Neutral Citation Number: [2023] EWHC 1849 (TCC)

Case No: HT-2022-000165

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 July 2023

Before :

NEIL MOODY KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

HENDERSON AND JONES LIMITED	**Claimant**
- and -	
STARGUNTER LIMITED	**First Defendant**
-and-	
RUDGARD CITY LIMITED (IN LIQUIDATION)	**Second Defendant**

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Daniel Churcher (instructed by **Berwick Law**) for the **Claimant**
Cullum Monro Morrison (instructed by **BDB Pitmans LLP**) for the **First Defendant**

Hearing dates: 7th July 2023

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APPROVED JUDGMENT

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 19 July 2023 at 10.30am

NEIL MOODY KC:

Introduction

1. I heard the first Costs and Case Management Conference in this case on 7th July 2023. In advance of the CCMC, the First Defendant served a costs budget which was in time but materially incomplete, and then served a "replacement" budget which was complete but five days late.

2. The First Defendant made an application for relief from sanctions so that it could rely upon the second budget. Having heard argument, I granted relief and proceeded to deal with costs budgeting at the CCMC. In view of the number of authorities cited to me and the lack of time available, I confirmed to the parties that I would provide written reasons for my decision. These are my reasons.

Background

3. I take the background facts from the Claimant's Note for the CCMC. The proceedings arise out of a construction contract entered into between the First Defendant ("Stargunter") and the Second Defendant ("Rudgard") on 20th November 2008. Stargunter is the owner of a property at 6 Tregunter Road, London, SW10, which was the subject of the contract. Rudgard was a construction company but has been insolvent since 2010. Rudgard's rights under the construction contract have been assigned to the Claimant ("Henderson"), although the effectiveness of that assignment is in issue in this action. Rudgard has taken no part in these proceedings.

4. Pursuant to the construction contract Rudgard undertook works to the property. During the works the parties fell in to dispute regarding, amongst other things, delay and the value of Rudgard's account. On 30th April 2010 Stargunter issued a notice of specified default against Rudgard alleging that Rudgard was failing to proceed regularly and diligently with the works.

5. A further notice was sent on 11th May 2010 followed by a meeting between the parties. What happened at that meeting is disputed, but it is common ground that on 13th May 2010 Stargunter issued a notice purporting to terminate Rudgard's employment under the contract for default on 18th May 2010.

6. Rudgard's claims (now pursued by Henderson) are essentially for a valuation of Rudgard's termination account, raising issues of: liability for delay and delay losses; the valuation of Rudgard's works; and the validity of Stargunter's notices of default and termination. The total sum claimed by Henderson is £980,802.

The Relevant Rules

7. The CPR provide as follows:

> 3.9(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
> (a) for litigation to be conducted efficiently and at proportionate cost; and
> (b) to enforce compliance with rules, practice directions and orders.
> (2) An application for relief must be supported by evidence.
>
> 3.13(1) unless the court otherwise orders, all parties except litigants in person must file and exchange budgets –
> (a) where the stated value of the claim on the claim form is less than £50,000, with the directions questionnaires;
> (b) in any other case, not later than 21 days before the first case management conference.
> …
> (5) Every budget must be dated and verified by a statement of truth signed by a senior legal representative of the party.

…

> 3.14 Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees.

The Relevant Procedural History

8. On 1st June 2023 the Court gave notice that the CCMC was listed for 7th July 2023. It is common ground that, in accordance with CPR 3.13(1)(b), the parties' costs budgets had to be served not later than Thursday 15th June 2023. Henderson served a compliant budget in Precedent H format on 15th June 2023. It totalled £492,400.

9. Stargunter served a Precedent H budget on 15th June, but it was materially incomplete. The document was unsigned, there were no incurred or estimated costs in respect of statements of case or the CCMC, and there were two differing front sheets. The first totalled to £338,084, and the second totalled to £144,812. The second front sheet included figures for pre-action and statement of case costs but, for all other phases, against the totals it stated "TBA". It was not verified by a statement of truth.

10. Stargunter then served a second budget on Tuesday 20th June. This was complete, but the total budgeted sum was now put at £891,897.

11. The position therefore is that Stargunter has not served a budget in accordance with the rules. The first budget does not comply with the requirement in CPR 3.13(5) that it should be verified by a statement of truth; the second budget was served after the deadline in CPR 3.13(1)(b). Accordingly, the sanction in CPR 3.14 applies, and Stargunter will be treated as having filed a budget comprising only the applicable court fees "unless the court otherwise orders".

12. Stargunter now seeks to rely upon its second budget. It has not issued a formal application seeking relief from sanctions, but it has served a witness statement

from Mr David Gwillim dated 4th July 2023. He is a partner in BDB Pitmans LLP and has conduct of the matter.

13. Mr Gwillim says that he was not timeously notified of the order of 1st June because the Court's e-mail was sent to his firm's former outdoor clerk who had left the firm on 24th January 2023. Fortunately, Henderson's solicitor wrote to Mr Gwillim on 7th June enclosing the court notice and associated documents.

14. Mr Gwillim says that he obtained fees estimates from counsel's clerk and instructed his colleague, Ms Emma Dunkley, a trainee legal executive, to prepare a Precedent H budget based on his estimates. Mr Gwillim was in the Reading office and she was located in the London office. He then says:

> "6. Ms Dunkley adopted the Precedent H from the gov.uk website in the form of an Excel spreadsheet. She reported to me on the morning of 15 June 2023 by Zoom that the Excel spreadsheet had not populated the first page, there appeared to be some issues with the formulae and the totals were not adding up. I phoned my firm's costs lawyer Elena Kostova to find out whether this was a known issue and if we could use her software which would be dependable. Ms Kostova explained that she was attending a training course and had only limited access to her PC of about 20 minutes that day. Ms Kostova sent Ms Dunkley a replacement Precedent H form, but that version did not calculate any of the figures. Ms Kostova was unable to access her system until her return to the office on Monday 19th June 2023.
>
> 7. Ms Kostova suggested that we should file and serve Precedent H in as complete a form as we could on or before the deadline and revise it as soon as practicable thereafter. I considered the draft Excel spreadsheet, and I was dismayed to discover that a considerable number of entries had corrupted and did not accurately represent the budgeted costs. I removed as many of the incorrect entries as I could. I attempted to apply my electronic signature to the form, but I was unable to do so. I asked my colleague Angela Burgess who is an Excel "super user" to

> help but she was unable to apply a signature. When all our attempts to amend the spreadsheet had failed, the corrupted and incomplete Precedent H was filed and served by Lyndsey McIntyre at 15:59 on 15 June 2023…
>
> 8. I spoke to Ms Kostova on Monday 19th June 2023, and she prepared a fresh Precedent H on her dedicated costs software for which only she has a licence. I considered it later the same day. I considered changes which were incorporated. I applied my electronic signature without incident and caused the document to be filed and served at 14:41 on 20 June 2023…"

15. The email from Ms Dunkley serving the first budget on 15th June made no mention of any problems and said simply:

> "Please find attached, by way of service, the Defendant's Costs Budget. There is an electronic signature which we will confirm with a hard copy shortly."

16. The email from Mr Gwillim serving the second budget on 20th June stated:

> "We attach a revised Defendant's Costs Budget in substitution for the version served on Thursday. We apologise for any inconvenience. This is the version upon which we intend to relay. [sic] Please kindly discard the previous version."

17. On 21st June, Henderson's solicitors replied saying that if Stargunter wanted to rely on the second budget then a prompt application for relief from sanctions would be required. In the meantime they proposed to serve budget discussion reports in relation to both budgets.

18. On 28th June Mr Gwillim replied saying that Stargunter intended to argue the point and "…invoke the saving provision in CPR 3.14.1 ('unless the court otherwise orders') at the hearing convened for costs management purposes on

the basis, inter alia, that the service of the revised budget had no material impact upon the proceedings."

19. As I have indicated, no formal application for relief from sanctions has been served, but Henderson relies on the witness statement from Mr Gwillim. I accept his evidence.

Is a formal application for relief required?

20. Mr Monro Morrison, who appeared for Henderson, submitted that a formal application was not required. He relied upon the notes to the *White Book* at 3.14.2 and which state:

> "A party in default of r.3.14 need not make a separate application for relief from sanctions under r.3.9. Instead, it may seek to invoke the saving provision in r.3.14 itself ('unless the court otherwise orders') by seeking to persuade the court to adopt that course at the hearing convened for cost management purposes. This saving provision gives the court an express power to disapply the sanction which is additional to the power it has under r.3.9. Whichever application is made, the court should apply the three stage test set out in *Denton v. TH White* [2014] EWCA Civ 906… There is an important difference between these two applications: on an application for relief from sanctions under r3.9, the starting point should be that the sanction has been properly imposed and complies with the overriding objective (*Denton* at [45]); however, on an application under r.3.14, the court is not required to take that starting point unless there has been a prior judicial decision to that effect *(Page v RGC Restaurants Ltd* [2018] EWHC 2688…)"

21. In *Page* Walker J held at [136]-[138] where a party had failed to serve a budget in accordance with the rules, the court was required to consider whether the sanction in rule 3.14 should be disapplied.

22. Mr Churcher, who appeared for Stargunter, relied on *Park v Hadi* [2022] EWCA Civ 581 to the effect that the application should be made by application notice. In that case the Court of Appeal held (at [49]):

> "An application for relief from sanctions should be made (and usually is made) by a Part 23 application notice supported by a witness statement. It is, however, clear that the court has the discretion to grant relief from sanctions in two situations: where (as in the present case) no formal application notice has been issued, but an application is made informally at a hearing; or where no application is made, even informally, but the court acts of its own initiative. The discretion must of course be exercised consistently with the overriding objective. The court, therefore, should initially consider why there has been no formal application notice, or no application at all; whether the ability of another party to oppose the granting of relief (including, if appropriate, by the inducing of evidence in response) has been impaired by the absence of notice; and whether it has sufficient evidence to justify the granting of relief from sanctions (though the general rule in CPR rule 32.6 does not impose an inflexible requirement that the evidence be in the form of a witness statement). It follows, from the need for those initial considerations, that the discretion will be exercised sparingly… If, however, the initial considerations lead to the conclusion that relief might justly be granted, the court will then go on to follow the *Denton* three stage approach…"

23. Mr Churcher did not oppose Stargunter seeking relief without having first made a formal application, but he submitted that Stargunter's approach was "somewhat cavalier".

24. In my judgment the *White Book* notes are correct and a separate application for relief is not necessarily required where the defaulting party seeks to invoke the saving provision under CPR 3.14. This is clear from a plain reading of the words of the rule and is supported by the decision in *Page* at [136]-[138]. However, I would in any event hold that, pursuant to the discretion explained at paragraph

49 of *Park*, I may consider Stargunter's application without a formal application notice having been issued. I reach that conclusion because (a) Stargunter reasonably relied upon the notes in the *White Book*; (b) evidence in the form of a statement from Mr Gwillim was served in support of Stargunter's position; (c) that statement discloses material which would arguably justify relief from sanctions; (d) Henderson have not been prejudiced by the absence of a formal application notice in that they have been able to respond to the application by written submissions served in advance and oral argument before me; and (e) Henderson did not oppose Stargunter adopting that approach.

25. It was common ground that, if I allowed the application to proceed, I should apply the three-stage test in *Denton*, and I turn to this next.

The Denton test

26. The test in *Denton v. TH White Ltd* [2014] EWCA Civ 906 is too well known to require extensive citation here. Suffice to say that the guidance (see *Denton* at [24]) requires me to consider whether to grant relief in three stages. First, I must identify and assess the seriousness and significance of the default. Secondly, I must consider why the default occurred. The third stage is to evaluate all the circumstances of the case so as to enable the court to deal justly with the application including the two factors specifically identified in CPR 3.9 and which should be given particular weight: see *Denton* at [32].

The Parties' Submissions

27. For Stargunter, Mr Monro Morrison referred me to the notes in the *White Book* at 3.14.1 which state:

> "In *Mitchell* [2013] EWCA Civ 1537… the failure to file a costs budget in time had caused the cancellation of a hearing in another case and the master's decision to refuse to grant relief from sanctions was upheld. In other cases, where the consequences of breach were not so material, the late service of a costs budget was held to be neither serious nor

> significant and relief from sanctions was granted: see for example *Utilise TDS Ltd v Cranstoun Davies [2014] EWHC 834 (Ch)* (45 minute delay), *Azure East Midlands Ltd v Manchester Airport Group Property Developments Ltd [2014] EWHC 1644 (TCC)* (two day delay) *and Murray v BAE Systems Plc, 22 December 2015* [2016] WLUK 422, unrep HH Judge Peter Gregory, (seven day delay)."

28. As is well known, in *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537, the claimant failed to serve a costs budget in time and the Court of Appeal upheld the sanction confining the claimant to a budget comprising only the applicable court fees. The guidance in *Mitchell* was explained and amplified in *Denton.* It is not necessary for me to set out the *Mitchell* guidance here.

29. Mr Monro Morrison submitted that the key issue when addressing seriousness and significance was the materiality of the breach; in other words, the effect it had on the litigation. He drew my attention to *Azure* (supra) and *Wain v Gloucestershire County Council and Others* [2014] EWHC 1274. These were both decisions of HHJ David Grant sitting as a judge of this court. Both cases pre-dated *Denton,* and so the judge applied the *Mitchell* guidance. He held that delays of two days and one day respectively in serving costs budgets were "trivial and/or insignificant and/or inconsequential" in the context of seven-day compliance periods and where there was no material disruption to the Court timetable or prejudice to the innocent party.

30. Mr Monro Morrison also relied on *Mott v Long* [2017] EWHC 2130 (TCC), a further decision of HHJ David Grant in this court where he decided that a delay of 10 days was serious and significant, but relief was granted because the parties would have been in precisely the same procedural position had the breach not occurred.

31. In *BMCE Bank International Plc v Phoenix Commodities Pvt Ltd* [2018] EWHC 3380 Bryan J refused to grant relief from sanctions where a costs budget had been filed 14 days late. Mr Monro Morrison sought to distinguish this case on the footing that the delay prevented budget discussion reports from being served

in time for costs budgeting to be dealt with at the CCMC thereby necessitating an additional hearing.

32. He also sought to distinguish *Lakhani v Mahmud* [2017] EWHC 1713 where the Deputy Judge upheld the decision of the County Court to refuse relief despite the fact that the delay was just one day. The point relied upon by Mr Monro Morrison was that, although the delay was short in that case, it had a significant impact on the effective amount of time that was available to the parties because it had already been reduced as a result of Christmas office closures.

33. He therefore submitted that this was not a serious or significant breach because it had had no material impact on the proceedings and caused only minimal prejudice to Henderson (in that they had to serve two budget discussion reports). In particular, the second costs budget was still filed 16 clear days before the CCMC in the context of a 21-day period; the overall cost budgeting process was not delayed; both parties filed and served their Precedent R budget discussion reports more than seven days before the CCMC; and costs management could still take place at that hearing.

34. On the question as to why the default occurred, he referred to the witness evidence of Mr Gwillim and frankly accepted that he could not establish a good reason for the default.

35. When turning to all the circumstances of the case, he submitted that the litigation could still be conducted efficiently, and at proportionate cost. He said the application for relief had been made promptly and in accordance with the procedure contemplated by the notes to the *White Book*; and that the mistake was an isolated one due in large part to an IT error rather than any deliberate non-compliance with the rules.

36. Finally, he submitted that Henderson's opposition to the application was opportunistic and should be deprecated by the Court pursuant to the guidance in *Denton* at [41]-[43].

37. For Henderson, Mr Churcher submitted that the impression given by the first budget was of an unfinished document served in haste to meet a deadline. He pointed out that no explanation was given in correspondence as to why the first budget was incomplete or why a revised budget was served five days later with an "enormous increase" in incurred and estimated costs. He submitted that the default was significant and serious because Stargunter never intended to rely on the first budget which misrepresented their costs; because Mr Gwillim tried to sign a statement of truth which he knew to be inaccurate; and because there was no explanation from Henderson in correspondence as to what had happened. He submits that it was tantamount to an abuse of process. He further says there was no good reason for the breach. On the question of all the circumstances of the case, he submits that Stargunter should be held to their first budget and that this would achieve a "balanced outcome".

Analysis and Decision

38. I turn to apply the *Denton* test to the facts of this case.

39. At the first stage, I consider that the breach in this case was neither serious nor significant. I accept Mr Churcher's points that Henderson seemingly sought to rely upon a defective and incomplete budget and no proper explanation was offered at the time. The (unsuccessful) attempt to sign a statement of truth was thoroughly misguided. However, it would have been obvious to any reasonable litigation solicitor that something had gone seriously wrong with the preparation of Stargunter's first budget. I consider that, on the facts of this case, a key consideration when assessing whether the breach was serious or significant is whether it had a material effect on the litigation overall in the sense of disrupting the proper progress of the proceedings: see *Denton* at [26]. The first budget was served on a Thursday and the second on the following Tuesday. The time lost was two clear business days. Henderson served a short Precedent R budget discussion report in response to the first budget and that was wasted work. But there were sixteen days between Stargunter's second budget and the CCMC. Both parties were able to serve full budgets and budget discussion reports in

good time before the hearing, and indeed I was able to proceed to deal with costs management at the CCMC. The only disruption to the proper progress of the case has been the need for argument on the application for relief, and for me to prepare these reasons. But such "disruption" will necessarily occur whenever there is a disputed application for relief, and so that cannot of itself demonstrate seriousness or significance.

40. As to the second stage, in my judgment there was plainly no good reason for the default, and this was frankly admitted by Stargunter. The breach occurred because of inefficiency in Stargunter's solicitors' offices. The budget was left to the last minute, the IT systems were inoperable, and the relevant people were not available. That cannot amount to a good reason: see *Mitchell* at [41] and *Denton* at [30].

41. Turning to the third stage, and all the circumstances of the case, I note specifically paragraphs (a) and (b) of CPR 3.9(1). As to paragraph (a), in my judgment, granting relief will not prevent this litigation being conducted efficiently and at proportionate cost: see *Denton* at [34]. I have already referred to the fact that the breach has not disrupted the progress of these proceedings. Furthermore, the costs budgeting exercise I undertook was specifically directed to proportionality having regard to the value of the claim. Nor has the breach had any knock-on effects on other proceedings by taking up additional court resources. As to paragraph (b), I bear in mind of course the need to enforce compliance with the rules and to ensure that the old lax culture is no longer tolerated (see *Denton* at [34]), but it was not argued before me that there had been a history of default in this case and, on the material I have seen, this was an isolated breach. Standing back and looking more broadly at all the circumstances, I accept that Stargunter made clear its intention to seek relief reasonably promptly, and that the mistake was an isolated and unintentional one, due in large part to IT difficulties rather than any deliberate non-compliance with the rules. Stargunter's solicitors have subsequently cooperated with Henderson's solicitors so that directions for the future conduct of this matter have been largely agreed.

42. The first instance authorities cited to me are decisions on their own facts, but I consider that my decision in this case is consistent with the approach of this court in *Wain*, *Azure* and *Mott.* I regard the decisions in *Lakhani* and *BMCE* as distinguishable because in both those cases the efficient conduct of litigation was disrupted.

43. Finally, I reject Mr Monro Morrison's characterisation of Henderson's opposition to this application as "opportunistic". Stargunter were clearly in breach of the rules, and they failed to communicate timeously and openly with Henderson as to what had gone wrong. I note that Henderson's solicitors acted reasonably and co-operatively both when drawing Mr Gwillim's attention to the date of the CCMC, and also when serving a budget discussion report responding to Stargunter's second budget. In my judgment, Henderson were entitled to oppose the application for relief.

44. For those reasons, Stargunter's application for relief from the sanction in rule 3.14 succeeds, and I give permission for Stargunter to rely upon its cost budget dated 20th June 2023. As I have already explained, the costs management process has been undertaken, and I have ordered the parties to serve revised budgets in light of the adjustments I made.

45. I invite the parties to agree an order in light of this judgment. If there are any outstanding consequential matters, they should be addressed by short written submissions.