



LEGAL BRIEFING

Chartwell Estate Agents Ltd v (1) Fergies Properties SA (2) Hyam Lehrer

[2014] EWCA Civ 506, Lord Justice Laws, Lord Justice Sullivan and Lord Justice Davis

The Facts

Chartwell Estate Agents Ltd ('Chartwell') commenced proceedings to recover commission in connection with the sale of a property owned by Fergies Properties Ltd ('Fergies') in Knightsbridge, London.

Chartwell commenced proceedings in May 2013. Fergies declined to provide disclosure of certain sale related documentation. Chartwell's solicitors advised that witness statement could not be finalised without this information.

The Court issued directions for simultaneous exchange of witness statements on 22 November 2013. This date was missed and neither party sought an extension from the Court.

Following Fergies' disclosure of further documents in January 2014, Chartwell's solicitors applied to the Court for an extension to the date for exchanging witness statements and relief from sanction under CPR 3.9 for failing to exchange by 22 November 2013.

At first instance, Globe J found that both parties were at fault for the failure to exchange witness statements. The Judge thought that Chartwell's solicitors were more culpable, given they were dissatisfied with disclosure but did not seek specific disclosure or apply to extend time until the present application was made.

Globe J, noting that his obligation was to deal with the case justly and at proportionate cost decided that both parties were entitled to relief from sanction. He recognised that the trial date was unaffected, that both parties could exchange witness statements almost immediately and that a robust application of CPR 3.9 and the consequential refusal to grant relief would effectively mean the end of the action.

Fergies appealed.

The Issue

On appeal, Fergies challenged the judgment on the grounds that the Judge failed to adopt the robust approach laid down in *Andrew Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and not properly applied the two considerations set out in CPR 3.9, namely:

- (i) the need for litigation to be conducted efficiently and at proportionate cost; and,
- (ii) the need to enforce compliance with rules, practice directions and orders.

The Decision

Fergies' appeal was dismissed. In the leading judgment, Lord Justice Davis said he was of the view that the Globe J was entitled to decide the matter as he did, where CPR 3.9 requires the consideration of all the circumstances to enable the application to be dealt with justly, including the two specific considerations.

The Judge's finding that the non-compliance by Chartwell was not trivial and was without good reason was justified. However, the non compliance was not a "flouting" of the rules. The reason for non-compliance was self-evident from the parties' communications regarding disclosure.

Davis LJ said notwithstanding the great weight to be placed upon the two factors listed in CPR 3.9, these had been reasonably assessed and outweighed by the circumstances in the case, including that:

- (i) the parties could exchange witness statements within 7 days, if not immediately;
- (ii) fault had occurred on both sides;
- (iii) the trial date could be maintained; and
- (iv) there were no significant additional cost implications on the basis that the cost budgets would not be increased.

Davis LJ agreed it would have been a disproportionately severe consequence if relief had not been granted as the action would effectively be brought to an end if Chartwell had been unable to call any evidence.

In Mitchell, the Court of Appeal said in instances where a default is not trivial that the CPR 3.9 factors would normally “trump” other circumstances. In all the circumstances of this case, Davis LJ found that the Judge was entitled to depart from the expectation which otherwise would ordinarily arise.

Albeit not dissenting, Laws LJ added that he found the case more finely balanced and emphasised that the result, driven by the particular facts, was an unusual one.

Commentary

Davis LJ observed that the correspondence exchanged between the lawyers showed a lack of real understanding of the requirements of the changes to the Civil Procedure Rules. It is clear the courts will not be sympathetic to inaction by a party who relies on a failure of the other party. In this instance, Davis LJ criticised the failure by Chartwell to seek specific disclosure and the parties’ collective failure to apply to extend the date for service of the witness evidence before expiry the date set by the court, or for some considerable time thereafter. The Courts will not countenance the notion the parties may set their own timetable at the expense not just of their own proceedings but also other court users.

The appellate courts will not lightly interfere with robust and fair case management decisions. Whilst in this instance relief from sanction was granted, it should be regarded as an exception based on the facts rather than the rule and parties should not expect that as a matter of principle a cavalier approach to courts’ directions and timetable will be tolerated.

Andrew Weston
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