Case No: A00CL008

IN THE COUNTY COURT AT CENTRAL LONDON

The Mayor's & City of London Court
Date: 13/04/2016

Before :

DISTRICT JUDGE PARFITT

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Between :

ENGJELLUSH KRASNIQI	**Claimant**
- and -	
WATFORD TIMBER COMPANY LIMITED	**Defendant**

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Gurion Taussig (instructed by **TV Edwards LLP**) for the **Claimant**
Charles Bagot (instructed by **Keoghs LLP**) for the **Defendant**

Hearing dates: 18 March 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 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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DISTRICT JUDGE PARFITT

District Judge Parfitt :

1. This is my judgment on the Claimant's applications dated 5 August 2015 and 16 December 2015. It is about a party who has failed to comply with court orders regarding production of bank statements. I note at the outset and bear in mind throughout the judgment that the Claimant is said to have limited or no English and that consequently communications between him and his solicitors are not straightforward.

2. The claim was issued on 10 January 2013 and seeks damages for an accident at work on 13 January 2010. Liability was admitted on 7 July 2010 and the Claimant seeks damages in an amount not exceeding £100,000. Each side has obtained permission to rely on experts in orthopaedics, pain and psychiatry. In an amended defence dated 5 December 2014, the Defendant raised exaggeration and relies on surveillance evidence. For the Defendant the importance of the bank statements is that they provide some independent evidence of what the Claimant was doing since the accident against which his descriptions of incapacity can be measured.

3. I thank both Counsel for their skeletons and oral arguments. I have taken all points into account even if I do not specifically mention them in the analysis that follows.

Chronological Narrative & Comment

4. On 29 July 2014 directions were made which took the case through to a CMC on 9 February 2015 where any necessary trial directions would be given.

5. On 8 December 2014 the Defendant's exaggeration case became apparent to the Claimant: it was reflected in surveillance evidence, the proposed amended defence and a request for further information dated 5 December 2014 which probed the Claimant's account of his condition after the accident. In particular, the Defendant asked the Claimant to identify what bank accounts he had from the period January 2010 to date and to provide copy bank statements.

6. The request for further information asked for a response by 2 January 2015. None was given and on 12 January 2015 the Defendant issued an application seeking, among other things, a response and permission to amend its defence.

7. The application came on for hearing on 9 February 2015 at the same time as the CMC. Materially at that hearing the court ordered: *Unless by 4pm 2 March 2015 the Claimant serve a reply…to the Defendant's part 18 request for further information dated 5/12/14…the Claimant's claim shall stand struck out….* The unless order also included the service of copies of the Claimant's Albanian medical records or alternatively a disclosure statement addressing those records.

8. In the reply to the request for further information which is dated 2 March 2015, the Claimant stated: *I have requested and paid for copy statements from the above account from HSBC but as at the date of providing these replies the copy statements have yet to be received by me. I undertake to disclose those copy statements immediately upon there being sent to me.*

9. In fact the covering letter which sent the reply was able to provide most of the statements requested but the Claimant's solicitors added *the bank has only provided part of the requested statements. The bank has been asked to provide the additional statements as a matter of urgency and we will forward copies to you as soon as they have been received.*

10. In reply the Defendant's solicitors on 6 March 2015 identified the pages that they said were missing and asked for a letter from the bank confirming the reason for the delay.

11. The Defendant's solicitors chased again by email of 25 March 2015. On 27 March 2015 the Claimant's solicitor said he was continuing to chase the outstanding bank statements. The Defendant's solicitors pressed again on 30 March 2015 and reminded the Claimant of her request for a letter from the bank.

12. Some detail was provided by an email of 2 April 2015 from the Claimant's solicitor. He said that the Claimant had been to the bank that day to chase. A colleague had spoken to the bank and was told that complete bank statements from January 2010 onwards would be sent by the bank to the Claimant by post to be received within the next 5-7 days. The writer was not aware of any reason for the continued delay. The Claimant had been asked to tell the solicitors as soon as the statements had been received so that they could be sent to the Defendant.

13. The missing statements were not sent to the Defendant and on 16 April 2015 the Defendant's solicitors chased again. The Defendant explaining that if they were not sent then an application would be issued. The Claimant's solicitor's response was that the Claimant went back to his bank to ask where the statements were and was told he needed to re-order them. It was expected that the statements would be available. The Defendant was asked to defer making an application to the end of that week (which was 24 April).

14. On 27 April, the Defendants wrote to say they would be issuing an application for the missing statements. They did so and a copy of it was sent to the Claimant. On 15 May a further letter was sent asking the Claimant for an update about the bank statements in circumstances where there was likely to be a delay before the application was considered. Further copy statements were sent by the Claimant under cover of a letter dated 18 May 2015 but these appear from the face of the letter to be largely duplicative. The statements from January 2010 to September 2010 were still missing. The Claimant's solicitors were seeking to clarify the situation with the Claimant and the bank.

15. On 2 June 2015, on the Claimant's application, an order was made extending the time for the Claimant to file his updated schedule of loss to 3 July 2015. None has yet been filed.

16. On 3 June at a telephone listing appointment it was not possible to list the case within the trial window provided by the order of 9 February (7 September to 27 November) because of availability problems for the Defendant's experts and so it was necessary for the parties to apply back to court for an extended window and a new telephone listing appointment. The Defendant made that application on 15 June 2015. It has not been dealt with by the court but given the Defendant's position that the claim has been struck out since 5 August that is not surprising.

17. The Defendant's application dated 27 April was considered on paper on 2 July 2015 and an unless order was made without a hearing. This required the outstanding statements to be provided by 4pm on 5 August. The order contained the familiar rubric that any application to have the order varied, set aside or revoked should be made within 7 days of service.

18. There is nothing at all in the evidence to explain what happened after 18 May 2015 to obtain the missing bank statements. The material set out above demonstrates that it was a matter that the Claimant was dealing with directly with his bank. The position as of at least 18 May 2015, but more likely 3 March 2015, must have been that it was clear to the Claimant and his solicitors that the statements from January 2010 to September 2010 were still missing. There is no direct evidence from the bank and no evidence from the Claimant as to his dealings with the bank on this issue. The Claimant's solicitor's letter of 3 March 2015 said that the bank had been asked to provide the missing statements.

19. The 2 July unless order was drawn on 17 July and sent out to the parties soon after.

20. The Claimant's solicitors' evidence is that from at least 13 July 2015 until 7 September 2015 the Claimant and the solicitors lost touch with each other. The difficulty was that the Claimant moved and his new address was not entered on the solicitors' system. The solicitors believed that telephone messages had been left but the Claimant disputed it. The Claimant received one message and called back but did not receive any call back himself.

21. There is no evidence that any and if so what steps were taken regarding the missing bank documents between 18 May and 16 December when they were eventually provided to the Defendant. I note letters from the Claimant's solicitors to the Claimant on the issue on 23 & 24 July 2015 (in response to receiving the unless order).

22. In the absence of any instructions, the Claimant's solicitors applied on 5 August to vary the unless order to allow the Claimant until 4pm on 19 August 2015 to provide the missing statements. The application was based on the Claimant's solicitors loss of contact with the Claimant.

23. The 5 August application was seen by a district judge on paper on 7 September and ordered to be listed for a 15 minute hearing – a hearing date was given of 11 January 2016.

24. On 11 August 2015 the Defendant wrote to the court to say that the Claimant had not complied with the order dated 2 July 2015 and so the action stood struck out. The letter was copied by email to the Claimant's solicitors. The Claimant's solicitors did not respond to that letter and did not otherwise themselves tell the Defendant about the application dated 5 August 2015.

25. The Defendant did not know about the Claimant's application until a listing notification was received from the court on 2 November 2015. The Defendant explained that by that time it thought the claim had been closed for three months and its counsel explained various steps that had been taken as a consequence – standing

down experts, dealing with benefit payments and other administrative end of case matters.

26. On 16 December the bank documents were provided to the Defendant and the Claimant made an application for relief from sanctions. The timing of the relief application was premised on the Claimant's solicitors not wanting to make it until the Claimant had provided the documents. The evidence in support of that application refers to contact between the Claimant and his solicitors on 7 September, 29 September (when there was no interpreter), 23 October and 13 November 2015. There is no evidence about how the bank statement issue was advanced during those meetings.

The Claimant's Case

27. The Claimant's case is straightforward. The 5 August 2015 application was an in time request for an extension of time and needs to be considered as a matter of open discretion bearing in mind the over-riding objective. It would be disproportionate to strike out this quantum only claim that might be approaching £100,000 just because of the failure to disclose a few bank statements. In particular where there were general communication difficulties because of the Claimant's lack of English and specific communication difficulties between July and September 2015.

28. In the alternative, but I think it fair to say it was recognised that it was a more difficult application, for similar reasons relief from sanction should be granted to prevent the Defendant getting a disproportionate windfall arising out of a relatively small default on the Claimant's part particularly in circumstances where for other reasons the trial date has yet to have been fixed.

The Defendant's Case

29. The Defendant's case is as follows:

    i) The Claimant is in breach of the unless order of 9 February 2015 and so the claim was struck out on 2 March 2015.

    ii) If not, then any application to vary the 2 July 2015 order had to be made within 7 days of service. It was not and no application for relief of that sanction has been made and so the court can only consider the 16 December 2015 relief from sanction application.

    iii) If the court can consider the 5 August application it should be refused because the Claimant's litigation conduct has disrupted the progress of proceedings and there are many and repeated failings.

    iv) For similar reasons the application dated 16 December should also fail: the breach is serious, there is no good reason for it and in addition to the other matters relied upon in answer to the 5 August application the application for relief itself is many months after the documents should have been provided.

Analysis & Decision

30. The logic of the Defendant's arguments require that my discussion deals with them in the order that I have set out above. However, because my decision is that the Claimant fails on the substantive merits of his applications, I will deal more briefly than I might otherwise have done with the Defendant's more technical objections.

Claim Struck Out Through Non-Compliance with 9 February Unless Order

31. The unless order of 9 February required the Claimant to reply to the request for information by 4pm 2 March 2015. On 2 March 2015 the Claimant provided a reply. The reply was genuine and addressed in full the questions sought. It did not on its face provide the documents that the Defendant had requested but such of the documents that the Claimant had at that time were provided under separate cover on the same date.

32. I have no doubt that such a reply was sufficient to meet the requirements of the unless order of 9 February. The order could have specified that it was a necessary part of complying with the order that the reply had to produce the documents sought but it did not do so. The nature and extent of the argument between the parties which led to the unless order being made does not in this context change the conclusion as to what the Claimant needed to do to comply. The draconian sanction of a strike out points to a construction of any unless order which errs on the side of compliance rather than setting traps for inadvertent non-compliance.

The Application of 5 August 2015 was out of time

33. In the differing world of credit-hire litigation, but also in the context of debarring orders, the Court of Appeal in *Zurich Insurance v Umerji* [2014] EWCA Civ 357 at paragraph 25, commented *But one should not be over-critical. The County Court is not the Commercial Court…* Although no part of the decision in that case, the illustrative contrast is helpful to the extent of reminding those in the County Court that it is often the case that parties – whether represented or not – make choices which could have been done better. Often it is necessary to look at the substance of what is being done rather than its form. It seems to me that the Defendant's criticisms of the Claimant's position under this heading are formulaic rather than substantive.

34. The order of 2 July was made on the application of the Defendant dated 27 April 2015. The Defendant sent the application to the Claimant and so it was not "without notice". However the court dealt with it on paper and without a hearing. This was done pursuant to the court's powers under CPR 23.8(c)[1]. Paragraph 11.2 of CPR PD23A says that where CPR 23.8(c) applies the court will treat the application as if the court was proposing to make an order of its own initiative. CPR 3.3(5)(b) requires the court when making an order of its own initiative to include within the order a statement of the right of any party affected by the order to apply to have it set aside or varied or stayed. The normal period for any such application to be made is 7 days after service (CPR 3.3(6)(b)).

[1] The application notice sought that it be dealt with without a hearing and included a proposed time estimate of 30 minutes. In any event the court did not follow the procedure in CPR PD23A para 2.3 to 2.4

35. CPR 3.1(2)(a) recognises the court's power to extend the time required for a party to do something.

36. An application arising out of a party's right to ask the court to revisit an order made of its own initiative and an application for the court to exercise its powers to extend time are different in substance. The normal 7 day after service time-bar in respect of the former has no relevance to the latter.

37. In form the Claimant's application dated 5 August 2015 is made pursuant to the right recognised in CPR 3.3(5)(a) and indeed it could have been made pursuant to that right if it had been made in time. In substance, however, because all it seeks is an extension of time, it is an application to extend time under CPR 3.1(2)(a) for which there is no time limit within which it has to be made beyond the general requirement to make an application as soon as it becomes necessary or desirable to do so (CPR 23APD para 2.7). The technical contrast is between the application notice which talks about a "variation" and the witness statement in support which concludes by seeking an extension.

38. The Defendant's counsel said that given how bad the Claimant had been in not complying with the requirement to give copies of the bank statements the court's intent would be thwarted if he was allowed to make an application to extend time outside of the 7 day limitation. I disagree. The 7 day limitation did not apply to an application to extend time and in substance that was what the Claimant's application sought. The application is not caught by the 7 day time bar.

The Merits of the 5 August Application

39. It was common ground that an in-time application is not to be equated with an application for relief from sanctions even by analogy. The application must be dealt with under the court's general discretion informed by the requirement under CPR 1.2 to seek to give effect to the overriding objective when exercising, here, the power to extend time.

40. In circumstances where the court is dealing with the application so long after it was made there is a temptation, which both parties fell into to some extent during submissions, to assume hypotheticals in their favour based on what would have happened had things been done sooner. I do not consider it appropriate to frame the question as being would the court have extended time until 16 December 2015 if it was considering whether to grant the extension in August 2015. The court should deal with the reality before it and take account of everything relevant that has happened.

41. The reality is that the Claimant has known since December 2014 that the Defendant wanted to see his bank statements from January 2010. The scope of the documents sought has been clear and limited – he has only had one bank account during the relevant period and that is with HSBC – a major High Street bank.

42. The statements appear to have been sought from the bank (and paid for) some time prior to 2 March 2015 and probably after 9 February. The bulk of them had been provided by 2 March. There is no explanation as to why the request for the missing statements made before 2 March 2015 was not successful. It appears that a further

request for a set of statements was made on 2 April 2015. There is no explanation as to why only the missing statements were not chased at that time. Despite promises being made no further statements were available until 18 May 2015. Again no explanation has been given for why the statements between January 2010 and September 2010 were missing from the second production of statements by the bank.

43. There is no evidence as to what happened about the statements between May 2015 and July 2015 when at least the Claimant's solicitors had woken up to the seriousness of the situation and were writing letters to the Claimant. Even excusing the period between July and September 2015 when there was a communication breakdown does not explain why it took until December 2015 to provide the missing statements.

44. This is a period from 9 February 2015 to 16 December 2015 when there could have been no doubt that the Claimant was required by the court to provide the statements from January 2010 but he did not do so. There is nothing, including the language difficulties, that explains why such a simple task should have taken so long.

45. The consequence of the length of time taken to provide the missing statements has been to increase the parties' costs and time spent having to deal with what should have been a straightforward part of the case management of this dispute.

46. The missing documents are considered important by the Defendant because the Defendant believes they provide an objective benchmark against which the Claimant's description of his incapacities can be tested.

47. The Claimant's failure to provide the documents in a reasonable time – which has been recognised already to some extent in the unless orders that have been made – is contrary to the need for expedition and has threatened to undermine fairness to the extent that one option for the Defendant – if it did not want to incur further time and cost to get the missing statements – would have been to go to trial without them and risk the potential prejudice to its own position.

48. The issue over these bank statements has involved three separate applications (I am not counting the relief from sanctions application for this purpose) and has been addressed by the court on two occasions other than the applications under consideration in this judgment. This is disproportionate for such a straightforward and familiar aspect of litigation.

49. The Claimant failed to provide copies when invited to and then failed to provide them in full when the court first ordered replies and failed again to provide copies when the court again required them notwithstanding the unless order.

50. All of those circumstances analysed by reference to the relevant requirements of the overriding objective point to the Claimant not being allowed an extension of time to 16 December 2015 to provide the missing disclosure. There is no sufficient explanation given as to why it took the Claimant so long to provide the missing statements to justify an extension of time from the 5 August 2015 deadline until 16 December 2015. When that lack of explanation is balanced against the other factors that inform the overriding objective, as set out above, the refusal of a 19 week extension for something so apparently simple is inevitable.

51. For completeness I address here the points made by Mr Taussig on behalf of the Claimant in his admirably complete skeleton argument:

    i) I am not persuaded that the Claimant's solicitors' did their utmost to obtain the documents. There is too great a delay at various stages in the narrative between December 2014 and December 2015 and too little information about what steps the solicitors or the Claimant took with the Bank to get the documents. There is more information about the communications breakdown between about July 2015 and September 2015 and too little about getting the documents.

    ii) The fact that it is only a minority of pages that were missing since 2 March 2015 is nothing to the point. Compliance in this case is not sensibly measured by percentages. It all depends on context: a failure to pay a sum of money by a few pounds because of an unexpected banking charge might be of minor importance; a failure to disclose one page of a document could be highly significant. In the present case I am satisfied that the missing January to September 2010 disclosure is of such potential significance (I can say no more on an interim basis) that its production was of substantial importance to the fairness of the litigation process.

    iii) It is not open to the Claimant to rely on the efficient litigation of his claim otherwise when he has failed to pay the costs order from the 9 February 2015 hearing, failed to provide an updated schedule of loss which was due on 3 July and failed to give notice to the Defendant of his application to extend time dated 5 August 2015.

    iv) In this context the Court of Appeal often uses "windfall" to contrast the insignificant litigation management consequences of a failure, with the potential consequences of a strike-out (para 40 of *Denton* for example) but where that contrast does not exist because the court is satisfied that the failure is significant then there is nothing inherently wrong in the consequences of refusing a time application being the likely strike out of that parties' claim or defence. It remains a balancing exercise.

    v) The Claimant has remedied the failure in so far as the missing documents have now been provided. It is a factor that weighs in favour of the Claimant. But the delay itself, the lack of a good explanation for that delay and the consequences to the due management of the litigation weigh heavily against the Claimant.

    vi) I do not consider any possible claim that the Claimant might have against his solicitors – which does not seem to me immediately obvious anyway given the relatively short period of time when there was a communication breakdown compared to the longer period of time in which the missing documents were not provided – of significant weight in the present case.

The Relief From Sanction Application

52. It was common ground that this needed to be approached in three stages.

53. The failure between 2 March and 16 December to provide a complete set of the bank account records was serious. It was serious because of the amount of time taken. It was also serious because the court, in its unless order dated 2 July, had already determined that it was sufficiently important to justify a strike out if compliance was not made by 5 August 2015.

54. For the reasons I have set out above the Claimant has put forward no explanation for the failure to get the documents. Paragraph 28 of the Claimant's solicitor's witness statement in support of the application for relief from sanctions states: *…the only reason that the Claimant had not previously provided these additional sheets was because the bank had not provided them to him*. On the assumption that this is accurate it does not explain at all how this happened twice (in February 2015 & in May 2015) or why it took such a long time to rectify – between May 2015 and December 2015 (taking the time frame which I regard as most generous to the Claimant).

55. The analysis of all the circumstances of the case requires the rejection of the application for relief. In addition to the matters I have already referred to above I regard the following factors as significant:

    i) The court's case management plan for the case was that it would be ready for trial by February 2015 and then tried during 2015. This did not happen and whatever other potential causative factors there were, for example the inability to find a suitable date within the intended window, a major contributing factor to 2015 being lost to the parties was the failure to disclose the complete bank statements and the interim orders and applications required as a result. It is now March 2016 and the block on the litigation caused by the Claimant's failure is only now being considered.

    ii) The difficulties in getting hearing dates within reasonable times (the 15 minute application for an extension made on 5 August 2015 was given a first hearing date of 11 January 2016) only emphasises the importance to the due progression of cases that parties comply with the orders that the court has made. As soon as there is non-compliance, the due progression of a case becomes much more difficult.

    iii) The Claimant did not comply with the requirement to serve an updated schedule of loss by 4pm on 3 July 2015. This has still not been done and it has not been excused or explained.

    iv) The Claimant has also failed to pay a costs order of £850.00 ordered against him on 9 February 2015. This is more significant than the amount of the costs order alone because it was a costs order made to recognise the need that the Defendant had for making its application dated 14 January to compel the replies to the request for further information. If the Claimant had complied with that request in full at the first time of asking none of the consequences with which this judgment is concerned would have happened. The Claimant does not appear to take seriously the need for complying with court orders – in this instance the requirement to pay £850.00.

v) The Defendant has criticised the Claimant for not disclosing Albanian medical records. The Claimant has filed three statements explaining that any existing records are not in his control and I do not regard the latest of those statements as failing to meet the obligation on the Claimant contained in the 9 February 2015 order. This is not a factor against the Claimant.

vi) The Claimant's solicitors did not send the Defendant a copy of the application dated 5 August 2015 when it was made. This was a mistake and contrary to the requirements of good practice.

vii) This mistake was compounded by the Claimant's solicitor's failure to respond to the Defendant's solicitors' letter dated 11 August 2015 to the court but copied to the Claimant's solicitors stating their position that the claim had been struck out. The Claimant's solicitor should have taken that further opportunity to send a copy of the 5 August application to the Defendant or at least written to inform them of the substance of that application.

viii) The lateness of the application for relief from sanctions (5 August breach and 16 December application) is not excused by the statement that the Claimant was waiting until he could comply before making the application. A more understandable timing for the application might have either after 19 August – the time sought in the original extension application – or shortly after 7 September once the Claimant and his solicitors had re-established contact. In any event waiting until the unless order had been complied with was the wrong choice. It added to delay and compounded the court's and the Defendant's ignorance about what was happening.

ix) I do not consider that the outcome of refusing relief being to deprive the Claimant of whatever damages he might have been entitled to makes the sanction disproportionate. The sanction is only the consequence of the Claimant not complying with an unless order which was not challenged as to its substance. The Defendant was right to draw attention to *British Gas Trading v Oak Cash and Carry Ltd* [2016] EWCA Civ 153 where a defendant was struck out from defending a £200,000 claim because of failing to file a pre-trial checklist in time. Strike out is a serious sanction but the court's ability to grant relief from sanction in an appropriate case mitigates that harshness. If it is not appropriate to grant relief otherwise then it is unlikely that the mere fact of the sanction would itself justify the granting of relief. Ultimately it will depend on the facts and the facts of this case when taken as a whole do not entitle the Claimant to relief from sanction.

56. Lastly, I consider expressly the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with orders. Both of these factors have informed much of the analysis above but when they are directly addressed there can be no doubt that the application for relief from sanction should be refused. The Claimant's inexcusable failure to provide the full set of bank statements has contributed to many months of delay, much additional cost and has not demonstrated due concern for following the court's orders.

57. Accordingly the Claimant's applications are dismissed.