Commercial: Goldscheider v Royal Opera House Covent Garden Foundation [2019] EWCA Civ 711

Dominic Bright

This is a landmark case on the control of noise at work in music and entertainment. The Association of British Orchestras, Society of London Theatre, and UK Theatre Association expressed concern about the wider ramifications of this appeal for 'all music making in the UK – concerts, theatres, schools, the lot'.

Facts

The material facts were succinctly summarised by Bean LJ in these terms:

> "The 2012-13 season at the Royal Opera House ('ROH'), Covent Garden, London opened with four cycles of Wagner's *Der Ring der Nibelungen*. Rehearsals began on Thursday 30 August 2012. Christopher Goldscheider was among the viola players in the orchestra. By the end of the third day of rehearsals, 1 September 2012, he had suffered injury to his hearing which ended his professional career."

Law

The Control of Noise at Work Regulations 2005 prescribes three relevant statutory duties, the first being the most significant in the instant case: 1) Regulation 6 (elimination or control of exposure to noise at the workplace); 2) Regulation 7 (hearing protection); and 3) Regulation 5 (assessment of the risk to health and safety created by exposure to noise at the workplace). The Health and Safety Executive's *Sound Advice: Control of Noise at Work in Music and Entertainment* (2008) provides practical guidance on ways to prevent irreversible hearing damage.

Outcome

The ROH breached their statutory duties under all three Regulations, albeit it was accepted that it wasn't reasonably practicable for players in the orchestra pit to perform wearing personal hearing protectors at all times. The failure to take the necessary steps to reduce exposure to the lowest level reasonably practicable left it open to the appellant to show that the breach did not cause the injury. The medical evidence accepted by the trial judge, however, established causation. The appeal court was not invited to re-visit the detail of this evidence, "and it would have been unrealistic to do so". As Sir Brian Leveson, P concluded:

"[This case] emphasises that the risk of injury through noise is not removed if the noise – in the form of music – is the deliberate and desired objective rather than an unwanted by-product (as would be the case in relation to the use of pneumatic machinery) … "

Relief From Sanctions: A Sense of Perspective

In Parham Khandanpour -v- Colin Chambers [2019] EWCA Civ 570the Court of Appeal considered the question of appropriation of payments made by a debtor and relief from sanctions

Bernard Pressman

Judgment was obtained, and damages of £6,874 awarded, for unlawful eviction and breach of covenant, following a fast track trial. The appellant did not pay the judgment debt and so the respondent took steps to enforce it. The appellant did not engage with the process of the assessment of the respondent's costs and a Default Costs Certificate was obtained in the sum of £27,824. Upon the appellant's application, the Default Costs Certificate was ordered to be set aside, subject to the appellant paying £10,000 towards the respondent's costs by 4pm on the 15th of June 2017, and, by the same date and time, filing Points of Dispute.

The appellant filed his Points of Dispute in time. However, the appellant had had difficulty raising the £10,000 and, due to emergency surgery, having been the victim of a knife attack, he had to make alternative plans for the payment of the £10,000. Two people agreed to make the payments on his behalf: one would pay £4,000, and the other would make two payments – one also of £4,000 and another of £2,000. On the 15th of June 2017, the two individuals gave instructions to their respective banks to make the payments. In fact, only one payment made its way to the respondent's solicitor's account by the 4pm deadline, with the balance making its way to the account by no later than 8.53 am the following day.

The respondent's solicitors accepted the first payment of £4,000 towards their costs, but refused to appropriate the £6,000, which arrived the next morning, towards their costs. Instead suggesting that, as the payment of £6,000 had not been made in compliance with the order setting aside the Default Costs Certificate, those monies were to be appropriated towards the judgment debt instead. The effect of this would be to prevent the appellant from being able to comply with the set-aside order. This was the context for the dispute regarding appropriation of payments. Whichever view was correct, the appellant would need relief from sanctions. The sanction being that the Default Costs Certificate would not be set aside unless the appellant had complied with the order.

Giving judgment, Males LJ affirmed the position regarding a debtor's intention to appropriate a payment to a particular debt: that a debtor's intention to do so may be inferred from the circumstances known to both parties.

"But if the inference to be drawn from the circumstances is that the payment was in fact appropriated by the debtor at the time of payment, the fact that he made no express statement at the time is immaterial. Now an appropriation by the debtor may be inferred from a variety of circumstances. Each case must, in my opinion, be considered on its own peculiar facts." (Per Lush J, at 131, in Parker -v- Guiness (1910) 27 TLR 129)

Males LJ found that it was obvious from the circumstances known to both parties (see also Leeson -v- Leeson [1936] 2 KB 156) that the payment of £4,000 was intended to be a part payment of the sum required to be paid as a condition of setting aside the Default Costs Certificate. And it was equally obvious that the payment of £6,000 received the next morning was intended as payment of the balance. It was evident that, by seeking to

appropriate the payment as they did, the respondent's solicitors were taking advantage of what they regarded as a slip by the appellant. They knew that their purported appropriation was contrary to the appellant's obvious intention in making payment. In those circumstances, the £6,000 was (like the £4,000 that preceded it) impliedly appropriated by the appellant to fulfilment of the payment condition for setting aside the Default Costs Certificate. The application for relief from sanction therefore had to be approached on the basis that £4,000 was paid on time, and the balance of £6,000 was paid, at the most, 17 hour late.

In relation to the *Denton* principles, which were therefore engaged, the breach was minor and had no effect at all on the conduct of the litigation or in any other way. Consequently, the breach was neither serious nor significant. The Court of Appeal confirmed that regard to previous conduct was an irrelevance at Stage 1 of the *Denton* principles. The exception being where the breach consists of failure to comply with an unless order which was itself made as a result of a failure to comply with one or more previous orders – in that situation, the assessment of seriousness of the breach should take account of the previous failure(s) as well as the failure to comply with the unless order itself (British Gas Trading Ltd v Oak Cash & Carry Ltd [2016] EWCA Civ 153).

It appeared that instructions had been given, albeit at the last minute, for payments to be made, which ought to have enabled them to have been made on time. Further, there was clear evidence that the appellant himself had been in hospital on the date payment was due and was therefore unable to attend to the matter personally. Applying stages one and two of the *Denton* principles to these facts meant that relief could well have been granted without the need to go on and consider stage 3.

Insofar as it was necessary to consider stage 3, even though the application for relief was not made as promptly as it could have been, even if the appellant's conduct of the litigation was open to criticism and that he had sought to obstruct enforcement of the judgment, Males LJ was still prepared to grant relief from sanctions. By the time of the breach, the respondent had in any event obtained charging orders over the appellant's properties which would enable the judgment to be enforced. Without relief, the Default Costs Certificate in the sum of £27,824 would stand unchallenged. On the face of it, this seemed high, having regard to the value of the claim.

Males LJ allowed the appeal, granted relief from sanctions, and ended with this: *"Ultimately, a sense of perspective is necessary. For the delay of a few hours which made no practical difference whatever, it would be disproportionate and unjust to deprive the appellant of an opportunity to challenge the Default Costs Certificate."*

Reserving your position on jurisdiction during adjudication

Ove Arup & Partners International Ltd v Coleman Bennett International Consultancy plc [2019] EWHC 413 (TCC)

Graeme Kirk

In October 2018, an adjudicator decided that Ove Arup ("OA") was entitled to a payment of £389,268.43 plus interest from Coleman Bennett ("CB") in relation to engineering services OA had provided for a 'Northern Powerhouse' project for proposed magnetic levitation railways. OA sought summary judgment so that the adjudication could be enforced.

CB disputed the claim on the basis that the contract was not a construction contract at all for the purposes of the Housing Grants, Construction and Regeneration Act 1996; it claimed that the statutory adjudication scheme was not engaged because OA had essentially merely carried out a study. CB also argued that the adjudication pertained to more than one contract or dispute, which again was outside the scheme's jurisdiction. Thirdly, CB claimed that the adjudicator had wrongly purported to decide matters which neither he (nor the TCC on this application) could properly determine, namely whether or not this was indeed a construction contract and whether it had effectively been varied.

The Court was assisted on the question of waiver by the Court of Appeal's decision in Bresco Electrical Services Limited (in liquidation) v Michael J Lonsdale (Electrical) Limited [2019] EWCA Civ 27, which had recently been handed down. Coulson J had concluded that the purpose of adjudication would be defeated if a party could simply reserve its position on jurisdiction, rather than simply challenging it 'appropriately and clearly'. Here, the points taken by CB had been ventilated in its initial response in general but not specific terms, as no details had been given as to the basis for its objections on a number of issues. It could not have been clear to the adjudicator what the basis of the challenge to his jurisdiction might be, as the adjudicator had himself pointed out. Those objections which were more specifically outlined had been addressed by the adjudicator and resolved in AO's favour.
Mrs Justice O'Farrell also concluded that in reality, CB had lost its right to challenge jurisdiction simply because of the wording of its pleaded response to AO's claim which amounted to an admission.

CB's argument that the consultation on the feasibility of a transport scheme could not be a construction contract for the purposes of the Act was also at odds with a plain reading of ss.104-105 of the Act, which affords a broad definition to such contracts.

Summary judgment was therefore granted to AO in the amount sought.