Neutral Citation Number: [2021] EWCA Civ 1163

Case No: B3/2020/1552

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
His Honour Judge Gore QC (sitting as a High Court Judge)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th July 2021

Before :

LORD JUSTICE UNDERHILL
(VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION)
LORD JUSTICE HADDON-CAVE
AND
LADY JUSTICE ELISABETH LAING

- -

Between :

MINISTRY OF DEFENCE — **Appellant**

- and –

SHIJI SIVAJI — **Respondent**

(executrix of the estate of Mr Bhanu Sivaji, Deceased, on behalf of the estate and on behalf of the Deceased's widow and dependant, Mrs Thankam Sivaji)

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Niazi Fetto, Tim Johnston and Lucinda Spearman (instructed by Government Legal Department) for the Appellant
Andrew Young (instructed by Hodge, Jones and Allen LLP) for the Respondent

Hearing date : 16th June 2021
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Judgment Approved by the court
for handing down

Lord Justice Haddon-Cave:

Introduction

1. This is an appeal against the judgment and order of HHJ Gore QC (sitting as a High Court Judge) on 19th August 2020, debarring the Appellant from challenging the Respondent's factual case on exposure to asbestos of her late husband and directing that the action was no longer suitable for a hearing of preliminary issues and there should be a single trial.

2. The claim arises out of the alleged exposure of the Respondent's late husband, Bhanu Sivaji ("the Deceased"), to asbestos whilst he worked in a naval dockyard in Singapore as a welder between 19th May 1952 and 30th November 1968. The Deceased died on 3rd November 2015.

3. The Respondent, the Executrix of the Estate of Bhanu Sivaji, brought a claim under the Law Reform (Miscellaneous Provisions) Act 1934 ("the 1934 Act") and the Fatal Accidents Act 1976 ("the 1976 Act") against the Appellant for negligence, breach of contract and breach of statutory duty. The causes of action raise complex legal issues in English and Singaporean law, including (a) the applicable law to the claims, (b) to what extent the 1934 Act and the 1976 Act have extraterritorial effect or apply where the applicable law is that of Singapore and (c) whether any immunity applies to the Appellant.

4. The original Claim Form was issued on 12th October 2018, and the original Particulars of Claim were served on 13th November 2018. Both plead English law only.

5. On 27th March 2019, a case management hearing ("the First CMC") was held before Master Thornett. The Master held that the action was unsuitable for the 'show cause' procedure and that the case was to be tried as a standard case in the Queen's Bench Division List. The Master's Order dated 27th March 2019 gave each party the permission to instruct an expert in Singaporean law and permitted the Respondent to amend her Particulars of Claim and the Appellant to file an Amended Defence. The Master also ordered that there was to be a trial of preliminary issues ("PIT"), and a further CMC be listed in October 2019, ahead of which the parties were to attempt to agree the issues to be tried at the PIT.

6. On 28th June 2019, the Respondent served Amended Particulars of Claim pleading Singaporean law. On 10th September 2019, the Appellant served an Amended Defence which stated that the Respondent's permission to amend her case, granted by the Master, did not extend to the addition of new Singaporean causes of action to the Claim Form or Particulars of Claim which were time barred.

7. On 10th October 2019, during a second case management hearing ("the Second CMC"), the Master listed the PIT for the Michaelmas term of 2020 and directed that the parties should agree the issues, failing which the issues would be decided at a hearing on 20th April 2020.

8. On 16th April 2020, the Respondent applied for permission to amend her Claim Form in response to the Appellant's Amended Defence to include a Singaporean cause of action. The 20th April 2020 hearing was vacated pending the determination of the Claimant's permission application.

9. On 8th July 2020, the permission application was heard before HHJ Gore QC who granted the Respondent permission to amend her Claim Form and to rely on her Amended Particulars of Claim ("the July hearing"). At the end of the July hearing, it was agreed that a further hearing would be held to determine the orders consequential to the application.

10. On 19th August 2020, the consequential orders hearing was held before HHJ Gore QC ("the August hearing"). The Judge decided that he would treat it as a 'show cause' hearing and debarred the Defendant from defending the allegations that "the Deceased was exposed to and inhaled substantial and injurious quantities of asbestos while working at the Sembawang dockyard in Singapore between 1953 and 1968" ("the debarring order"). The Judge then ordered a single trial of all the issues in the case ("the single trial order").

11. On 9th September 2020, the Respondent sought permission to appeal against the Judge's judgment dated 19th August 2020 and order sealed on 4th September 2020. Permission to appeal and a stay were granted by Asplin LJ on 4th February 2021.

The Law

The 'show cause' procedure

12. Practice Direction 3D applies to claims for compensation for mesothelioma. It is aimed toward dispatching those cases "in which there are no reasonable prospects of maintaining a defence at an early stage in order to avoid the time and increased costs of applications" for summary judgment:

> "The 'show cause' procedure
> **PD3D 6.1** The 'show cause' procedure is a requirement by the court, of its own initiative and usually on a 'costs in the case' basis, for the defendant to identify the evidence and legal arguments that give the defendant a real prospect of success on any or all issues of liability. The court will use this procedure for the resolution of mesothelioma claims.
>
> **6.2** At the first case management conference, unless there is good reason not to do so, the defendant should be prepared to 'show cause' why –
>
> (1) a judgment on liability should not be entered against the defendant; and
> (2) a standard interim payment on account of damages and (if appropriate) costs and disbursements should not be made by the defendant by a specified date."

13. Essentially, this procedure requires the defendant to 'show cause' at the first case management conference why 'judgment on liability should not be entered' against it.

14. At a 'show cause' hearing, only if the claimant adduces credible evidence in support of their case does the defendant become subject to an evidential burden to 'show cause' (*Silcock v HMRC* [2009] EWHC 3025 (QB) at [9]).

Procedure when varying or revoking a case management order

15. A court may only vary or revoke an interim order under CPR r.3.1(7) where there has been a "material change in circumstances" since the order was made or "where the facts on which the original decision was made were misstated".

16. CPR r.3.1(7) "cannot constitute a power in a judge to hear an appeal from himself in respect of a final order", especially "where the order is founded upon a settlement agreed between the parties after the most detailed and highly skilled advice. The interests of justice, and of litigants generally, require that a final order remains such unless proper grounds for appeal exist" (*Roult v North West Strategic Health Authority* [2010] 1 W.L.R. 487 at [15]).

The Judgment below

17. HHJ Gore QC noted that the Master gave directions in the Second CMC to facilitate the trial of issues at a preliminary hearing in a prompt and timely fashion. The Master had directed that the parties should agree a list of issues for the PIT. The Judge concluded that since no list of issues had been agreed, there had been a material change in circumstances which gave rise to the entitlement to the court to vary the case management order made following the Second CMC.

18. The Judge stated that the Appellant had never been excused formally by an order from the 'show cause' requirement. The Appellant also failed to file any evidence prior to the First CMC or afterwards to 'show cause' why it should be permitted to defend the allegation concerning the Deceased's exposure to asbestos.

19. The Judge decided to debar the Appellant from defending the allegation that "the Deceased was exposed to and inhaled substantial and injurious quantities of asbestos while working at the Sembawang dockyard in Singapore between 1953 and 1968".

20. The Judge considered that the six remaining issues after the debarring order - which included issues of the applicable law on liability, limitation and damages and the assessment of damages - were interrelated and would benefit from the factual findings in a single trial. The Judge thus ordered a single trial on the basis that, in his view, a single trial would be the only fair, realistic and proportionate option.

21. The Judge also criticised both parties for fundamentally failing in their duty to cooperate and assist the court in furthering the overriding objective. The Judge said that the Respondent should have applied for her amendment much earlier than she did, having been alerted to the need to do so by the Appellant. Likewise, the Judge criticised the delay caused by the Appellant. The Judge accordingly decided not to adopt the ordinary rule that he who amends is ordered to pay the costs of and occasioned by the amendment and made no order as to costs (so each party bore its own costs related to the application to amend the Claim Form and Particulars of Claim).

Grounds of Appeal

22. The Appellant raised six grounds of appeal against the debarring order:

    (1) Ground 1: The Judge had no jurisdiction to reverse the Master's decision on 'show cause'.

    (2) Ground 2: The Judge misdirected himself regarding the nature of the First CMC.

    (3) Ground 3: No account was taken of the parties' agreement that the case was unsuitable for a 'show cause' procedure.

    (4) Ground 4: The judge prejudged the preliminary issues in the case.

    (5) Ground 5: The Judge reversed the burden of proof.

    (6) Ground 6: The debarring order was unjust because of a serious procedural irregularity.

23. The Appellant raised two further grounds in respect of the single trial order:

    (7) Ground 7: The Judge was wrong to disturb the Master's decision that a preliminary issues trial was required.

    (8) Ground 8: The Judge failed to take into account relevant matters.

24. The Respondent cross-appealed the Judge's costs order.

Submissions

Appellant's submissions

25. Mr Fetto's submissions on behalf of the Appellant can be summarised as follows:

    (1) Ground 1: Mr Fetto submitted that the Judge had no jurisdiction under CPR 3.1(7) to reverse the Master's order for two reasons. First, there was no material change in circumstances between the First CMC and the August hearing - the fact that the present case was unsuitable for the 'show cause' procedure had not changed since the Master's decision. Secondly, the facts were not misstated to the Master at the

First CMC. Mr Fetto further submitted that the Judge had not applied his mind to the right test under CPR 3.1(7). The reasoning the Judge gave confirmed this. The Judge erroneously relied on the lack of evidence filed by the Appellant prior to the First CMC. The situation before the Judge was precisely the same as before the Master – there had been no change of circumstances. Mr Fetto further pointed out that neither he nor Mr Young sought to persuade the Judge to conduct a 'show cause' hearing orally.

(2) Ground 2: Mr Fetto submitted that the notice of the First CMC did not provide for a "full" 'show cause' hearing on that date or for the Appellant to file any evidence. The Appellant was simply required to 'show cause' *in brief* why judgment on liability should not be entered at that date. The Notice explicitly provided that if the Appellant crossed the preliminary threshold, the matter would be "adjourned for a full 'show cause' hearing". Mr Fetto submitted that the Judge wrongly assumed that the First CMC had been a full 'show cause' hearing.

(3) Ground 3: Mr Fetto submitted that the Judge did not have regard to the evidence before the Master of an agreement between the parties in October 2018 that the case was unsuitable for the 'show cause' procedure. Mr Fetto submitted that since the Judge raised the 'show cause' procedure unilaterally, it is likely that he was unaware of this agreement.

(4) Ground 4: Mr Fetto submitted that the Judge prejudged the applicable law to the claim. The Judge stated that the Appellant exposed the Deceased to "substantial and injurious" amounts of asbestos. Mr Fetto argued that these words reflect the tests for liability under English law. Likewise, the Judge prejudged (a) the application of the Common Law to the Appellant and (b) whether the Appellant was immune from suit under both English and Singaporean law. Mr Fetto submitted that these were all preliminary issues that needed to be determined properly before the Appellant could fairly be held liable.

(5) Ground 5: Mr Fetto submitted that the Judge failed to require the Respondent to discharge her burden of proof in accordance with *Silcock*.

(6) Ground 6: Mr Fetto submitted that the grounds of appeal taken together demonstrated that the debarring order was unjust. He submitted that the Judge conducted the hearing in a procedurally defective way, causing unfairness to the Appellant. The Judge raised the issue of 'show cause' without any invitation from the parties to do so. The Appellant did not have the opportunity to file evidence and Counsel could not take instructions. Furthermore, the debarring order was made without following the procedural requirements set out in PD3D.

(7) Ground 7: Mr Fetto submitted that there had been no material change in circumstances since the First CMC, nor were facts misstated to the Judge. The PIT might reduce the scope of a full substantive trial or

eliminate the need for a trial. Mr Fetto submitted that the Judge was wrong to consider that the delay in the progression towards the PIT and the lack of costs budgeting amounted to a material change in circumstances as these issues were not relevant to the Master's original reasons for ordering a preliminary issues trial.

(8) Ground 8: Mr Fetto submitted that there was no justification for the Judge's finding that a single trial of all the remaining issues would be the "only fair, realistic and proportionate way forward". A single trial of all the issues was likely to last 14 days: 4 days for the applicable law issues and 10 days to determine the other issues in the case.

The Respondent's submissions

26. Mr Young's submissions on behalf of the Respondent can be summarised as follows:

(1) Ground 1: Mr Young submitted that Master in the First CMC made no decision on 'show cause' but merely made observations to counsel which resulted in the 'show cause' procedure not being pursued. There is no reference to any decision on the 'show cause' procedure in the minute of the order. In the alternative, Mr Young submitted that the Master's decision on 'show cause' was wider than the Judge's. The Master's decision was that the Appellant had a defence on the issue of liability, not the narrower factual issue of the Deceased's exposure to asbestos debarred by the Judge.

(2) Ground 2: Mr Young submitted that the Judge did not misdirect himself as to the nature of the First CMC as both parties were prepared to argue the 'show cause' issue and provided written submissions on the issue. Mr Young submitted that the Appellant's Defence does not include any assertions that amount to a defence of the factual claim that the Deceased was exposed to excessive amounts of asbestos dust while working for the defendant. The Judge was, therefore, entitled to assume that the Appellant had the opportunity to put its case fully before the Master in the First CMC and there was no more evidence that it could have put before the Judge on the issue.

(3) Ground 3: Mr Young challenged whether the agreement ever had any effect and, even if it did, it could not provide a reason for setting aside the debarring order.

(4) Ground 4: Mr Young submitted that the Judge did not prejudge the issues of applicable law, nor the Appellant's immunity from suit. The debarring order debarred the factual issues but does not imply that English law applies to the claim - the applicable law remained a disputed issue. Nor did the debarring order imply any breach of duty on the part of the Appellant.

(5) Ground 5: Mr Young submitted that the Respondent's evidence on liability was summarised in written submissions for the July hearing which were before the Judge. The Judge also had the Particulars of

Claim and Amended Particulars of Claim which contain a full account of the Deceased's exposure to asbestos. The evidence before the Judge was, therefore, enough to place an evidential burden on the Appellant to 'show cause'.

(6) Ground 6: Mr Young denied that the Judge conducted the August hearing in a procedurally defective way. The White Book at paragraph 6.1 of PD3D expressly states that '(t)he requirement to 'show cause' may be imposed at successive occasions'. He submitted that the Appellant could have asked for a short adjournment if instructions were necessary. Mr Young submitted that paragraph 6.2 of PD3D provides that, at the First CMC, unless there is good reason not to do so, the Appellant should have been prepared to 'show cause' why a judgment on liability should not be entered against it. Therefore, the Appellant should have been prepared to provide such evidence at the First CMC. Mr Young submitted that it did not do so because it could not do so. The Appellant's skeleton before the First CMC indicated that it had no evidence to file on the issues of the Deceased's exposure to asbestos. Furthermore, Mr Young submitted, setting aside the debarring order would result in greater costs and delay and more unnecessary use of court resources.

(7) Ground 7: Mr Young submitted that the single trial order was a case management decision which can only be impeached if it was outside the Judge's wide discretion. Mr Young questioned whether the Order following the First CMC in fact amounted to a direction requiring the PIT (rather it amounted to a preliminary step towards a future direction for a preliminary hearing which was never made), but accepted that both parties were under the assumption that there would be a hearing of preliminary issues. Mr Young submitted that there had been three material changes since the order was made. First, a finding by the joint experts that Singaporean law was applicable for the tort claims would not mean that all of the Respondent's tort claims are statute-barred. This meant that the original decision by the Master after the First CMC was based on a misstatement: that the Respondent's claims were statute-barred under Singaporean law such that deciding the applicable law would be decisive. Second, the delay and failure to agree issues: the parties have failed to agree on what preliminary issues should be included even after 12 months of attempting to do so. Third, the Respondent's withdrawal of support for a preliminary issue trial.

(8) Ground 8: Mr Young contended that the Appellant's time estimate of 14 days for a full trial was exaggerated. The hearing will be composed of legal submissions and two expert witnesses. Mr Young submitted that it was wrong to say that a PIT could eliminate the need for a trial altogether following the joint experts' opinion on Singaporean law.

27. Mr Young also submitted that the Judge's power to make the debarring order could have been based on other grounds, namely (a) the court's general case management powers under CPR 3.4(2)(a) to strike out a defence that discloses no reasonable grounds (b) by the court's power under CPR rule 3.1(m) to

make any other order for the purpose of managing the case or furthering the overriding objective or (c) under the inherent jurisdiction of the court.

Analysis

28. In my view, the Appellant's grounds are well-founded and the Judge's debarring order and single trial order cannot stand. I can set out the reasons relatively briefly.

29. First, the Judge did not have the power to vary the original order. There had been no material change in circumstances that could impeach the Master's earlier case management decision.

30. Second, there were several complicated preliminary issues (including, *e.g.* issues as to applicable law and immunity from suit) which had to be resolved before liability was determined.

31. Third, the Master had considered the matter carefully and had come to the conclusion (which was reasonably open to him) that this case was not suitable for the 'show cause' procedure. I do not accept Mr Young's submission that the Master merely made observations and made no decision on 'show cause'. The Master stated in clear terms (at paragraph 4 of the First CMC judgment):

> "…[O]bviously, this is a sophisticated case where jurisdiction has a primary issue before one even gets to the centrality of the allegations on exposure. I am therefore going to treat this as I would do any other case in the general QB list."

32. Fourth, both parties subsequently proceeded on the basis that the 'show cause' procedure had been abandoned and a PIT would be held until the August hearing.

33. Fifth, in relying on the Appellant's apparent "lack of evidence" the Judge failed to have proper regard the true nature of the First CMC hearing. It was not a full 'show cause' hearing. The Notice for the First CMC stated that:

> "[T]he Defendant[s] must be prepared to 'show cause' *in brief* as to why judgment on liability should not be entered at that stage…If the Court thinks there may be merit in the Defendant's submissions the matter will be adjourned for a *full* 'show cause' hearing".

34. Sixth, Mr Young's reliance on the provision in the White Book which provides that the 'show cause' requirement may be imposed at successive occasions does not avail him in circumstances where, in my view, the course of action and decision taken by the Judge was procedurally unfair and unjust. The 'show cause' requirement had been dispensed with by the Master. There was no reason to expect that the Judge would unilaterally raise it without warning or invitation from Counsel. The PD3D procedural rules were not followed. Further, the Judge's judgment does not show how the Respondent's burden of proof was satisfied. The Deceased's witness statement of 1st September 2015 and a relevant medical report of 21st September 2018, which

were before the Master in the First CMC, were not before the Judge in the August hearing.

35. Finally, it follows from my view that the debarring order was flawed and cannot stand, that the single trial order cannot stand either. The two matters stand or fall together. If the debarring order is revoked (which, in my view, it must be for the reasons stated above), a single trial cannot be said to be appropriate or a fair or proportionate way forward. As the Master concluded, the preliminary issues could reduce the scope of the substantive trial or obviate the need for a substantive trial altogether.

The Respondent's cross-appeal on costs

36. At the August hearing, Mr Young argued that costs should follow the event – and since the Respondent's application to amend the Claim Form to add claims under Singaporean law succeeded, this meant the Appellant should pay her costs. Mr Fetto argued on behalf of the Appellant that the Judge should order costs in the case.

37. The Judge declined to follow the views of either party. He ordered that each party bear their own costs of and occasioned by the Respondent's application and stated this order reflected "the conduct of each party and its blameworthiness"[8].

38. The Judge held in his July judgment that the Master's order permitting the Respondent to amend the Particulars of Claim "did not effect, and could not have effected the amendment" because there was no draft amendment in existence at the time, the language of the order was "not merely and permissibly infelicitous" (sic) and the Respondent required permission to amend *both* the Particulars and the Claim form [29].

39. Mr Young made what he admitted was a bold submission that the Judge's finding was 'perverse'. He submitted that the Master's order in effect gave the Respondent unqualified permission to amend the Particulars of Claim. Mr Young submitted that the Judge unfairly criticised the Respondent for not seeking an adjournment of her amendment application to obtain expert evidence before directions were given. The Appellant raised limitation arguments in relation to the alternative case in Singaporean law so there was a significant reason for securing an order for permission to amend the Particulars of Claim as soon as possible.

40. Mr Fetto submitted that the Master's order did not give *carte blanche* to amend or to add new causes of action out of time. He submitted that it was always envisaged that the parties would return to court in due course to consider the scope of the permitted defence.

Summary on costs

41. The Court has a wide discretion in dealing with costs. The Court of Appeal should not readily interfere with a judge's exercise of such discretion absent

error of law or serious procedural irregularity (*c.f. Tanfern Ltd v. Cameron-McDonald* [2000] 1 WLR 1311).

42. HHJ Gore QC took into account a wide range of matters when coming to his overall conclusion on costs. He was critical of the Respondent for not adjourning the application to amend pending the obtaining of expert evidence on whether the claim was actionable under Singaporean law and for not applying for the amendment "in the proper formal way much earlier than she did and had been alerted to that need by [the Appellant]" [5]. He was critical of the Appellant for filibustering and for "taking of this amendment point in this way at this time" which had led to significant extra costs [40(g)]. He was critical of the conduct of both parties which he said exhibited an "inexcusable misunderstanding of the ordinary principles of procedure" but also "intransigence" and "a fundamental breach of the duty to liaise co-operatively and assist the court in furthering the overriding objective" [7].

43. In my view, the Judge was entitled to come to the overall conclusion on costs that he did, taking into account the various factors that he outlined, including the relative blameworthiness of both the parties for the problems regarding the amendment and the delays in the conduct of the case. His decision was within the reasonable bounds of discretion. I am not persuaded that it would be appropriate to interfere with his decision.

44. The Judge rightly said that the parties must future pursue the litigation in a more cooperative and cost-effective manner in accordance with the overriding objective. I note that the Master had ordered the parties after the Second CMC to agree issues for a preliminary trial. These issues have still not been agreed. This is regrettable.

Conclusion

45. For the above reasons, in my judgment, the Appellant's appeal should be allowed and the Respondent's cross-appeal on costs should be dismissed.

Lady Justice Elisabeth Laing

46. I agree.

Lord Justice Underhill

47. I also agree.