and if the applicants make out a case to the effect that Begbies and/or Mr. Lee gave negligent advice, issues of quantum will necessarily need to be dealt with in the context of the relevant company’s financial position, from time to time, as it might be found to have been upon such findings of fact being made. I can see the force of Mr Gale’s submission but keep in mind that, as Dr Wilkinson pointed out, the respondent’s case relating to the bonuses that were paid is not that these were unlawful distributions, but only that there is liability on the part of the applicants for misfeasance as directors.
36. In my judgement the point is not so clear-cut as to permit me to conclude that the arguments advanced by Dr Wilkinson, building upon the content of the draft Defence, can be said to be fanciful rather than points which have a real prospect of success.
37. It is also pointed out by Dr Wilkinson that the Applicants seek to rely upon section1157 Companies Act 2006 to obtain discretionary relief from the Court. In circumstances where Mr Connolly gives evidence that he was primarily guided by professional advice, being essentially a scaffolder without the requisite knowledge to decide what accountancy and/or corporate affairs’ steps should be taken, the proposition that he and his wife acted honestly and reasonably is certainly not a proposition that could or should be summarily dismissed. It is patently an arguable issue with a real prospect of success.
38. For the foregoing reasons the default judgment is set aside under CPR 13.2, 13.3(a) and 13.3(b).

Geraint Jones QC.

Recorder.

12 July 2021.