KIMATHI V FCO [2017] EWHC 939 (QB)

By Andrew Kinnier

EXTENSION OF THE CUT-OFF DATE IN GROUP ACTIONS: CPR 19.13 AND THE DENTON GUIDANCE

THE FACTS

1. The decision in *Kimathi v FCO* [2017] EWHC 939 (QB) stems from a group action against the British government in respect of the conduct of British officials in Kenya between 1952 and 1963. The claims are brought by over 40,000 individuals and they involve allegations of rape, torture and detention.

2. This was an application under CPR 19.13(f) on behalf of some 30 prospective claimants seeking an order that they be entered onto the court register as claimants in the group action.

3. The court had imposed a cut-off date for adding claimants to the court register. Under CPR 19.13(e), the effect of that order was that, beyond that date, new claimants could not be added to the register without the permission of the court.

4. The cut-off date was 30 May 2014. The applicants made their application on 8 December 2016, two and half years later.

The applicants

5. The applicants were Kenyan nationals resident in Kenya. Many of them were elderly and some may have been illiterate (evidenced by the fact that they had signed their retainer by fingerprint). Some of the applicants brought their claims in a personal capacity, others brought them in their capacity as personal representatives of a deceased relative.

6. The applicants were part of a group of over 300 former clients of GT Law. The applicants retained GT Law around April 2014 (before the cut-off date) and GT Law went into administration towards the end of 2015. GT Law had entered most of the claims onto the register during that period. However, GT Law had failed to do so in respect of around 30 prospective claimants.

7. On 8 December 2016 solicitors Hugh James (acting on behalf of the 30 who had apparently been overlooked) applied to the court for an order under CPR 19.13(f).

DECISION

8. In *Holloway v Transform Medical Group (CS) Ltd (PIP Breast Implant Litigation)* [2014] EWHC 1641 (QB) Thirlwall J (as she then was) held that an application for permission to join the register under CPR 19.13(f), in circumstances where the cut-off date had passed, would engage CPR 3.9.

9. Stewart J did not expressly refer to PIP Breast Implant Litigation in that regard. However, the application was framed as an application for relief from sanctions. Therefore, Stewart J applied the three-stage test laid down by the Court of Appeal in *Denton v White Limited and De Laval and others* [2014] EWCA Civ 906:

   a. Whether the breach is serious and significant;

   b. Whether there is a good reason for it; and

   c. All the circumstances of the case.

First stage

10. In relation to the first stage, the judge seemed to be satisfied that the breach of the order imposing the cut-off date was serious and significant (a delay of almost two and half years). This conclusion would apply equally to both types of applicant (i.e. those acting in a personal capacity and those acting on behalf of a relative).

Second stage

11. Essentially, the reason for the delay (as put forward by the applicants) was that GT Law had made a mistake in not adding their claims to the register and it could not be rectified until Hugh James had uncovered it.

12. Hugh James was instructed in December 2015. They made the application in December 2016, one year later. Hugh James encountered significant delays in obtaining the files from IC Law (the firm who represented the applicants after GT Law went into administration). Hugh James first requested the files from IC Law in December 2015 shortly after they were instructed. Despite repeated efforts to chase IC Law, the first tranche was not forthcoming until March 2016. The remaining tranche only arrived in January 2017 (after the application had been made and on threat of a CPR Part 8 claim for delivery up of the files). Hugh James say that they could not have sought to rectify GT Law's mistake until they had received all files from IC Law.

13. However, the judge took the view that it was more likely that GT Law had made a conscious decision not to enter the applicants' claims onto the register. The claims made on behalf of deceased relatives were not even within the scope of the group action (which only covered claims made in a personal capacity). In relation to the other claims, the judge noted that there was evidence of many reasons why GT Law would have made the conscious decision not to enter these claims onto the register. For example, lack of evidence, or evidence that the prospective claimant had been coached. The fact that over 300 claims were properly registered by GT Law was also compelling.

14. Therefore, GT Law had made no "mistake", there was nothing for Hugh James to rectify and there was no good reason for the delay.

Third stage

15. Having found that the breach was serious and that there was no good reason for it, the judge moved on to the third stage and he looked at both types of claim together.

16. The judge noted that Denton "mandates" that the application for relief will not automatically fail in these circumstances. He further noted that, in looking at all the circumstances of the case, he had to give particular weight to the following:

    a. The need for litigation to be conducted efficiently and at proportionate cost;

    b. The need to enforce compliance with rules, practice directions and orders;

    c. The promptness of the application;

    d. The seriousness and significance of the breach (stage 1) and the reason for it (stage 2).

17. In relation to a) the judge found that, if he were to grant relief in respect of the claims brought in a personal capacity, the trial timetable would not be threatened. The same could not be said of the claims brought on behalf of deceased relatives. However, those claims ought not to proceed in any event (because of evidential difficulties). Therefore, they should not be taken into account. This factor weighed in favour of granting relief.

18. In relation to b) the judge noted the "particular force" of the following statements of Thirlwall J at paragraph 17 of PIP Breast Implant Litigation (which would appear to weigh against granting relief):

> *"The purpose of a GLO is to ensure the orderly and disciplined progress of large numbers of cases. The advantage to the claimants in this GLO is that relatively modest claims are managed together so that costs are not disproportionate to the individual claims. The advantage to the defendants is that they can ascertain*

> *the scope of the litigation and organise their affairs accordingly."*

19. In relation to c), the judge noted the following factors which weighed in favour of granting relief:

    a. The applicants' personal circumstances in Kenya would have made it difficult for them to manage the claims themselves.

    b. Significant delay was caused by the conduct of the applicants' representatives. The judge noted the fact that the first year and a half of the delay may have been due to a lack of information from GT Law and IC Law. The Judge concluded that the final 12 months "were lost for reasons which can either be categorised as the responsibility of either [IC Law] or [Hugh James]".

20. The judge also noted the following factors which weighed against granting relief (in relation to c)):

    a. The application was made two and a half years after the cut-off date.

    b. If relief is refused the applicants would have a valid, albeit less advantageous, alternative claim against GT Law in negligence.

    c. If relief is granted (and the group action succeeds) the Defendant would have to "map" the findings from the test cases to an additional set of claims which may add to the cost of the litigation by "tens of thousands of pounds".

    d. There were evidential difficulties with the claims and there was uncertainty over whether the reason that GT Law did not add the claims to the register was because they were unmeritorious.

21. In relation to d), the judge noted that the breach was significant and that there was no good reason for it. This further weighed against granting relief.

22. The judge concluded with the following:

> *"I have come to the clear conclusion that relief from sanctions should not be granted. There are many factors… which militate against the granting of relief…while the cut off date in this litigation has not been regarded as a trip wire… to quote paragraph 30 of Thirlwall J's judgment in the PIP Breast Implant Litigation, to grant these applications 'would undermine the discipline of this litigation. The cut off date would be rendered meaningless'".*

COMMENT

23. This decision is noteworthy because it clarifies the application of the Denton principles in the context of a group action.

24. It appears to confirm the approach taken by Thirlwall J in PIP Breast Implant Litigation i.e. that applications under CPR 19.13(f) (if made in circumstances where the cut-off date set under CPR 19.13(e) has expired) will engage CPR 3.9. In PIP Breast Implant Litigation it was argued that CPR 3.9 should not apply in these circumstances because the applicants were not parties to the action and therefore could not be said to have breached any rule, order or practice direction. This argument was rejected by Thirlwall J.

25. Stewart J relied heavily on the decision of Thirlwall J in PIP Breast Implant Litigation. This is slightly confusing because Thirlwall J's decision was based on the now superseded guidance in Mitchell v News Group newspapers [2013] EWCA Civ 1537. Stewart J confirmed that the judgment of Thirlwall J should be treated with caution for that very reason. However, despite this word of caution, the judge showed signs of heavy reliance on the decision at key points in his judgment.

26. Stewart J also made no mention of the decision in Pearce v Secretary of State for Energy and Climate Change (British Coal Coke Oven Workers Litigation) [2015] EWHC 3775 (QB). In that case Turner J held that the question of whether to extend the cut-off date involved balancing two considerations. On the one hand, there is the importance of the cut-off date to allow the parties to decide how to

deploy their resources. On the other hand, there is the need to avoid a mechanistic approach which may give rise to an accumulation of residual applications that would further disrupt the progress of group action. Stewart J made no mention of this countervailing factor.

27. At first glance, the decision of Stewart J has confirmed the CPR 3.9 approach. However, this is hardly surprising given that this application was framed in that way. If this decision is appealed to the Court of Appeal this issue might fall for consideration i.e. whether CPR 3.9 ought even to apply to applications under CPR 19.13(f). The Court of Appeal might also be asked to consider the extent to which the countervailing factor in British Coal and Coke Workers Litigation ought to be considered in future cases.

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19 May 2017