Relief from sanctions

British Gas Trading Ltd v Oak Cash and Carry Ltd
Queen's Bench Division
05 December 2014

The appellant (B) appealed against a decision to grant the respondent (O) relief from sanctions in B's claim against O. The court made directions in November 2013 for both parties to file listing questionnaires by February 5, 2014. O had not filed its questionnaire by February 10. The court issued an order that unless O filed its questionnaire by February 19, the defence would be struck out. On February 18, O filed a directions questionnaire, not a listing questionnaire. The solicitor with conduct of O's case had had personal difficulties during the litigation, and had delegated the task of complying with the unless order to a trainee solicitor. After being notified that the wrong document had been filed, O's solicitors filed a listing questionnaire on February 21. B obtained judgment in default. O successfully applied for relief from sanctions. The judge also set aside the default judgment. B argued that the judge had misappliedCPR r.3.9 and had erred in setting aside the default judgment when there was no application to do so.

Appeal allowed. A three-stage test was to be applied to relief applications: identifying the seriousness of the default; considering why the default occurred; and evaluating all the circumstances of the case, Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795 and Denton v TH White Ltd [2014] EWCA Civ 906, [2014] 1 W.L.R. 3926 followed. The breach had been serious and significant. O had failed to comply with both the original order and the unless order. O's solicitors had had over three months to complete a not particularly difficult questionnaire. It had not been completed, and when an attempt was made to comply with the unless order, the wrong form had been sent. There was no good reason for the breach. Although O's solicitor had had personal difficulties, there were over 40 solicitors in the firm and there had to be provision to delegate work to others with the skill to ensure that tasks were properly completed. It had not been until the unless order was issued that the solicitor had delegated the task to a trainee, and the trainee must not have had sufficient experience to identify the correct form. The solicitor's personal difficulties could not be a good reason for failure to comply with the original order for three months and the unless order subsequently. Nor was there a good reason why the trainee had not been properly supervised. In considering all the circumstances, the court took account of the effect of the failure to comply. The persistent failure to provide the questionnaire had meant that the trial date of two days was lost. That was a matter of grave concern when one considered the impact that it would have on the instant case, the impact on other cases awaiting hearing dates, and the waste of court time. The court also considered the effect on O of not being granted relief from sanctions. The judgment was substantial. It was unfortunate that refusal to grant relief could mean that O would have to bring an action against its solicitors. In the circumstances as a whole, there was no reason why relief should be granted. The judge had erred in applying an overly generous interpretation of *Mitchell* (see paras 18-20 of judgment). In the absence of an application to set aside the default judgment, the judge should not have taken the view that the application should have been brought and therefore would be treated as though it had been brought. Further, there had been no evidence in support of such an application (para.21).

Official Transcript

British Gas Trading LTD v Oak Cash & Carry LTD

Case No: QB/2014/0268
High Court of Justice Queen's Bench Division
5 December 2014
[2014] EWHC 4058 (QB)
2014 WL 6826717
Before: Mrs Justice McGowan
Date: 05/12/2014

On Appeal from Oxford County Court
Hearing dates: 07/10/2014

Representation

- Malcolm Birdling (instructed by Moon Beever) for the Appellant.
- Martin Strutt (instructed by Bower & Bailey) for the Respondent.

Approved Judgment

Mrs Justice McGowan DBE:

1 This is an appeal from a decision of HHJ Charles Harris QC sitting in the County Court in Oxford. On 15th April 2014 he heard the Defendant's application for relief from sanction and on that date he ordered that;

- i) the default judgment of 18th March 2014 be set aside,
- ii) the Defendant's defence be reinstated and
- iii) the time for filing the Defendant's listing questionnaire be extended until 4pm on 21st February 2014. He gave further directions for the eventual trial of the case if it was not settled. He also ordered that the trial date which was then listed for the 30th April to 1st May 2014 be vacated.

Background

2 The original claim brought by British Gas Trading Ltd against the Defendant, Oak Cash & Carry Ltd was for an unpaid debt for the provision of electricity. Proceedings were initiated in February 2013 and the litigation continued.

3 In the course of the proceedings various directions were made by District Judges in order to regulate the conduct of the litigation.

4 On 5th November 2013 DJ Matthews ordered a series of directions as to inspection of documents, provision of witness statements, and in particular trial and pre-trial checklists. On that occasion it was ordered that the trial would take place during the period beginning 7th April 2014 and ending 30th May 2014. The trial at that stage was given a time estimate of two days.

5 On the 8th November 2013 a further order was made setting down the date for trial on the 30th April and 1st May 2014 in accordance with the time estimate of two days.

6 Amongst the directions given by DJ Matthews on 5th November 2013 was a requirement that both parties file listing questionnaires by 3rd February 2014. By the 10th February 2014 no such listing questionnaire had been filed on behalf of the Defendant and on 10th February 2014 DJ Gatter issued an "unless" order; that unless the Defendant filed the listing questionnaire by 19th February the defence would be struck out without further order of the court.

7 On 18th February the Defendant's solicitors filed a directions questionnaire, not a listing questionnaire with the court.

8 On 20th February the court notified the Defendant's solicitors that they had received the direction questionnaire and pointed out that that was not the document required and that in fact the listing questionnaire was still awaited. That was not received by the court until the 21st February when it arrived by fax.

9 On 25th February 2014 the Claimant's solicitors contacted the court requesting judgment in default. On 27th February 2014 solicitors acting for the Defendant wrote to the court apologising for the mistake and simply asking the court not to grant the sanction requested by the Claimant.
10 On 18th March 2014 judgment in default in the sum of £211,388.61 was granted. On 21st of March 2014, the Defendant's solicitors applied to the court for relief from sanction and supported that application with a witness statement from Jeremy Leach who was the solicitor acting for the Defendant at the firm of Bower and Bailey. The hearing took place on 15th April 2014 and His Honour Judge Harris QC granted relief from sanction and set aside the default judgment.
11 At the hearing of this matter in the County Court, the learned Judge heard an application that he should grant relief from sanction. There was in fact no application before him to set aside the default judgment.
12 The Claimant, now the Appellant in this case, seeks to appeal against the ruling of the learned Judge on two grounds.

- i) Ground one is that the learned Judge erred in that he misapplied CPR 3.9 .
- ii) Ground two that he made an error in setting aside the default judgment notwithstanding there was no application to do so (and no evidence in support).

13 It should be observed that the hearing took place in the time period between the handing down of the judgment in the case of Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537 and the subsequent handing down of judgment in the consolidated cases known as Denton and others v TH White Ltd and De Laval Ltd [2014] EWCA Civ 906 .

The Law

14 CPR 1.1

"(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

1.3 The parties are required to help the court to further the overriding objective.

(1) The court must further the overriding objective by actively managing cases.
(2) Active case management includes –
(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;

(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently."

15 CPR 3.9(1)

"(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."

16 In the case of Mitchell Lord Dyson, Master of the Rolls reviewed the CPR provisions and considered the proper application of the rules governing the conduct of litigation in the light of the restated overriding objective that, not only must the court seek to achieve fairness so far as the parties to the action are concerned but consideration to all those other litigants, potential litigants and witnesses in other cases must be given in assessing whether litigation is being conducted properly, expeditiously and with a view to achieving justice. The court in Mitchell restated the position in a way that makes it clear that there is to be greater penalty

or sanction for failure to comply with the rules governing the conduct of litigation. It is to be no longer a matter that failing to comply with a court order will simply be met with a sanction of costs relating to some wasted hearing or some extra piece of work required by the court or the other side.

"45. On an application for relief from a sanction, therefore, the starting point should be that the sanction has been properly imposed and complies with the overriding objective. If the application for relief is combined with an application to vary or revoke under CPR 3.1(7) , then that should be considered first and the Tibbles criteria applied. But if no application is made, it is not open to him to complain that the order should not have been made, whether on the grounds that it did not comply with the overriding objective or for any other reason. In the present case, the sanction is stated in CPR 3.14 itself: unless the court otherwise orders, the defaulting party will be treated as having filed a budget comprising only the applicable court fees. It is not open to that party to complain that the sanction does not comply with the overriding objective or is otherwise unfair. The words "unless the court otherwise orders" are intended to ensure that the sanction is imposed to give effect to the overriding objective. As we have said, the principles by which the court should decide whether to order "otherwise" are likely to be the same as the principles by which an application under CPR 3.9 is determined. In most cases, the question whether to relieve a party who has failed to file a costs budget in accordance with CPR 3.13 from the CPR 3.14 sanction will therefore be dealt with under CPR 3.14 . That did not happen in the present case. That is why the question of relief from sanctions was dealt with under CPR 3.9 . "

46. The new more robust approach that we have outlined above will mean that from now on relief from sanctions should be granted more sparingly than previously. There will be some lawyers who have conducted litigation in the belief that what Sir Rupert Jackson described as "the culture of delay and non-compliance" will continue despite the introduction of the Jackson reforms. But the Implementation Lectures given well before 1 April 2013 were widely publicised. No lawyer should have been in any doubt as to what was coming. We accept that changes in litigation culture will not occur overnight. But we believe that the wide publicity that is likely to be given to this judgment should ensure that the necessary changes will take place before long.

17 The brave new world of Mitchell and its application caused new cases to come again before the Master of the Rolls on appeal and in July 2014 judgment in the case of Denton was handed down. Denton restated and gave greater definition to the views of the court expressed in Mitchell . There were adjustments to facilitate greater understanding and perhaps a greater explanation but Denton does not alter the statement of principle as set out in Mitchell . The case sets out a three stage approach to assist any court dealing with an application for relief from sanction.

"24 ... A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to 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 [factors (a) and (b)]".

18 Applying the Denton approach to the facts of this case, one must view each of the stages in turn.

- i) 1st stage : The court must consider the seriousness and significance of the Defendant's failure in this case. The Defendant failed to comply with the order of 5th November 2013 and had not complied with the order by 3rd February 2014. The Court issued the "unless" order on 12th February 2014. The "unless" order itself was not complied with, as what was served on the 18th February 2014 was not in fact the required questionnaire but a second version of a directions questionnaire filed earlier. The effect of this was that the Defendant's solicitors had failed to comply with the original order of November and subsequently failed to comply with the "unless" order. It cannot be said that such a breach is not either serious or significant. This was not only a failure to comply with a directions order but also a failure to comply with the "unless" order. The Defendant's solicitors had over three months in which to complete a not particularly difficult

questionnaire. It was not completed and when in due course an attempt was made to comply with the "unless" order, the wrong form was sent to the court.

- ii) 2nd stage : In this case the Defendant's solicitor, who had conduct of the case, had personal difficulties during the course of the litigation. His wife was pregnant and the pregnancy had been beset by problems. As has been clear throughout the proceedings, nothing but sympathy has been expressed for him and his personal circumstances. That being said, this was a significantly sized firm, over 40 qualified solicitors practised within the firm. There must be provision for those who have the responsibility of conducting litigation who know that they may not be available because of an ongoing medical problem to delegate the work to others who have sufficient experience and skill to ensure that tasks are properly completed. It appears clear in this case that it was not until about the time that the "unless" order was issued, that the solicitor with conduct of the case delegated the task of complying with the order to a trainee solicitor. That trainee solicitor must not have had sufficient experience to identify the correct form and ensure it was completed and must not have been adequately supervised in the purported compliance with the order. Notwithstanding all due sympathy for the predicament that the solicitor who has conduct of the litigation found himself in, it cannot be a good reason for a failure to comply with the original order, throughout a three month period and a subsequent failure, having delegated the work to another. Nor is there a good reason why that trainee solicitor was not properly supervised or controlled in that exercise.
- iii) 3rd stage : The third stage as set out in Denton invites the court to consider all the circumstances of the case. In considering all the circumstances of this case, I take into account the effect of the failure to comply. It is accepted that a questionnaire of this sort might not be the most important document provided by either side in the conduct of litigation. That being said, the persistent failure to provide such a questionnaire meant that in this particular case the trial date of two days was lost. That must be a matter of grave concern when one looks as the court did in Mitchell to the overall effect of such a breach, to the impact that it would have not only on the conduct of this piece of litigation but all those other cases awaiting dates for hearings and the waste of valuable court time, which is already massively under strain. I also bear in mind the effect on the Defendant of their not being granted relief from sanction in this case. The finding against them is one in a substantial sum. It is unfortunate, to say the least, that the consequence of a refusal to grant relief from sanction in a case such as this, will in certain circumstances mean satellite litigation. It may well mean that the Defendant now has to bring an action against its own solicitors. Neither side has asked me to consider the strengths of the relative cases in the original action.

19 It is to be noted in this case that at the point where the Claimant's solicitors had appreciated the failure of the Defendant's solicitors to provide the required questionnaire, the matter was returned to court, an extension of over two weeks was effectively given by the provision of the "unless" order and the requirement of the questionnaire was neither unusual nor onerous. It cannot fairly be said in this case that the Claimant sought to take advantage of an insignificant or trivial failing on the part of the Defendant. In effect a second chance was granted by the issue of the "unless" order.

20 In my view the learned Judge fell into error in applying an overly generous interpretation of the judgment in Mitchell . The three stages as enumerated in Denton , which as I have said already simply define the decision in Mitchell , set out the test which must be followed. In following that test it is clear;

- i) that the breach here was both serious and significant,
- ii) that in the circumstances of this case there was no good reason for such a breach and,
- iii) that in looking at the circumstances of the case as a whole there is no reason why relief from sanction should be granted.

21 Returning to the grounds of appeal,

- i) Ground one, that the learned trial Judge misapplied CPR3.9 is properly made out.
- ii) Ground two, insofar as it is necessary for me to determine, is also made out. In the absence of an application to set aside the default judgment, a matter seemingly not

thought of by those acting on behalf of the Defendant at the time it applied to the Judge for relief from sanction, the court should not simply take the view that the application ought to have been brought and therefore would be treated as though it had been brought. In any event there was, as was pointed out by the Appellant no evidence in support of such an application. Accordingly, ground two is also made out.

22 For the reasons above this appeal succeeds. The order of the learned Judge of 15th April 2014 is set aside; judgment is entered for the Claimant.