The interplay between an unsuccessful application to adjourn a trial (CPR 3.1) and a subsequent application to set aside a judgment due to non-attendance (CPR 39.3(3)) (Fatima v Family Channel Ltd and another)

02/07/2020

Dispute Resolution analysis: This appeal raised an important point of principle, namely, the interplay between an unsuccessful application to adjourn a trial under CPR 3.1(2)(b) and a subsequent application to set aside a judgment entered against a non-attending party under CPR 39.3(3). The Court of Appeal made it clear that there is no principle of consistency or judicial comity which requires a judge dealing with an application pursuant to CPR 39.3(3) to follow the trial judge's decision, even where nothing has subsequently changed in respect of the facts.

In particular, an application to adjourn a trial and an application under CPR 39.3 are discrete applications involving different tests. An application pursuant to CPR 39.3(3) justifies a less draconian approach; the approach to the question of whether or not there is a good reason for non-attendance is different (and more generous to the applicant) under CPR 39.3(3) than it is in an application to adjourn. Written by Georgia Whiting, barrister, at 4 King's Bench Walk.

Fatima v Family Channel Ltd and another [2020] EWCA Civ 824

What are the practical implications of this case?

This case serves as a reminder as to the distinct tests to be applied when considering an application to adjourn a trial due to non-attendance under CPR 3.1(2)(b), and a subsequent application to set aside judgment pursuant to CPR 39.3(3).

An application to set-aside under CPR 39.3(3) justifies a less draconian approach than an application to adjourn due to non-attendance on medical grounds, and the approach to the question of whether or not there is a good reason for the non-attendance is different (and more generous to the applicant) under CPR 39.3(3) than it is in an application to adjourn.

It is also clear that it is entirely open to a judge dealing with an application pursuant to CPR 39.3(3) to reach a different conclusion to the trial judge, even on the same facts; there is no principle of 'consistency and judicial comity' requiring judges to do otherwise.

Where an application to adjourn a trial on the basis of non-attendance has been unsuccessful, parties and practitioners will be afforded (an arguably more generous) second bite at the cherry by way of an application to set-aside pursuant to CPR 39.3(3). Of course, such an application should be made promptly and include as much evidence as possible, but a judge hearing that application will by no means be bound by the decision of the trial judge.

What was the background?

In 2016 Family Channel Ltd (FCL) commenced proceedings against Ms Fatima for the repayment of some £28,000 and/or damages for allegedly unauthorised withdrawals by Ms Fatima from FCL's bank account, while she was engaged as an administrative assistant by them. Ms Fatima denied the claim and countered with a Part 20 claim against FCL and Mr Riaz, the sole director of and

shareholder of FCL, alleging that he had raped and falsely imprisoned her, and that FCL was vicariously liable for the same.

The matter was listed for a three-day trial commencing on 16 January 2019 before Mr Recorder Bebb QC (the Recorder). Ms Fatima did not attend court on the first day of the hearing and counsel on her behalf applied for an adjournment of the trial under CPR 3.1(2)(b) based upon Ms Fatima's illness. Reliance was placed on two letters from GPs and, in short, they outlined that Ms Fatima was suffering from depression and anxiety, to a large part caused by the upcoming trial date.

The Recorder referred to the various authorities in respect of an adjournment on grounds of ill health and acknowledged the serious nature of the allegations on both sides, stating that the action had gone on for 'far too long'. He ruled that he would commence the trial the following day after making arrangements for adjustments in order to assist Ms Fatima in the giving of her evidence.

Ms Fatima did not attend on the next day, nor did counsel on her behalf. By this stage, there was a letter from Bradford Crisis and Sexual Abuse Service before the court. The letter stated that the Service had been working with Ms Fatima since 2016. The Recorder indicated that, at face value, this would mean that the trial would never happen. There was also a text message from Ms Fatima's husband stating that she had been admitted to hospital with chest pains, vomiting, headaches, and hysteria.

The Recorder ruled that the evidence was insufficient to justify an adjournment and accordingly proceeded in her absence. He then struck out her defence and counterclaim and awarded judgment in favour of FCL.

On 29 January 2019 Ms Fatima applied to set the order aside, as was her right pursuant to CPR 39.3. That application was heard by District Judge Hickinbottom (the District Judge) and was successful. The material before the District Judge was essentially the same as that before the Recorder, save that a witness statement accompanied the application notice. The judgment and orders of the Recorder were set aside and directions given for the matter to proceed to trial.

The order of the District Judge was appealed by FCL and came before HHJ Gosnell (the judge). The appeal was successful, with the judge holding that the material before the Recorder and the District Judge was materially the same and, as such, the District Judge should therefore have followed the decision of the Recorder 'for reasons of consistency and judicial comity'.

Ms Fatima was subsequently given permission to appeal to the Court of Appeal.

What did the court decide?

Lady Justice Carr in giving the leading judgment drew the following conclusions from an analysis of the relevant case law and tests:

- first, it is clear that an application under CPR 39.3(3) is not an appeal of any sort (nor is it an application to vary the previous decision not to adjourn and/or proceed in the absence of a party). It can be pursued instead of, or in appropriate circumstances alongside, an appeal (see *Bank of Scotland v Pereira* [2011] EWCA Civ 241)
- secondly, CPR 39.3(3) to (5) provide for a specific procedural remedy with its own self-contained code of applicable principles, albeit subject, on the question of ultimate discretion, to a consideration of CPR 3.9 (which reflects the overriding objective) and the *Denton* principles
- thirdly, there is a material distinction between an application for adjournment of a trial and an application to set aside judgment, the latter justifying a less draconian approach (see *TBO Investments Ltd v Mohun-Smith* [2016] EWCA Civ 403)
- for those reasons, the hearing of an application under CPR 39.3(3) involves a separate exercise of discretion which is unfettered by any previous exercise of discretion on an adjournment application
- finally, an appellate court will be slow to overturn a judge's decision under CPR 39.3 to refuse or allow an application to set aside, unless satisfied that the judge was wrong in principle

Following from the above conclusions, the judge's reasoning below was flawed. There is no principle of consistency or judicial comity which required the judge hearing an application

under CPR 39.3(3) to follow the trial judge, and the judge was wrong to hold otherwise. It is open to the judge hearing an application under CPR 39.3 to reach a different decision on the same facts.

Further, since the judge was conducting an appeal by way of review under CPR 52.21 and the decision under appeal was an exercise of discretion, he should not have interfered with its exercise in the absence of error of law or it being outside the wide ambit permissible. He erred in his approach that it was a binary decision as to whether the District Judge was right or wrong. The District Judge had in fact made no error of law, and the exercise of his discretion was well within the range of decisions properly open to him. For those reasons, the appeal was allowed and the District Judge's decision restored.

Case details:

- Court: Court of Appeal, Civil Division
- Judge: Lord Justice Lewison, Lord Justice Popplewell, and Lady Justice Carr
- Date of judgment: 1 July 2020

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