IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Case No: JR 1306057

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 13/01/2014

Before:

MASTER ROWLEY, COSTS JUDGE

Between:

Norah Christina Long — **Claimant**

- and -

(1) Value Properties Limited
(2) Ocean Trade Limited — **Defendants**

Mr R R Power instructed by Edwards Duthie for the Claimant
Groom Halliday Solicitors for the First Defendant
London Solicitors LLP for the Second Defendant

Hearing date: 12 December 2013

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MASTER ROWLEY, COSTS JUDGE

Master Rowley:

1. The Claimant's solicitors in this case are instructed via a CFA with a success fee. Notification of that arrangement was given by notice in form N251 upon the commencement of proceedings. Following settlement, detailed assessment proceedings were commenced in October 2013 but no statement of reasons or other information was served contrary to Section 32.5 of the Costs Practice Direction which applies to this case by virtue of CPR Rule 48.1.

2. Consequently, the Claimant has applied for relief from sanctions in the following terms.
   "That the Claimant/receiving party be relieved from any sanction imposed by CPR 44.3B and/or any Sections of the Costs Practice Direction, for failing to serve the paying parties' solicitors with copies of the CFAs and/or a statement setting out the relevant details of the success fees in accordance with CPR 32.5."

   Both Defendants oppose the application. I heard submissions from Mr Power of Counsel on behalf of the Claimant and Mr Carter and Mr Moran, both costs lawyers, for the Defendants and I reserved judgment on the day so that I could consider the submissions made.

Chronology

3. The claimant, along with her late husband, instructed Messrs Edwards Duthie in October 2011 and entered into a CFA on 12 October 2011. Counsel subsequently entered into a CFA with Edwards Duthie on 11 June 2012. Notice of Funding was served at the end of 2012 prior to proceedings being commenced on 7 February 2013. The case was compromised by an order dated 15 August 2013.

4. Whilst there was some dispute between the parties as to how quickly notification of these CFAs had been given, there was no suggestion that the Claimant was in breach of any of the requirements of the CPR up to this point.

5. The chronology of the detailed assessment proceedings is as follows:-
   17 October – Notice of Commencement and Bill of Costs served
   5 November – D2 requests extension of time for serving Points of Dispute (otherwise due on 7 November)
   6 November – C agrees extension of time with both Ds until 15 November
   14 November – Points of Dispute served by both Ds
   20 November – C sends letter enclosing CFA and other documents; proposes Amended Points of Dispute if required
   25 November – D1 indicates it will wait to see Replies before deciding on whether to serve Amended Points of Dispute.
   27 November – C serves Replies
   28 November – C issues application for relief from sanctions

Witness statement of Terence Macleish

6. The application for relief is supported by a witness statement from Mr Macleish who is the solicitor with conduct of this case at Edwards Duthie. The first 6 paragraphs of the statement deal with the events of the underlying property proceedings and the notification to the defendants of the additional liabilities during the course of those proceedings.

7. Paragraph 7 refers to serving the Notice of Commencement by letters dated 15 October. These letters are exhibited to the witness statement at pages 89 and 90. Having recited the orders giving rise to the right to costs and the claimant's instructions to proceed with detailed assessment of those costs, the letters set out the following enclosures:-

   i. Notice of Commencement dated 15 October 2013
   ii. Copy Order dated 15 August 2013
   iii. Notice of Funding
   iv. Counsel's Fee Note
   v. Miscellaneous disbursement vouchers and other invoices

8. Paragraph 8 deals with the correspondence received from the Defendants' respective costs lawyers and the fact that this correspondence does not mention the question of further documentation required by the Costs Practice Direction in respect of the CFAs. The first notification of any problem was in the Points of Dispute themselves.

9. The First Defendant's Points of Dispute ask for copies of the CFAs to enable the First Defendant to satisfy itself that the work done is within the scope of those CFAs. The Points then separately state, at Point 2, that *"The Claimant has failed to serve with the Bill of Costs a statement setting out the relevant details of the success fees in accordance with CPD 32.5. The First Defendant contends that the Claimant is in clear breach of the Rules and accordingly any success fees claimed should be disallowed in full per CPR 44.3B."*

10. The Second Defendant's Points of Dispute makes the same point and sets out the relevant parts of the CPR and Costs Practice Direction. It also refers to the case of Middleton v Vosper Thornеycroft (UK) Ltd (2009) regarding the timing of when the missing documentation needs to be served.

11. Mr Macleish's statement continues at paragraph 9 by saying
"Having realised my inadvertent omission of those documents and my mistake in not having previously sent them to the paying parties' solicitors, I wrote to both parties' solicitors and costs lawyers with copies on 20th November 2013 and apologised for my omission and suggested to both that it would be more proportionate to serve Amended Points of Dispute rather than, as is now the case, take up the court's time with an Application by Mrs Long for relief from sanctions."

12. The remainder of Mr Macleish's statement deals with the issuing of the application in the absence of any agreement from the Defendants as to the course of action he had proposed. It also asserts that the Defendants have not suffered any prejudice and that the Claimant's counsel will be affected by his inadvertence if relief is not granted.

The Law

13. A party who fails to provide information in accordance with s32.5 of the Costs Practice Direction suffers the sanction of being unable to recover an "additional liability" which in this case means the success fee claimed on both the solicitors' and counsel's fees. That sanction is imposed by CPR rule 44.3B.

14. An application for relief from a sanction is governed by CPR rule 3.9(1) which says
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.

15. The rule was rewritten in April 2013 and guidance on how it should be interpreted was recently given by the Court of Appeal in Mitchell v News Group Newspapers Limited [2013] EWCA Civ 1537. Judges are required to be more robust, or less indulgent, to applicants who have to seek relief from sanctions than was the case prior to April 2013. Whilst still taking all of the circumstances into account, judges are to give less weight to circumstances other than those set out at (a) and (b) in the rule. The parties' procedural obligations serve two purposes. Firstly, they are to ensure that the litigation is conducted proportionately. Secondly, and more importantly, those obligations serve the wider public interest in ensuring that other litigants can also obtain justice efficiently and proportionately. It is for the court to enable this to happen.

16. The guidance in Mitchell indicates that the court should usually look first at the nature of the non-compliance. Is it trivial? If it is, and an application is made promptly, relief from the sanction should be given. If the default is more than trivial, then a good reason needs to be given by the applicant. Pressure of work or "well-intentioned incompetence" will not be a good reason. Something outside the control of the party is more likely to be a good reason than something within that party's control.

17. The case of Forstater v Python (Monty) Pictures Ltd [2013] EWHC 3759 was heard by Norris J prior to the Mitchell decision but the judgment confirms, by its final paragraph, that the judge took into account the decision of the Court of Appeal before handing it down. In paragraphs 37 to 47 Norris J considers an application for relief from sanctions imposed by CPR rule 44.3B as is the case here. In Forstater the receiving party had failed to serve a Notice of Funding rather than subsequently failing to provide information about the relevant funding arrangement.

18. The judge recites that there was "no good explanation" for the failure to serve the Notice of Funding in form N251. "It was simple oversight." The judge goes on to say that "this was a failure (through human error) to comply with a rule of general application: it may be contrasted with a conscious failure to comply with a specific order made in the action itself."

19. It is not clear to me when the CFA in Forstater was created. On 19 July 2012 the receiving party notified the paying party of its existence albeit not using Form N251. Norris J considered that the paying party had been given the relevant information required by the rules, even if not on the correct form and granted relief from the sanction imposed by CPR rule 44.3B from that date.

20. Similarly to the position in which Norris J found himself, I should record that I have become aware of a further decision in this area since the hearing, namely Durrant v Chief Constable of Avon & Somerset Constabulary [2013] EWCA Civ 1624. It is a decision of the Court of Appeal which overturns a grant of relief from sanctions at first instance. It very much reinforces the approach set out in Mitchell.

Claimant's submissions

21. Mr Power took me through the chronology of events, particularly in relation to the detailed assessment proceedings. He emphasised the constructive and conciliatory approach taken by the claimant's solicitor in agreeing extensions of time; providing documents as soon as requested and proposing dealing with any amendments required to the Points of Dispute in a cost effective manner. Mr Power contrasted that approach with the Defendants failure to approach the Claimant for the missing documentation even though they must have known it existed. Instead they had said nothing until they had set out the problem in the Points of Dispute and were taking an opportunistic approach to the Claimant's oversight.

22. Mr Power then queried whether any relief from sanctions was in fact needed. He referred me to the case of Middleton and to the argument canvassed before the judge that the documents specified in CPD 32.5 do not have to be served with the Notice of Commencement and bill of costs. Mr Power accepted that the judge in Middleton was against that proposition on the basis that the rules did not work satisfactorily if the information was only provided after Points of Dispute were served. But the decision in Middleton is not binding on me and I could take a contrary view and so support the Claimant's position.

23. In support of taking a contrary view was Mr Power's argument that CPR rule 44.3B imposed such a draconian sanction that it should be construed narrowly where possible. There had been no prejudice to the Defendants here (or at least none that could not have been cured by the Defendants own actions of asking for the missing information.) Having had the information, there is no suggestion that the Defendants have any further arguments to the ones already set out in the Points of Dispute as served. In these circumstances, granting relief to the Claimant will not cause the Defendants' position to deteriorate from the one set out in the Points of Dispute.

24. If I am not with the Claimant on the question of breach of the CPR in the first place, Mr Power urged me to follow the approach in Forstater rather than Mitchell. Here there had been human error with no prejudice to the Defendants. If I declined relief I would be depriving the Claimant's representatives of significant sums and giving the Defendants a windfall. If, however, I grant relief then the Defendants would either suffer no prejudice (because their Points of Dispute were unchanged) or could be compensated by payment of the costs thrown away by the amendments.

25. Insofar as Mitchell is concerned, Mr Power drew me to the approach highlighted by Walker J in the case of Wyche which is mentioned within Mitchell and described it as a "more just" approach. Mr Power said that he could not go so far as to submit that the non-compliance with the rule was trivial. As such, he conceded that if I were to follow the Mitchell approach of requiring a good reason the Claimant might be in some difficulty.

26. Finally, Mr Power informed me that he understood that the decision in Mitchell may be heading to the Supreme Court and if I were inclined not to grant relief based on the Mitchell approach he asked me to defer the decision in those circumstances. He also laid down a marker that he considered the wider range of interest passages in Mitchell (i.e. justice only being required in the majority of cases) to be wrong in law. He stressed that he did not require me to deal with that point but was making sure it could not be said on any later appeal that it had not been raised initially and I have duly recorded it in that spirit.

Defendants' submissions

27. Mr Carter led the submissions for the Defendants. He emphasised the comments in Mitchell regarding the need to give greater weight to the (a) and (b) factors set out in CPR rule 3.9(1) (see paragraph 15 above). He reiterated the Claimant's concession that this was not a trivial breach and submitted that no good reason had been put forward to the court. The bill had been prepared by a costs lawyer and served by an experienced solicitor. There was no reason why the Claimant should not have complied with the requirements of the CPR. In Mitchell a simple oversight had resulted in the budget being set at the relevant court fees. It did not take much to attract a draconian sanction and Mitchell was clear that the starting point should be that whatever sanction had been imposed was the proportionate one.

28. Mr Carter disputed the Claimant's position that there had been no prejudice to the Defendant. He said that by not receiving the information when required, it meant that the Defendants' lawyers could not advise their clients on any suitable offers to make. There had been no reason to think that the position would be rectified at any particular point. Mr Moran subsequently made the same argument. I queried the length of the prejudice in this particular case given the requests for extensions of time for the Points of Dispute and the prompt provision of the information after the Points had been served. I suggested the period would be two or three weeks and that was accepted as being the relevant period.

29. Mr Carter was very firm on the issue of the Points of Dispute being the appropriate place to raise the omissions by the receiving party. Other aspects of missing information such as disbursement vouchers or counsels' fee notes would be similarly requested in the Points of Dispute. "Picking up the phone" to the receiving party to request such items was not required and it was certainly not for the paying party to advise the receiving party on how to deal with preparing her bill properly. In Mr Carter's submission, pleadings in costs assessments are no different from those in the underlying proceedings. If a party misses something out, it is not for the opponent to point it out. In any event, based on Middleton, it was too late to pick up the phone because the Claimant was already in breach of CPD 32.5.

30. Mr Carter disputed the relevance of the Claimant's submissions regarding there being no amendment to the Points of Dispute. It was not, as the Claimant implied, that it was because the Defendants had no further points to raise. It was simply that the application had been made so quickly that the Defendants had decided to see what the outcome of the application was before deciding on whether to make any amendments.

31. The Claimant's submission that the Notice of Funding had originally been served on time was also challenged by Mr Carter. The CFA between the Claimant and her solicitor was signed 15 months before notification was given at the end of 2012. (In response, Mr Power refuted the Defendants' submissions and prayed in aid CPD Section 19.2(2) on this point.)

32. Mr Carter did accept that prior to April 2013 applications of this sort would generally be dealt with as a verbal application at the beginning of a detailed assessment hearing. However, the changes in the CPR were well advertised and the first instance hearing of Mitchell was also well publicised in June. Therefore the non-compliance in this case was set against a backdrop of a changing culture.

Discussion

33. In responding to the Defendants' submissions, Mr Power contrasted the ability of parties to amend their statement of case in proceedings generally with the position that seemed to have occurred here. If the Defendants' argument was correct, the die was cast for the Claimant as soon as the letter left her solicitors' offices serving the bill of costs but not serving the statement of reasons etc required by CPD 32.5. Unless the Claimant's solicitor recognised his error before the Points of Dispute were served (and even then it may have been too late) he had breached the rule and oversight would not be sufficient to bring him back into play however promptly an application was made. Mr Power referred to passages in the Middleton case where the judge mentions the time period in which an application might have been brought but had not been. The clear implication of those passages was that such an application would have been favourably received.

34. This "one strike and you're out" issue troubled me throughout this hearing. The Court of Appeal at paragraphs 34 and 35 in Mitchell expressly refer to Sir Rupert Jackson's conclusion in his report that the "extreme" approach of non-compliance always suffering a sanction save in exceptional circumstances was not one to be followed. Nevertheless, this is the logical outcome of the paying parties' position in this case. My experience of these applications is that they almost invariably involve an oversight of one form or another and as such is very unlikely to be rectified before it is brought to the receiving party's attention by the Points of Dispute.

35. The position is made all the more stark by the nature of the sanction imposed. Where a Notice of Funding is not served for a period of time, the success fee is disallowed for that period of time but is recoverable once the requisite Notice has been served. If no Notice is ever served, then clearly the entire Success Fee is at risk. But there is at least an escape route of sorts for a party who overlooks serving the relevant notice immediately and then rectifies his error. The sanction for a failure to provide information at the commencement of Detailed Assessment proceedings however has no similar provision for late notice and as such it is all or nothing. That seems strange to me given that the complete absence of knowledge to the opponent caused by a failure to serve the N251 always seems to cause more prejudice than a failure to serve information regarding a CFA whose existence was already known. An opponent at this second stage could always "pick up the phone" but an opponent at the first stage would simply have no clue about the additional liability being accrued and subsequently being sought.

36. It did occur to me that the Claimant's non-compliance was potentially a trivial one. The period of any prejudice (and I was not convinced that there was much prejudice during this time) lasted no more than three weeks and it was in the hands of the Defendants to bring that period to an end should they have wanted to do so. The error was rectified promptly and the application made extremely quickly.

37. But the non-compliance is not of the sort suggested by Mitchell as being trivial – for example a matter of form over substance – and Mr Power's concession on this point seemed to me to be a telling indication of the parties' views as to whether the lack of provision of this information could be considered trivial.

38. In these circumstances, the Claimant has to persuade me that there is a good reason for the non-compliance and it is clear that oversight, or human error, is no longer to be

regarded as a good reason. Based on the Mitchell guidance, I must refuse relief from sanction.

39. The decision in Mitchell is clearly the Court of Appeal's opportunity to turn Sir Rupert Jackson's extra-court pronouncements into judicial precedent. The Court's decision in Durrant reinforces that position. I do not think I can realistically follow a different approach based on one High Court decision, as Mr Power encouraged me to do, even if I considered that to be the appropriate course. Furthermore, even if Mitchell is being appealed, and I have no information on that, the case of Durrant makes it clear that the Court of Appeal's general view is clear on applications of this sort. Therefore, whilst I may have qualms about the nature of the sanction imposed for a breach of this particular provision of the CPR, I am clear that I need to take that as being the correct sanction and simply concentrate on whether the breach was trivial and if not whether there is a good reason for granting relief. Both of those questions are to be answered in the negative in this case.