CA on appeal from Chancery (Mr L Hendersob QC sitting as a deputy judge) before Potter LJ; Laws LJ; Arden LJ. 19th December 2003.

Judgment : Lord Justice Potter :

Introduction

This is an appeal from the judgment and order of Mr L Henderson QC sitting as a deputy judge of the Chancery division dated 18 March 2003 whereby he dismissed an appeal from the order of Deputy Master Bartlett dated 8 August 2002. The Deputy Master had dismissed an application by the claimant to extend until 11 June 2002 the last date specified for the commencement of these proceedings (namely 5 June 2002) in an undertaking given by the claimant in an earlier action to which he was a party. Having refused the extension of time, the Deputy Master struck out the claim in these proceedings (which had been commenced on 11 June) as an abuse of process under CPR Part 3.4.

Background facts

4. The claimant is one of two surviving brothers of Angelo Di Placito ("the deceased") who died on 29 May 2000. The first and second defendants are the executors and trustees of the deceased's estate, probate having been granted on 19 July 2000 in respect of the deceased's last will dated 20 July 1999 ("the 1999 will").

5. By a will made some four years earlier on 7 February 1995 ("*the 1995 will"),* the deceased, then 85 years of age, had, inter alia, bequeathed £5,000 to his brother Ernest and £1,000 to various friends, leaving the residue of his property, real and personal, to the claimant. In the event that the claimant did not survive, the deceased made provision for other legacies which included a sum limited to £5,000 for certain named charities.

6. By a further will dated 7 December 1998 ("*the 1998 will"),* the deceased revoked the 1995 will, bequeathing to the claimant all his personal chattels and a sum of £50,000. He also bequeathed £5,000 to Elizabeth Di Placito, £5,000 to his brother Ernest, £10,000 to a friend Maria Grazia, and some smaller legacies to other named individuals. Legacies of £1,000 each were also made in favour of five named charities. The residue of the estate was left to the trustees to hold for such charity or charities or charitable object or objects or charitable purpose or purposes and in such shares and proportions and in such manner and subject to such terms and conditions as the trustees should in their absolute discretion select and determine.

7. Finally, by the 1999 will, the deceased revoked all former testamentary dispositions, bequeathing his personal chattels and £40,000 to the claimant, £5,000 to Elizabeth Di Placito, £5,000 to his brother Ernest, £10,000 to Maria Grazia and then some smaller legacies to other named individuals. Again there were legacies of £1,000 made in favour of five named charities and a further sum of £5,000 was to be paid in accordance with a note of the deceased's wishes left with his will. The residue of the estate was left to the executors to hold as trustees for such charity or charities or charitable object or objects as before. Thus the 1999 will had much the same shape and content as the 1998 will, save that the claimant's legacy of £50,000 in the 1998 will (which had superseded his earlier right to the entire residuary estate of the deceased under the 1995 will) was reduced by a further £10,000.

8. It is the claimant's case that, at the date of the deceased's execution of both the 1998 and 1999 wills, he was suffering from a distorted view of reality, impaired intellectual and emotional functioning and was likely to have been unable to review the needs of potential beneficiaries of his estate in a rational manner. He was prone to sudden inexplicable reversals of feeling towards friends or relations and was in such a condition of mind and memory as to be unable to understand the nature of the act of execution of the 1998 and 1999 wills, the effect of such execution, or the extent of the property of which he was disposing, or to comprehend and appreciate the claims to which he ought to have given effect. It is pleaded that he therefore lacked testamentary capacity. The claimant relies upon the report of Professor H L Freeman, a psychiatrist in support of his case.

9. By these proceedings, the claimant seeks the revocation of the grant of probate dated 19 July 2000, that the court should pronounce against the validity of the 1998 and 1999 wills and that it should pronounce for the 1995 will, the deceased's estate to be administered according to its terms.

10. The claimant is not the first of the deceased's brothers to challenge his will. An initial challenge was mounted by Ernest Di Placito, in the light of which the executors commenced an action, No HC01C04706, applying to the court for permission to distribute the estate in accordance with the 1999 will and without reference to Ernest's claim that the 1999 will was void for lack of testamentary capacity. The executors also joined the Attorney-General to represent the interests of the charities.

11. In May 2002, Ernest decided to withdraw his challenge and to compromise the executors' action on that basis. However, the claimant, now represented by the same solicitors as Ernest, wished to take up and prosecute the challenge. Accordingly, an order of compromise was made by consent by Master Price on 22 May 2002 on the occasion of a Case Management Conference already fixed, whereby the claimant was joined as third defendant to the executors' application in order to give and be bound by his undertaking not to challenge the validity of the will unless he had commenced proceedings to that end by 5 June 2002. The relevant parts of the order ("the Consent Order") read as follows:

"AND UPON Gabriel di'Placito by his Solicitors Messrs Dhama Douglas undertaking that after 5 June 2002 he will not commence proceedings under CPR Part 57 seeking an order (a) for the revocation of the grant of probate dated 19 July 2000 and (b) that the court should pronounce against the validity of the wills dated 20 July 1999 and 7 December 1998

IT IS BY CONSENT ORDERED

(1) that Gabriel di Placito be joined as Third Defendant to this application …

(3) that the Claimants have permission to distribute the estate of Angelo Di Placito ("the Deceased") as against the first Defendant in accordance with the terms of the deceased's will dated 20 July 1999 without reference to the claim put forward by Messrs Dhama Douglas, solicitors acting for the first defendant that the said will is invalid for want of testamentary capacity;

(4) unless on or before 5 June 2002 the said Gabriel di Placito commences proceedings under CPR Part 57 seeking revocation of the grant of probate dated 19 July 2000 and that the Court pronounce against the validity of the wills dated 20 July 1999 and 7 December 1998 the Claimants have permission to distribute the estate of Angelo Di Placito ("the deceased") in accordance with the terms of the Deceased's will dated 20 July 1999 without reference to the claim put forward by Messrs Dhama Douglas, …."

12. The claimant did not commence these proceedings until 11 June 2002. The reason for that is that his solicitor believed it was necessary to serve Professor Freeman's psychiatric report with the Particulars of Claim because that report was referred to in paragraph 7 of counsel's draft as "served herewith". She found that the last page of that report was missing. Despite a reminder, the Professor did not send it to her before 5 June 2002. She rightly decided therefore to issue the proceedings that day without that report. Had she been able to do so, there would have been no breach of undertaking. However, the court office was closed on 5 June 2002. Nonetheless, that fact meant that, by virtue of CPR 2.8(5)(b), the claimant still had until the next day, Thursday 6 June 2002, to issue the proceedings. Again, if she had done so, all would have been well. However she did not. On 6 June she asked the defendants' solicitors for an extension of time of one day but they would not agree to it. Instead of issuing proceedings at once on that day, she served a copy of the claim upon the defendants' solicitors that day by fax, having still not received the missing page of the expert's report. That page arrived at her office on Friday 7 June 2002, but by then she was out of the office until Monday 10 June. In fact she issued the proceedings on Tuesday 11 June 2002. It was conceded before the judge on these facts that there was no adequate excuse for not serving the proceedings on Friday 7 or Monday 10 June. The reason was said to be the workload and commitments of the conducting solicitor and the lack of sufficient support staff in the office.

13. On 24 June 2002, the claimant made an application: *"That the time specified for compliance with Clause 4 of the Consent Order dated the 22nd May 2002 be extended to the 11th June 2002."*

The decision of the Deputy Master

14. The application was heard by Deputy Master Bartlett on 7 August 2002 when he decided that the claimant had failed generally to act with due expedition in bringing the proceedings. He did not differentiate between the application to extend the time under the order and the application of the claimant (which was, at best, implicit in the Application Notice) to extend the time under the claimant's undertaking. He held that neither should attract any extension of time.

15. In coming to his decision on the original application, the Deputy Master adopted a three-stage approach.

16. First, he held that the court has jurisdiction to extend a time limit confirmed in a consent order, except where the parties have made it clear that they wish to exclude such jurisdiction. Second, he said that, if it were not for the undertaking he would have concluded without much difficulty that that was the position here and that the parties did not intend to exclude the jurisdiction of the court. Third, he asked himself whether the undertaking made a difference and said: *"With considerable hesitation, I have come to the conclusion that it does not. I find it difficult to find what is the object of the undertaking save for providing for the sanction of the Court."*

17. As already indicated, he gave no separate consideration to the question whether the claimant should be released from his undertaking, but rather, having held that the court had jurisdiction, proceeded to hear submissions on the question whether he should extend time for compliance both with the undertaking and with paragraph (4) of the Consent Order, without clearly distinguishing between the two. He reviewed the history of the first action by the claimant's brother, considering briefly in that context various of the factors set out under CPR 3.9, before concluding that the claimant had had sufficient leeway to make his claim and dismissing the action accordingly.

The Decision of the Judge

18. Upon appeal the judge confirmed the decision of the Deputy Master to dismiss the action, though upon a different basis.

19. The judge pointed out that the bite of the original Consent Order lay in the claimant's voluntary undertaking and not in the body of the order. Paragraph (4) of the order was not a conventional "unless" order, which provided for the claim to be struck out in default of the issue of proceedings by the date specified; it simply permitted the executors to proceed without reference to the claim that the will was invalid. The bar upon the claim arose as a result of the fact that the claimant had undertaken not to commence any further proceedings for the revocation of probate after 5 June 2002. Thus the undertaking went further than the body of the order. The commencement of proceedings thereafter was a breach of that undertaking and prima facie an abuse of the process of the court unless, in its discretion, the court saw fit to release the claimant from the terms of the undertaking: see ***Miller v Scorey*** [1996] 1 WLR 1122.

20. Having so analysed the matter, the judge went on to hold that his task was not, as argued by counsel for the claimant, simply to consider and apply the considerations applicable to a retrospective extension of time under an "unless" order pursuant to CPR 3.9, but to consider and apply the principles appropriate to an application by a party to be released from an undertaking voluntarily given, in compromise of proceedings to which he is a party. In that context, the judge considered that the onus was upon the party applying for release to establish 'special circumstances' justifying such release, having regard to the public interest in encouraging and enforcing the settlement of litigation by agreement: see ***Eronat v Tabbah*** (C.A.) [2002] EWCA Civ 950.

21. On that basis, the judge held at paragraph 33 and 34 of his judgment:

> *"33. If I ask myself whether special circumstances have been shown in the present case, I can only answer that question in the negative …There is simply no acceptable excuse for the failure to start the present action on 6 June 2002 at the very latest. In the context of the tight deadline agreed between the parties little more than two weeks earlier and embodied in the Consent Order, the delay until 11 June was not only inexcusable but also substantial. It cannot possibly be brushed aside as insignificant or de minimis. In these circumstances, it is not enough for Mr Beaumont to submit, as he did with force and eloquence, that no additional prejudice has been caused to the Executors or to the beneficiaries under the 1999 Will, because the Consent Order expressly envisaged that probate action might be begun before 6 June, and for all practical purposes it makes no difference whether the action was begun then or five days later. In one sense, that submission is obviously right. If the action had been started in time, the Executors and beneficiaries would now be exposed to a full probate action, and the precise date of issue of the claim form would be an irrelevance. Indeed, the particulars of claim might not have been served on them until well after 11 June. However, what the submissions crucially overlook, in my judgment, is the agreed terms of settlement of the First Action and the undertaking freely given by Gabriel to the court as part of that settlement. To allow the present action to proceed, in the absence of special circumstances justifying a release from the undertaking, would*

be to deprive the Executors and beneficiaries under the 1999 Will of the benefit of the consensual settlement of the First Action, and of Gabriel's undertaking, without any justification.

34. In reaching this conclusion I have considerable sympathy for Gabriel, who has been badly let down by the incompetence of his solicitors. However, I cannot allow that sympathy to deflect me from holding that the present action should be struck out as an abuse of the courts' process under CPR 3.4(2)(b), there being no special or exceptional circumstances to justify releasing Gabriel from his undertaking. I therefore uphold the contention in the Respondents' Notice and for that reason alone hold that this appeal must be dismissed."

22. In the light of the judge's decision and, in particular his approach to the exercise of his discretion, when granting permission to appeal, Lord Justice Peter Gibson observed: *"An important point of practice arises on this second appeal, viz. where (1) an undertaking, given to the court and incorporated in a consent order settling an action, not to bring proceedings after a specified date is breached by the commencement of proceedings shortly after that date and (2) the party in breach applies to the court to vary the undertaking by retrospectively extending the time therein specified so as to validate the proceedings, what is the correct approach of the court to such an application? It is properly arguable that the judge's approach may have been too narrow, having regard to the CPR authorities."*

The parties' submissions

23. In arguing this appeal on behalf of the claimant, Mr Beaumont concedes that the analysis of the judge was correct to the extent that the obligation of the claimant to start any fresh proceedings by 5 June 2002 was contained in the undertaking and that, for the purposes of obtaining relief from his solicitors' mistake, the burden lay upon the claimant to establish that the circumstances were sufficient to justify release from and/or modification of the undertaking in order to justify the commencement of his proceedings out of time. However, he criticises the approach of the judge in two principal respects each of which, as he submits, vitiates the exercise of the judge's discretion and permits the court to exercise that discretion anew according to what, as Mr Beaumont submits, are the proper principles.

24. Mr Beaumont argues that the judge erred in (a) adopting and (b) applying the test in ***Eronat v Tabbah*** when arriving at his decision. He submits

i) that the test or touchstone adopted in ***Eronat v Tabbah*** for exercise of the court's power to release or modify an express undertaking (*"in special circumstances … where this will not occasion injustice")* was an incorrect statement of the test to be satisfied, which was simply that of the necessity to show ***"good cause":*** see per Buckley LJ in ***Re Hudson*** [1966] Ch 209 at 214 and ***Arlidge Eady & Smith on Contempt,*** (2nd ed, para 12-174). Mr Beaumont reads the statement of Mance LJ in ***Eronat v Tabbah*** that the test stated was "*common ground"* as indicating that the matter went on the concession of counsel without reference to authority.

ii) Had the judge applied the test of "good cause", he could and should have treated what Mr Beaumont terms the complete lack of prejudice to the defendants arising from an extension of time as sufficient, even if (contrary to Mr Beaumont's submission) it did not constitute a "special circumstance".

iii) In any event, since the corollary of the breach of undertaking was that there was prima facie an abuse of process in commencing these proceedings and that their continuation without relief from such undertaking merited the striking out of the proceedings under CPR 3.4(2)(b), the judge should have had regard not only to the question of special circumstances/good cause, but also to the substantial jurisprudence which has developed under the CPR in relation to abuse of process. Mr Beaumont submits that, because a fair trial of the action was still possible and the claimant would be deprived of such a trial, the application to extend time should have been allowed on the basis that a strike-out for abuse of process was not warranted: see ***Asiansky Television v Bayer Rosin*** (a firm) [2001] EWCA Civ 1792 at paragraphs 44-51. In this connection, the judge should also have given consideration to the availability of a sanction short of strike-out: see ***Biguzzi v Rank Leisure*** [1999] 1 WLR 1926 at 1933 per Lord Woolf MR. Mr Beaumont submits that, in the absence of prejudice, the extreme outcome in this case was wrong in principle and disproportionate and that a sufficient alternative sanction would have been an order for payment of the defendants' costs forthwith and on an indemnity basis.

iv) Albeit the time limit against which relief is sought was one contained in an undertaking and not in the body of the order, it was nonetheless part of an order which the court was considering whether or not to vary under CPR 3.1(7). The judge was therefore required not only to give effect to the overriding objective (CPR 1.2) which is to deal with cases justly (CPR 1.1(1)); he was also obliged systematically to

go through the criteria listed in CPR 3.9(1): see ***Woodhouse v Consignia plc*** [2002] EWCA, unreported, 7 March 2002 and the note upon the effect of the rule at paragraph 3.9.1 of *Civil Procedure* (2003) vol 1.

25. Finally, on the basis that the true complaint was of failure to comply with a time limit analogous to one required by the rules or specifically ordered by the court, Mr Beaumont submitted that the following factors demonstrated the absence of prejudice to the defendants and a balance of justice plainly in favour of the claimant (i) the time default on the part of the claimant's solicitor was minimal in that the proceedings were issued on the third working day after 6 June 2002 (the date on which the proceedings could have been issued in time due to effect of CPR 2.8(5)(b)); (ii) although the proceedings had not been issued in time, a copy of the claim was served upon the defendants' solicitors on the last available day; (iii) the claimant himself was not to blame, the fault being that of his solicitors (see CPR 3.9(1)(f)); (iv) the fault of the solicitors was careless rather than intentional; (v) the defendants' solicitors had been asked, but had refused, to co-operate by agreeing a short extension of time; (vi) there was no practical prejudice flowing from the default, the executors having taken no steps in reliance upon it, and had in any event delayed the administration of the estate as a result of the first action; (vii) the issues raised by the new proceedings were not new, being precisely the same as in the first action; (viii) there was no prejudicial effect upon the administration of justice as no date for trial had been fixed (c.f. ***Cank v Broadyard Associates*** [2000] EWCA, unreported 11 July 2000, in which the Court of Appeal regarded breach of a time limit by a few days which caused no prejudice and did not delay the trial as not being a proper basis for striking out); (ix) the refusal of an extension of time of three working days with the consequence of a strike-out was disproportionate to the default in question (c.f. ***Asiansky Television v Bayer Rosin*** at paragraph 50).

26. For the respondent executors, Miss Mason submits that the judge was correct to apply the test or principle stated in ***Eronat v Tabbah***, application of which can be well accommodated within the overarching principle, embodied in the overriding objective, to deal with cases justly, albeit the effect of applying that test may result (and in this case Miss Mason submits ought properly to result) in striking out the claimant's case as an abuse of process. Miss Mason submits that, where the issue arises as to whether or not a claimant should be released from a voluntary undertaking, freely given as part of a compromise designed to dispose of litigation, the court is exercising a jurisdiction substantially different in character from that which is provided for in CPR 3.9 which relates to applications for relief from a sanction imposed by the court for failure to comply with a rule, practice direction or interlocutory court order, usually imposing a time limit in respect of a step to be taken in the action. Miss Mason submits that the approach which falls to be applied in relation to express undertakings given by way of consensual settlement of proceedings is one which recognises *"the public interest in encouraging and enforcing the settlement of litigation by agreement"* (per Mance LJ in ***Eronat v Tabbah*** at para 21). Such an approach rightly recognises and reflects the traditional reluctance of the court to give relief from the provisions of consent orders: see ***Siebe Gorman & Co Ltd v Pineupac Ltd*** [1982] 1 WLR 185; ***Ropac Ltd v Intrepreneur Pub Co (CPC) Ltd***, 7 June 2000, unreported, and ***Ferrotex v Banque Française de L'Orient*** [2001] EWCA Civ 1387.

27. In this respect, Miss Mason submits that Mr Beaumont's insistence that the executors suffered no prejudice as a result of the short period of delay in meeting the deadline misses the relevant point. She accepts that such delay led to no tangible prejudice in the sense of creating or exacerbating any difficulty or disadvantage suffered by the defendants in meeting the claim *if* the new action were permitted to proceed. However, the effect of not holding the claimant to his undertaking would have been to deprive the executors of a consensual bargain knowingly entered into by the claimant under which he accepted a self-imposed time limit for the issue of proceedings, in default of which the new action would *not* proceed, and the executors would enjoy freedom from further obligation, thus obtaining the substantive relief which they had sought in the first action. In such a case, to discharge an undertaking of the type given by the claimant in the absence of special (i.e. compelling) circumstances, would scarcely further the overriding objective of seeking justice *between the parties*. The alternative, of granting relief from the undertaking subject only to payment of the claimant's costs, would not be a just or realistic one.

28. Against the background of those principal submissions, Miss Mason submits as follows in respect of the arguments of Mr Beaumont enumerated in paragraph 23 above. (i) – (v) The time default was not trivial, nor was it inadvertent. The time agreed for service of fresh proceedings was a short one i.e. two weeks from the date of the consent order. The solicitor, who was well aware of the deadline, had a plain

opportunity to issue proceedings in time even on 6 June when, having been refused an extension of time on that day, she nonetheless failed to do so. Nor, although now in possession of the final page of the expert's report, did she do so on two further working days prior to final issue on 11 June. (vi) and (vii) The prejudice flowing from the default was that already described in paragraph 25 above. (viii) While there was no prejudicial effect upon the administration of justice to the extent that no date for trial had to be postponed or rearranged, there was and is a public policy interest in holding parties to bargains freely made in compromise of litigation. (ix). Where, as in this case, an action is compromised by a consent order imposing a limitation period for the commencement of further proceedings, a decision that no special circumstances have been demonstrated inevitably results in a striking-out order in respect of new proceedings commenced out of time. Where the default arises from a simple failure without proper excuse to meet a self-imposed time-limit, rather than a failure due to unexpected intervening circumstance, such a result is neither unjust nor disproportionate.

Discussion

29. I start with the preliminary observation that, had the time limit in this case been contained in the body of the order rather than in the form of an undertaking to the court, it is clear that this court would be directly concerned with the question considered by Neuberger J in the ***Ropac* case** (*supra*), namely whether or not the court had jurisdiction under CPR 3.1.2(a) and 3.9.1 to extend the time limit provided for in circumstances where, under the former Rules of the Supreme Court, it would have treated the time limit as having contractual effect between the parties. Under the RSC the court would not interfere, save in circumstances in which it could interfere with a contract as a matter of substantive law (see ***Purcell v F C Trigell Ltd*** [1971] 1 QB 359 at 365, per Wynn LJ and 366, per Buckley LJ). Neuberger J held that pursuant to the overriding objective as set out in CPR 1.1 the court now has such jurisdiction. He stated: *"To my mind, the CPR therefore give the court rather more wide-ranging, more flexible powers than the R.S.C.. In my judgment those powers are to be exercised not merely to do justice between the parties, but in the wider public interest. Further, the objective to deal with a case 'justly' must, as I see it, sometimes, (albeit rarely) require the court to override an agreement made between the parties in the course of and in connection with the litigation."*

However, he added: *"Having said that, I should add this. Where the parties have agreed in clear terms on a certain course, then, while that does not take away its power to extend time, the court should, when considering an application to extend time, place very great weight on what the parties have agreed and should be slow, save in unusual circumstances, to depart from what the parties have agreed."*

30. In the ***Ferrotex*** case (*supra*) the court, per Tuckey LJ, declined the opportunity to decide whether it considered Neuberger J was correct in the view which he took as to the expansion of the court's jurisdiction under the CPR. That was because, in ***Ferrotex*,** the court was satisfied that, albeit the consent order under consideration was made pursuant to a *'real contract'*, such a conclusion was not decisive because the parties had not expressly or impliedly intended to oust the jurisdiction of the court to extend the time provided for in the order c.f. ***Siebe Gorman v Pneupac*** (*supra*) at 189-190 per Lord Denning MR, 191 per Eveleigh LJ and 194 per Templeman LJ. We are similarly relieved of the necessity so to decide, because it has been conceded by Miss Mason that, when the time limit relied on is contained in an undertaking, there is, in principle at least, jurisdiction in the court to discharge or modify. However, as I have already indicated, she relies upon the reluctance of the court to interfere when the parties, with their eyes open, have come to a contractual agreement reflected in a consent order.

31. In my view the judge was correct to adopt as his starting point the test adopted in ***Eronat v Tabbah*** in respect of the burden facing a party who seeks to be relieved of an express undertaking given pursuant to, and as part of, a consensual settlement. In that case Mance LJ, at paragraph 21, contrasted the height of the hurdle to be surmounted with that applicable in the more familiar case of a party applying to be released from an implied undertaking of confidence given on disclosure of documents. He said:

> *"20. The implied undertaking, which relates to the documents disclosed in the commission action, is not the only relevant undertaking in this case. The order dated 20th October 1999 … recorded express undertakings by Mr Tabbah which go wider than any implied undertaking … It was common ground before us that the court also has power in this context to release or modify such express undertakings, in special circumstances (including the furnishing of assistance to foreign investigating bodies or courts) and where this will not occasion injustice.*

> *21. It is nevertheless appropriate to note a potential difference between the implied undertaking given on disclosure and the present express undertakings, to which the judge did not in terms advert. The express undertakings were given by way of consensual settlement of the proceedings … The purpose of the undertakings, from Mr Eronat's viewpoint, was plainly to avoid any future risk of Mr Tabbah repeating conduct of this nature. … The court has power to release or modify any such undertakings in the public interest. But I think that the court should be particularly careful regarding the appropriateness and manner of so doing, in circumstances [where] litigation involving complaints of this nature has been consensually settled, on terms designed to give the complainant the maximum protection. Further, although it is true that the merits of the litigation between Mr Tabbah and Mr Eronat were never determined by judicial decision, this was because the parties themselves reached an agreed outcome. The public interest in encouraging and enforcing the settlement of litigation by agreement is a factor present in relation to the express undertakings of 20 October 1999, which is not present in relation to the implied undertakings given on disclosure of documents in litigation. This additional factor reinforces the need for special circumstances before any release or modification of Mr Tabbah's express undertakings."*

32. Mr Beaumont is correct that in the earlier case of ***Re: Hudson*** [1966] Ch 209, concerning an undertaking to the court given by a deceased husband to pay maintenance to his former wife, Buckley J observed at 214: *"Where, on the other hand, no order for payment has been made but an undertaking has been given to the court to make a payment, the court could at any time upon good cause being shown release or modify the obligation under the undertaking."*

33. It is that phrase which has been taken up in the text of ***Arlidge Eady & Smith on Contempt*** (*supra*). I attach no significance to the difference in phraseology from that employed in *Eronat v Tabbah* and I prefer the latter. Each is an expression emphasising the onus which rests upon the applicant who seeks release from an undertaking voluntarily given in the course of litigation. I prefer the phrase 'special circumstances' because, in my view, it is more apt to emphasise that the discretion is not simply a discretion at large, but is to be exercised only in a situation where circumstances have subsequently arisen which, by reason of their type or gravity, were not circumstances which were intended to be covered or ought to have been foreseen at the time the undertaking was given.

34. In this connection, when deciding whether release from an undertaking is in the public interest and/or just as between the parties, three matters are of particular importance. First, the context, including of course the nature of the proceedings, in which the undertaking was given. Second, the question whether the undertaking was (a) given to the court as an undertaking required by, or offered to, the court independently of the agreement of the other party (as in the case of undertakings required by, or offered to, the court as the price of obtaining a particular form of relief) or (b) as part of a collateral bargain between the parties (as for example as part of, or pursuant to, the freely agreed compromise of an action). In the former case, the court is concerned primarily with questions of judicial policy and the importance of ensuring that an undertaking solemnly given to the court is observed unless and until the court sees fit to discharge or release such undertaking. In the course of doing so, the court incidentally takes account of the interests and reasonable expectations of any party for whose benefit or protection the undertaking has been given. In the latter case, the court will be primarily concerned with the issue of justice as between the parties and the fact that, by granting release from or modifying the injunction, the court will deprive the beneficiary of the undertaking of the benefit of a bargain voluntarily made.

35. Third, the court will be concerned with the circumstances in which the application is made. In relation to both categories of undertaking, the question is whether there are 'special circumstances' in the sense of circumstances so different from those which may properly be regarded as contemplated or intended to be governed by the undertaking at the time that it was given, that it is appropriate to release the undertaker from the burden of his undertaking.

36. In this respect, there are likely to be two principal considerations bearing upon the justice of discharging the undertaking. First, the question already highlighted i.e. was the undertaking pursuant to, or independent of, a compromise agreement? Second, whether the party seeking discharge from the undertaking is doing so in contemplation of a breach which will be avoided if his application is granted, or (as in this case) where he had already failed to do that which is required by his undertaking and its release

or modification will retrospectively deprive the beneficiary of the very benefit which the bargain was designed to procure and which has already accrued.

37. I also accept Miss Mason's submission that, when considering the question whether to release a party from an undertaking pursuant to a compromise agreement under which the party freely undertakes not to commence proceedings after a certain date, the court is considering a question different from and outside the intended scope of CPR 3.9. In this case, despite the form of the claimant's application ("that the time specified for compliance with Clause 4 of the Consent Order dated the 22nd May 2002 be extended to the 11th June 2002"), the judge rightly identified and treated it as an application for release from the undertaking which imposed the time limit for commencement of proceedings. Thus the court was not concerned with "an application for relief from any sanction imposed for a failure to apply with any rule, practice direction or court order" (see CPR 3.9(1)); nor was it obliged slavishly to follow the checklist of considerations to be taken into account in that respect as set out in paragraphs (a) – (i) of CPR 3.9(1).

38. That said, however, because the corollary of the refusal to discharge or modify the undertaking was that the claim fell to be struck out as an abuse of process, the judge was in my view required also to treat the matter as involving considerations necessary to be taken into account on an application, or a decision of the court of its own motion, to strike out the claim as an abuse of process pursuant to CPR 3.4(2)(b). That being so, the test of 'special circumstances' fell to be considered and applied within the overall regime of the CPR and, in particular, subject to the overriding objective to deal with cases justly (CPR 1.1(1)), including the particular matters set out in CPR 1.1(2). That in turn involved the necessity to deal with the case in a way proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party (CPR 1.1(2)(c)).

39. In so considering, the court, in a case of the kind before us, (i.e. an undertaking not to issue proceedings after a specific date), will also rightly bear in mind that the end result of a failure to discharge or modify the undertaking is that there will be no trial of the parties' dispute. On the other hand, it will also properly bear in mind that that is the result in any claim where a party fails to comply with a contractual limitation period which has no provision for extension or exemption. In such cases, the fact that (a) the failure to issue proceedings in time was (as usually it will be) the fault of the representative of the undertaking party and (b) no prejudice has resulted from a short period of delay in issuing proceedings, will not assist the defaulting party or give rise to any general dispensing power in the court.

40. Having rejected Mr Beaumont's submission that the matter fell within the regime of CPR 3.9(1) which relates to relief from 'failure to comply with a rule, practice direction or court order', it follows that the post-CPR jurisprudence which has grown up in relation to strike-out proceedings under the identical wording of CPR 3.4.2(c) is similarly not directly in point. As already indicated, the exercise of the court's powers to strike out in this case was effected under CPR 3.4.2(b).

41. Mr Beaumont has placed particular reliance upon various decisions of this court in relation to strike-out applications based upon non-compliance with time limits contained in the rules and/or ordered by the court in relation to interlocutory steps in the relevant proceedings. It is right to acknowledge that the judgments in those decisions are in some instances framed in general terms in relation to the decision whether or not a claim should be struck out. However, they must be read in context. In ***Biguzzi v Rank Leisure plc*** Lord Woolf MR in the course of a judgment, upholding the strike-out order made by the judge, observed that while the judge had an unqualified discretion to strike out a case under rule 3.4(2)(c) where there had been a series of failures to comply with time limits contained in the rules and orders of the court: *"The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the C.P.R. over the previous rules is that the courts' powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."*

42. In ***Walsh v Misseldine***, February 29 2000, CA, unrep Brooke LJ stated at paragraph 69 *"Although CPR 3.1(a) expressly preserves the courts' inherent jurisdiction to protect its process from abuse, this is a residual long-stop jurisdiction. The main tools the courts have now been given to exterminate unnecessary delays are to be found in the rules and practice directions and in the orders they may make from time to time."*

43. In the context of a case which involved delays where liability was not in issue, he stated at paragraph 82 *"I would add that the court is no longer necessarily faced, in a case in which liability is not in issue, with making a decision in favour of one side or the other on a strike-out application. It may be able to take a middle course if this is more consistent with the overriding objective of doing justice."*

44. Stuart-Smith LJ also stressed the more flexible approach appropriate under the CPR. At paragraph 100 he observed: *"It is particularly important to notice that there may well now be a significant difference between a case in which liability is not in dispute and one where it is. Under the old law, this tended not to make all that much difference. The choice was a stark one, either to strike out or not. But as this case illustrates, where liability is not in dispute, it may be possible to protect a defendant from prejudice by making orders for costs or disallowing interest, which will have a real impact. The order for costs can be deducted from the claimant's damages and he can be deprived of interest which he would otherwise recover. Where liability is in dispute, such an order may be of little effect if the claim fails, unless the costs order can be enforced against the claimant, and any deprivation of interest will not be effective if the claim fails."*

45. In ***Asiansky Television plc v Bayer Rosin*** *(supra)*, having reviewed the authorities including the cases last mentioned, Clarke LJ stated at paragraph 49: *"The essential question in every case is: what is the just order to make, having regard to all the circumstances of the case? As May LJ put it [in* ***Purdy v Cambran*** *[2000] CP Rep 67 at para 51] it is necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective. The cases to which I have referred emphasise the flexible nature of the CPR and the fact that they provide a number of sanctions short of the draconian remedy of striking out the action. It is to my mind important that the Master or Judge exercising his discretion should consider alternative possibilities short of striking out."*

46. Clarke LJ went on to state at paragraph 50 that consideration should be given to the question whether striking out the claim or defence would be disproportionate and that, except perhaps where striking it out would be plainly proportionate, the judge should give reasons why it was proportionate in the particular case. He also observed (at paragraph 51) that he accepted the submission of counsel that only in a case of *'flagrant'* abuse would a court be likely to strike out an action where a fair trial was still possible.

47. I do not seek to detract from the force of those observations in respect of cases concerned with delay in compliance with time limits laid down by the rules or ordered by the court for the taking of steps within extant proceedings. The decisions and observations cited are all illustrations of the overriding objective at work in an area where the CPR are careful to enumerate the considerations to which the court must have regard in relation to the necessity for getting on with an action once commenced. However, that is not the problem in a case of the kind before us, where the question is whether the action should have been commenced at all. In such a case, it seems to me that somewhat broader considerations apply. The key question is whether or not to hold to his bargain a claimant who has undertaken not to start proceedings after a date agreed as part of an agreed compromise failing which his claim will be debarred, the executors being free thereafter to proceed with the distribution of the deceased's estate regardless of that claim. In that respect, it seems to me well within the overriding objective to require of the claimant that he demonstrate special circumstances in the sense of unusual and unanticipated circumstances which have prevented or impeded him or his solicitor in complying with his undertaking. So long as such a requirement is observed and applied with a degree of flexibility in individual cases, it is in my view plainly compatible with the overriding objective.

48. Turning to the judgment in this case, it seems that the judge, having rejected the relevance of CPR 3.9 and identified the test of 'special circumstances' to be applied, simply treated the absence of 'acceptable excuse' on the part of the solicitor as per se definitive of the outcome. He made no reference to the requirement to have regard to the overriding objective and the criticism can thus be made that he did not specifically apply his mind to that question, so that the exercise of his discretion was flawed to that extent.

49. Upon that basis, it is appropriate for this court itself to review the judge's decision and to exercise its own judgment on the basis of the arguments which have been addressed to us. Suffice it to say that I accept Miss Mason's submissions in paragraph 25 above as to the true nature of the prejudice suffered by the defendants in a case of this kind. I also accept her further submissions as set out at paragraph 26 above in answer to the detailed submissions of Mr Beaumont at paragraph 23.

50. In relation to the submission of Mr Beaumont that the loss of the claimant's right to a trial of his claim is a disproportionate result in respect of the particular failings by the claimant's solicitor in this case, I would observe that the simplistic terms of that assertion do not seem to me to meet the difficulty that such a consequence is the very consequence which the parties must have had in mind at the time of their compromise as being the price of such a failure. I would add that, in those circumstances, it is pertinent that the claimant is likely to have an alternative remedy against the firm of solicitors concerned. Bearing those matters in mind, as well as those matters which CPR 1.1(2)(c) specifically requires the court to consider as aspects of the overriding objective, I do not consider that the striking out of the claimant's claim produces a disproportionate result.

51. Finally, it is right to record that, in addition to his submission on proportionality, Mr Beaumont somewhat tentatively submitted that, for the court to reach a 'hard line' conclusion, rather than to impose some lesser penalty short of a strike-out (i.e. a penalty in costs), might involve breach of Article 6 of the European Convention on Human Rights. In the face of discouragement from the court, he did not pursue the point with any vigour. For my part I see no substance in such an argument.

52. So far as Convention jurisprudence is concerned, there appears to be no decision directly in point. However, it is well established that, provided he has done so in an unequivocal manner, a litigant may be held to have waived various of his Article 6 rights. In ***Deweer v Belgium*** (1980) 2 EHRR 239, the applicant, who was a Belgian butcher, paid a fine by way of settlement in the face of an order for the closure of his shop until judgment was given in an intended criminal prosecution or until such fine was paid. Since the payment was made in circumstances of constraint and under protest, the European Court found a violation of Article 6(1). However, in the course of the judgment, the court stated:

> *"49. The 'right to a court', which is a constituent element of the right to a fair trial, is no more absolute in criminal than in civil matters …*
>
> *In the Contracting States' domestic legal systems, a waiver of this kind is frequently encountered both in civil matters, notably in the shape of arbitration clauses in contracts, and in criminal matters in the shape inter alia of fines paid by way of composition. The waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention; on this point the court shares the view of the Commission."*

53. It has been held that in order to be effective, a waiver must be made without undue compulsion (***Pfeifer and Plankl v Austria*** (1992) 14 EHRR 692 at para 37) and "*must be made in an unequivocal manner and must not run counter to any important public interest*", ***Hakansson v Sweden*** (1991) 13 EHRR 1 para 66). Subject to those qualifications "neither the letter nor the spirit of [Article 6(1)] prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public" (*ibid* para 66). It is also clear that arbitration proceedings agreed to by contract or in some other voluntary manner are regarded as generally compatible with Article 6(1) on the basis that the parties have expressly or tacitly renounced or waived their right of access to an ordinary court: see ***Suovanieni v Finland*** Application No. 31737/96, February 23, 1999. In my view there is no reason why the principle of waiver should not extend to circumstances where, without compulsion or constraint, a party voluntarily contracts with another party in the course of litigation that he will not proceed to trial upon a dispute between them unless he has issued proceedings by a particular date. Article 6 is principally concerned with questions of access. Where, in a case involving litigation of a private right, the claimant voluntarily limits his own right of access by agreement with the other party to the dispute, the considerations of justice arise simply as between the parties to the dispute; no additional public interest element falls to be considered. In my view no breach of Article 6(1) can be demonstrated in this case.

Conclusion

54. For the reasons above stated, I would dismiss the appeal.

54. **Lord Justice Laws:** I agree.

54. **Lady Justice Arden:** I also agree.

Mr Marc Beaumont (instructed by Keith Flower) for the Appellant
Miss Alexandra Mason (instructed by Merricks) for the Respondents