Neutral Citation Number: [2017] EWHC 1713 (Ch)

County Court Case No.: C01CL619
Appeal ref: CH-2017-000032

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FROM HH JUDGE LOCHRANE
IN THE COUNTY COURT AT CENTRAL LONDON

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4

Date: 5 July 2017

Before:

MR DANIEL ALEXANDER QC
Sitting as a Deputy Judge of the Chancery Division

- -

Between:

JAGDISH LAKHANI and another	Claimants/ Respondents
- and –	
IBRAHIM SHEIKH ABADULLAH MAHMUD and others	Defendants Appellants

---

Ms Alice Hawker (instructed by IBB Law) for the Appellants/Defendants
Ms Philomena Harrison (instructed by Blake Morgan LLP) for the Respondents/Claimants

Hearing date: 30 June 2017

Approved Judgment

I direct that, pursuant to CPR PD39A 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.

Daniel Alexander QC

MR DANIEL ALEXANDER QC

Introduction

1 This is an appeal by the defendants to this claim from the order of HH Judge Lochrane sitting in the Central London County Court, dated 10 January 2017, whereby he dismissed the defendants' application for relief from the sanctions provided for by CPR 3.14 in respect of the failure to comply with one of the case management orders relating to the filing of costs budgets made by District Judge Jackson sitting in the Central London Country Court on 18 November 2016. Permission to appeal was refused by the judge but was granted by Norris J.

The claim and the order which was not complied with

2 The case concerns a claim for an injunction brought by the freehold owners of land in a London suburb to require the defendants to restore car parking spaces of certain land to a condition in which they are available to the claimants, which it is contended should be done pursuant to a transfer dated 8 August 1986.

3 The order of 18 November 2016 provided that the parties should file and serve updated costs budget 21 days before the costs and case management conference which was scheduled to take place on 10 January 2017. It is common ground that the purpose of this order was to enable the parties to communicate with each other in good time prior to the costs and case management conference to limit disputes over costs budgeting and to smooth the resolution at that hearing.

Service of costs budgets

4 The claimants served their costs budget on 19 December 2016, the correct day. According to the evidence, this prompted the defendants' solicitor with conduct of the case, Mr Fellows at IBB Law, to ask a colleague to prepare the defendants' Precedent H costs budget. This was served the next day on 20 December 2016. The claimants' costs budget sought over £100,000 in costs and the defendants' budget was approximately half that amount. Because the defendants' costs budget was served late, the automatic consequence under the rules is that, unless relief from sanctions is permitted, the defendants will not be able to recover any more than court costs if successful in the claim.

5 In correspondence following service of these documents exhibited to the statement of Mr Fellows, which was itself served only just before the hearing at which the judgment under appeal was given, the solicitors engaged in debate as to whether the defendants' costs budget was in fact out of time. However, it was ultimately not in dispute before the judge that it was. HH Judge Lochrane was unimpressed with the attempt to argue that the 20th was the right day rather than the 19th, referring in his judgment to the "obvious reality" of the rules.

The parties' comparison of and comments on the costs budgets

6 Despite the defendants missing the deadline for their costs budget, the parties' solicitors got on with the exercise of commenting on each other's costs proposals. The parties exchanged Precedent R reports shortly before the hearing. The parties' respective positions for the costs budgeting hearing were reflected in a document served the day before the hearing before HH Judge Lochrane entitled **Costs Budget Comparison** which helpfully summarised the parties' respective positions on costs.

Both parties were able to make sensible comments on the other side's costs' schedules. In the case of the defendants' costs budget, the majority of the costs estimates were agreed. In the case of the claimants' costs budget, the defendants' solicitors provided comments on why they considered the claimants' costs estimates were too high. In some cases, these comments were detailed and in others they questioned more briefly why the claimants' costs should be higher than the defendants. Although the defendants did not, in that document, provide specific sums as to what they regarded as reasonable, under almost all of the heads they challenged the claimants' costs on the footing that there was no good reason for the disparity in costs between the parties.

7 The significance of this document, which was before the judge, albeit not referred to by him in his judgment, is that it shows that the parties had been able to engage in debate about costs estimates and that, in most cases as regards the defendants' costs, there was little, if any, dispute that they were appropriate. It provides concrete support for the evidence of the defendants' solicitors on the application for relief from sanctions that the claimants had suffered no prejudice by missing the deadline by a day and had ample time to consider and comment on the defendants' cost budget prior to the costs and case management hearing on 10 January.

8 At the hearing, the claimants' proposed costs budget was significantly reduced by the judge under a number of heads. However, because relief from sanctions was not granted, the defendants' costs budget was not considered by him at all. The court would have had to determine two main issues: costs for witness statements (where the difference between the claim and that agreed by the claimants was, in context, modest - about £2000) and trial (where this difference was less than £1000). Had relief from sanctions been ordered, there is little doubt that it would have been possible for the court to exercise its costs budgeting powers relatively easily although it is unclear whether time would have permitted that to be done at the same hearing, given the time taken on relief from sanctions and the claimants' costs budget. This point lies at the heart of this appeal because it is said that this was a minor default which did not affect the procedure to any significant extent and that the judge was wrong to treat it as a serious breach.

The application for relief from sanctions and the judgment under appeal

9 The application for relief from sanctions was not advanced in a manner calculated to optimise the chances of success. First, the application was not made in a timely manner on or immediately after the 20 December. Instead, it was made at the last minute just before the hearing, with the defendants' solicitor holding the position until late in the day that no application was needed. Prior to that, there had been dispute in correspondence as to whether such an application was necessary. Second, the circumstances in which the application was made and the late service of evidence precluded the claimants from serving evidence in response to it or having a reasonable time in which to consider whether it should be opposed. Third, the 45 minute hearing to determine comparatively simple costs budgets was turned into a ½ day hearing, dominated by the issue of relief from sanctions. Fourth, the late service of the costs budget and the consequential dispute over relief from sanctions had potential to disrupt agreement over costs budgets.

The judgment

10 The judgment under appeal is short and was given *ex tempore*. HH Judge Lochrane began by setting out the relevant provisions of CPR 3.14 and recorded the basic chronology.

11 The judge said, in my view rightly, that in certain circumstances being one day late with a costs budget "might not be regarded as terribly serious".

12 However, he went on to record a number of matters which led him to take a different view in paragraphs 5-6. In summary they were as follows. First, that the defendants' solicitor only accepted belatedly that the costs budget may have been out of time which, as the judge said, meant that days which should have been devoted to agreeing costs were cluttered with arguments about whether or not there had in fact been a breach of the rules. Second, that the situation was made worse by the defendants knowing that their office would be shut between 23 December 2016 and 3 January 2017, limiting the time available for agreement on costs (in effect to just a few days before Christmas and a few days after the New Year). Third, that the defendants' solicitor was aware that filing late would restrict a period already limited. The judge said that it was "clear" that the late filing had "artificially restricted an already restricted timetable". Fourth, he rejected an argument that it did not matter because the budgets were not agreed anyway. Fifth, he said that the impact of late service had created an environment which was not conducive to agreement and was more conducive to the defendants presenting the costs as highly contentious.

13 He then referred to the relevant authorities of *Denton* and *Mitchell* albeit that he summarised the principles in those cases very briefly.

14 He considered that this was not a breach for which there was a sensible excuse. He said at paragraph 14 that the defendants' solicitor had "failed properly to interpret the Rules which are there for all to see" and that the rule was not particularly complicated and that everyone was very familiar with it.

15 HH Judge Lochrane's overall conclusion in paragraph 16 was as follows:

> "My conclusion is that this is not a trivial breach. It is a serious breach. It is a breach which has imperilled the proper conduct of this litigation. It has reduced the time available for these parties to conduct themselves in the way that is expected by the Rules to narrow the issues on the costs budget. It has further created an environment in which the attention of both parties, by the default of the defendants, has been distracted onto a matter which is irrelevant to those costs budgeting issues."

Law – the CPR, *Denton* and *Clearway*

16 CPR 3.9 provides:

> "(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."

17 Although it was not cited by the parties, it is convenient to take the summary of the approach to CPR 3.9 in *Denton* from the relatively recent decision of the Court of Appeal in *Clearway Drainage Systems Ltd v Miles Smith Ltd* [2016] EWCA Civ 1258, since it contains useful contextual observations. In that case, the Master of the Rolls, Sir Terrence Etherton, said:

> "54 It is important in this area that there is consistency in the application of the legal principles which have been clearly laid down. It was made plain in *Mitchell* (at [1]) that the traditional approach of our civil courts used to be on the whole to excuse non-compliance if any prejudice caused to the other party could be remedied (usually by an appropriate order for costs) but that is no longer the correct approach. The new approach was stated in paragraph [37] of *Mitchell* as follows:
>
> > "We recognise that CPR 3.9 requires the court to consider "all the circumstances of the case, so as to enable it to deal justly with the application". The reference to dealing with the application "justly" is a reference back to the definition of the "overriding objective". This definition includes ensuring that the parties are on an equal footing and that a case is dealt with expeditiously and fairly as well as enforcing compliance with rules, practice directions and orders. The reference to "all the circumstances of the case" in CPR 3.9 might suggest that a broad approach should be adopted. We accept that regard should be had to all the circumstances of the case. That is what the rule says. But (subject to the guidance that we give below) the other circumstances should be given less weight than the two considerations which are specifically mentioned."
>
> 55. That remains good law, as is shown in paragraph [32] of *Denton* as follows:
>
> > "We can see that the use of the phrase "paramount importance" in para 36 of *Mitchell* has encouraged the idea that the factors other than factors (a) and (b) [in CPR 3.9(1)] are of little weight. On the other hand, at para 37 the court merely said that the other circumstances should be given "less weight" than the two considerations specifically mentioned. This may have given rise to some confusion which we now seek to remove. Although the two factors may not be of paramount importance, we reassert that they are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. That is why they were singled out for mention in the rule."
>
> 56. *Denton* laid down a three stage approach which the judge faithfully applied in the present case. The three stage approach is described in the following way in paragraph [24] in *Denton*:
>
> > "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)]"."

57. *Denton* made clear that the focus of the enquiry at the first stage should be on whether the breach was serious or significant. The court (at [26]) expressly rejected the notion that the sole test was whether a future hearing date was imperilled. It emphasised that, although there are many circumstances in which materiality in that sense would be the most useful measure of whether a breach has been serious or significant, it is deficient in leaving out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious.

58. As to the second stage, the Court of Appeal in *Denton* (at [29]) referred to the examples of failure or default given in paragraph [41] of *Mitchell*. One of the situations considered there was where solicitors may be under pressure and have too much work. The court said that this will rarely be a good reason. It said that solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. In paragraph [43] of *Mitchell* the court said that good reasons are likely to arise from circumstances outside the control of the party in default.

59. As to the third stage, the court in *Denton* emphasised (at [32]) that, as I have said, although the factors (a) and (b) in CPR 3.9(1) may not be of paramount importance, they are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. That is why they were singled out for mention in the rule. The Court of Appeal in *Denton* said (at [34]) that factor (b), namely the importance of complying with rules, practice directions and orders, had received insufficient attention in the past but the "old lax culture of non-compliance is no longer tolerated".

60. The Court of Appeal in *Denton* said (at [38]) that a more nuanced approach is now required, and that the two factors stated in CPR 3.9(1) must always be given particular weight since anything less will inevitably lead to the courts "slipping back to the old culture of non-compliance which the Jackson reforms were designed to eliminate".

61. Finally, in *Mitchell* (at [52]) it was emphasised that the Court of Appeal will not likely interfere with case management decisions and, quoting Lewison LJ in *Mannion v Ginty* [2012] EWCA Civ 1667 at paragraph [18], it is vital that the Court of Appeal upholds robust fair case management decisions made by first instance judges."

Approach to the appeal

18 First, it is common ground that this appeal is a review not a rehearing and that this court should not interfere with a case management decision of this kind if the court below has "applied the correct principles and…has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the trial judge"

(per Lawrence Collins LJ in *Walbrook Trustee (Jersey) Limited v. Fattal* [2008] EWCA Civ 427 at [33]). It goes without saying that, as with all such evaluations, multifactorial evaluations of degree which feed into case management decisions are particularly hard to disturb.

19 Second, the observations of Lewison LJ in *Mannion v. Ginty* cited by the Master of the Rolls at para. [61] of *Clearway Drainage* (see above) as to the importance of appellate courts upholding robust fair case management decisions should be borne in mind. Equally important, however, are the observations of Green J in *Joshi & Welch Limitd v. Tay Foods* [2015] EWHC 3905 at [28] that "Robustness is good but it sometimes needs tempering" and the undesirablity of permitting parties to use the rules as a tripwire so as to create injustice.

20 Third, an appellate tribunal is entitled to assume that, even if the lower court has not specifically mentioned an item of evidence, it has taken it into account. As the Supreme Court said in *Henderson v Foxworth Investments* [2014] UKSC 41 at [48]:

> "…An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration: *Thomas v Thomas* 1947 SC (HL) 45, 61; [1947] AC 484, 492, per Lord Simonds; see also *Housen v Nikolaisen* [2002] 2 SCR 235, para 72.

Grounds of appeal

21 In summary, the defendants contend that (i) HH Judge Lochrane erred in approach principally in his failure to take into account key matters in assessing the seriousness of the breach and (ii) he gave too little weight to the fact that there were innocent reasons for the breach. I deal with these in turn, commenting on the detail of the argument where necessary.

A. Seriousness of breach

22 The issue of seriousness of breach is encompassed by the first two grounds of appeal. It is convenient to treat these grounds together as a compendious question of whether the judge's approach to evaluation of the seriousness of the breach and his findings of fact on this issue were right, as counsel for the defendants did at the hearing. This involves primarily considering the factors the judge was entitled to take into account, whether he did so and whether he was bound to give particular weight to one or more of them.

Evaluation of seriousness of breach where a deadline is missed

23 In addressing this issue, it must be borne in mind at the outset that an evaluation of seriousness or significance of breach is not a binary question of primary fact. It is a multifactorial question of degree.

24 In *Denton,* the majority of the Court of Appeal said at [26]:

> "We therefore prefer simply to say that, in evaluating a breach, judges should assess its seriousness and significance. We recognise that the concepts of seriousness and significance are not hard-edged and that there are degrees of seriousness and significance, but we hope that, assisted by the guidance given

in this decision and its application in individual cases over time, courts will deal with these applications in a consistent manner."

25 As the claimant's counsel emphasises, the Court of Appeal did not set out hard criteria by reference to which seriousness and significance should be determined. Nor did it prescribe the weight that a judge should give to various factors.

26 It is impossible to list the full range of factors which may be relevant in assessing the seriousness or significance of a breach. In cases where the breach consists of failing to meet a deadline for performing a task such as service of costs budgets, the authorities illustrate that the court is entitled to take into account at least the following factors, giving them such weight as appears appropriate in each case. As discussed below, the judge did that.

(i) The absolute and relative amount of time lost by missing the deadline

27 First, it is necessary to determine how much time was lost by late service and its significance in absolute and relative terms.

28 In *Azure East Midlands v. Manchester Airport Group Property Developments Ltd* Unreported Judgment of HH Judge David Grant (Birmingham County Court), 7 May 2014, which is an exemplary application of the approach, it was held that a delay of two days in filing costs budgets in the context of a time frame of seven days was "trivial". That language was used in the light of the pre-*Denton*, *Mitchell* guidance. Other cases have held similarly (see e.g. the approach in one of the *Denton* cases).

29 The cases cited before me have not expressly considered a situation in which a comparatively generous period for compliance was provided in terms of number of days but the effective useable time was more limited. In this case, it is said that the time was limited by the closure of the defendants' solicitors offices taking out almost half of the period, leaving just a few days before Christmas and a short period in the New Year in which the issues over costs could be discussed.

30 In considering the amount of time lost by failure to meet a deadline, it is legitimate for a court to take account of the effective amount of time available and how much of that was lost as a result. Moreover, the amount of time lost can be more significant where a task involves a degree of co-operation, such as attempting to agree a matter, rather than the unilateral performance of an act, such as service of witness statements, which does not involve co-ordination with an opposing party of availability to discuss matters or exchange correspondence.

The judge's approach

31 The judge considered this factor to be relevant. He took into account the fact that the effective available period of time for agreeing costs budgets was not the full 21 days before the hearing but was shorter than that, given the Chirstmas and New Year break during which the defendants' solicitors' office was closed. This was a period in which, in his words, the defendants' solicitors had taken themselves out of the game. The judge thought that the period was already rather limited for attempting to agree costs and that losing a day mattered. Although others may have reached a different conclusion, I am not able to say that the judge was wrong to take this into account and give it appropriate weight.

(ii) Whether missing the deadline affected the litigation or a procedural step in it or was likely to do so

32 It is axiomatic that, in evaluating the seriousness of a breach, the actual consequences of it must be considered and, in particular, the extent to which it had an adverse impact, real or potential. There is a very important factor, as the following examples show (as, indeed, does *Denton* itself) and, in many cases, will be decisive.

33 In *Falmouth House Limited v. Micha'al Kamel Abou-Hamdan* [2017] EWHC 779 (Ch) Nugee J said at [52]:

> "…consistently with the guidance from the Court of Appeal, [the fact that it makes no difference to the conduct of the litigation] is therefore likely to be a very useful indication that the breach was not serious or significant. But one should then go on to consider whether there is any reason for regarding it as serious or significant. In order to do this, it seems to me that one should consider the purpose for which the Order was made. Courts do not make orders for their own sake – they make them for a reason – and it is not really possible to identify how serious or significant a breach of an order is without considering the reason it was made, what it was designed to achieve."

34 In *Murray v. BAE Systems PLC*, Unreported Judgment of HH Judge Peter Gregory of 17 February 2016, the court considered that the District Judge had failed to consider materiality at all or whether it would be the most appropriate measure of defining or classifying the breach as serious or significant. He referred to the judgment of Moore-Bick LJ in *Altomart Limited v. Salford Estates (No. 2) Limited* [2014] EWCA Civ 1408 where the Court of Appeal had said that a default "which does not disrupt the progress of litigation or the business of the court more generally may well not be regarded as serious or significant" and held that the default which had little, if any, effect on the course of the proceedings was not properly to be regarded as serious or significant in the *Denton* sense. HH Judge Peter Gregory allowed that appeal and granted relief from sanctions.

35 Similarly, in *Azure,* among the factors taken into account in reaching a similar conclusion were the fact that there was no prejudice and that the parties were "perfectly able to deal with the topic of costs management" at the hearing and no material disruption was caused to the court's timetable by the delay. That was a finding made before *Denton* at the time when the Court of Appeal in *Mitchell* had held that relief from sanctions should only be granted if the breach was trivial.

Is actual impact to be treated as a determinative factor in every case?

36 If litigation is adversely affected as a result of breach of an order, for example, necessitating an adjournment or by making it much harder to reach agreement without a hearing on given issues or by making other steps in litigation more difficult or complex to perform, that is a powerful factor in favour of finding that the breach was serious or significant.

37 While the actual impact on the ability to perform the task required by the order is very important and may be decisive in many cases, the authorities do not suggest that it is the over-riding factor in every case. In my judgment, in evaluating the seriousness of breach, a court is entitled to consider the risk of difficulty that the failure to meet a

deadline has created even if, in the event, it has been possible to perform the task required, notwithstanding the breach. That is particularly legitimate in the case of orders whose performance requires a degree of co-operation because, in such cases, even though it may be possible for the non-defaulting party still to do what is required as well, it may make it more inconvenient and costly, since extra time may need to be made available. That may be all the more so, if the number of effective working days to complete a co-operative task is limited, thereby reducing flexibility.

38 Co-operation over costs budgets requires parties to have some regard to each others' positions. In this case, both parties sought to justify their own claim or criticise their opponents' by comparing the respective claims. Creation of an environment in which that was made more difficult, even if ultimately possible, may in some cases be a legitimate factor to take into account in evaluating the seriousness of the breach.

39 Moreover, looked at purely between the parties, the issue here is not only whether it was possible to perform the task but whether the breach had an impact on the ease and convenience with which that could be achieved. In contrast to the service of pleadings and evidence (for example) costs budgeting is not an essential part of the process of resolving disputes. Some might say that the need for costs budgeting arises because legal advisors cannot be relied on to prevent over-egging the costs pudding. That has necessitated a scheme of early intervention by the court, requiring it to do additional tasks which should not be required in the first place if people conducted litigation more efficiently. Accordingly, it might be said that because costs budgeting involves additional time at hearings and in preparation, it is an aspect of English civil procedure for which the pain of performance should be minimised all round.

The judge's approach

40 Although HH Judge Lochrane did not expressly refer to it, there is to my mind no doubt that he had well in mind the fact that the parties had been able to prepare costs budgets and comment on the claims of the opposing party (see above). These were documents in front of him at the hearing which were in fact used to evaluate the claimants' costs.

41 I am not persuaded that he was, in this case, obliged to treat that as a conclusive factor on the question of seriousness. In each of the authorities referred to above, the court adopted a more systematic approach to evaluating the seriousness of the breach than HH Judge Lochrane did here, discussing specifically the impact on the case. However, while his analysis of this issue might have been fuller, I am not persuaded that he failed to take a relevant matter into account in this respect. The weight to be given to it was a matter for him.

(iii) The direct consequences of missing the deadline and how it was addressed

42 Matters consequential to the breach may in some cases more appropriately be considered under the third stage of *Denton*. However, in evaluating the seriousness of a breach the immediate consequences of it and the manner in which they were addressed may also be taken into account at the first stage. Where a deadline is missed in circumstances such as these, the sanction of the inability to recover more than court costs is automatic, unless relief from sanctions is granted (see CPR 3.14). In consequence, it is likely that missing a deadline of this kind may generate debate over

what the deadline is or an application for relief from sanctions or both. That has the capacity to distract from the ability to undertake the tasks required by the order.

43 In *Denton*, the court said that "assessment of the seriousness or significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past" and that the court should concentrate on an "assessment of the seriousness and significance of the very breach in respect of which relief from sanctions is sought". I am not persuaded that this makes it wrong as a matter of law in every case to leave out of account the immediate consequences of the breach at the first stage simply because they are better characterised as the consequences of the attempts (or refusal) to try to remedy the breach. There is a difference between taking into account at the first stage the direct consequences of the breach and how they were addressed on the one hand and quite different breaches or an unrelated pattern of non-compliance on the other.

The judge's approach

44 In this case, HH Judge Lochrane took into account the distraction caused by the debate over what the time limit was and whether there had been a breach. Again, I am not satisfied that he was wrong to do so.

45 That said, I do not consider that the mere fact that an application for relief from sanctions might need to take place at the same time as an attempt to complete the tasks required by the order means that the breach should ipso facto be regarded as serious on the basis that such may risk distraction. However, where a party in default makes a mountain of procedural annoyance out of a molehill of missing a deadline, it would be too strong to say that a court had fallen into error unless it ignored that reality in determining seriousness of breach. Conversely, if a party in breach takes rapid and reasonable steps to minimise the impact of any default on the opposite party and the court, the court may conclude that a minor breach has been kept minor or even, in some cases, that a breach which is *prima facie* more substantial has had its impact minimised, leading to it being treated as less serious.

(iv) The impact of missing the deadline on litigation generally

46 In *Denton*, the Court of Appeal was concerned to emphasise that evaluation of the seriousness of breach could take into account its impact not only on the litigation in question but on litigation generally (see para. [26] "…[p]rovided that this is understood as including the effect on litigation generally"). Courts are therefore obliged to consider the impact on litigation generally, not just the litigation between the parties so that if a default wastes court time it may be treated as serious even if the parties are able to address it. In *Jamadar v. Bradford Teaching Hospitals NHS Foundation Trust* [2016] EWCA Civ 1001, the Court of Appeal held that where a unsigned costs budget was only provided on the morning of the costs management conference in the erroneous belief that costs budgeting did not apply, that was "clearly" a serious or significant breach. It said:

> "Their failure to serve a budget meant that if relief were granted, there would have to be a second costs management hearing at a later date. That would add to the costs and lengthen the litigation. It would make additional demands on the resources of the court. Also, importantly, it would mean that case management and costs management were done on separate occasions".

The judge's approach

47 In this case, as noted above, the consequences of late service were sub-optimally handled. One result was that a short hearing on costs budgeting turned into a long one dominated by relief from sanctions, using valuable court time. That was partly because the dispute over whether that was required and the late service of the application for relief meant that the claimants and the court had limited time to address the application in advance and for there to be agreement as to how it should be resolved. It is true that costs budgeting was not completely derailed and, had relief from sanctions been granted, it might have been possible to proceed in the time available with the defendants' costs budget. But equally, given the state of the lists, it may not have been with the result that the combined effect of late service and the application for relief would have necessitated another hearing.

48 Although, again, this sort of factor may in some cases be better considered at the third stage of *Denton* in evaluating whether, in all the circumstances, it is just for there to be relief from sanctions, I am unable to say that, in this case, the judge was wrong to take this consequence into account in considering whether the breach was serious.

Summary on seriousness of breach

49 For the reasons given, in my judgment, HH Judge Lochrane was entitled to take the factors into account that he considered particularly relevant in this case in determining whether the breach was serious or significant and was not obliged to treat the fact that costs budgeting could be done as the overriding one. Other judges may have approached the matter somewhat differently, given factors more or less weight and reached a different conclusion. This seems to me a case on the borderline of sufficient seriousness to warrant refusal of relief from sanctions. However, I do not consider that this court can properly interfere on that basis, having regard to the approach required on an appeal of this nature.

50 Finally, there is a risk in these cases of attempting a purist compartmentalisation of factors into the respective stages of *Denton* and criticising judges if that is imperfectly done in *ex tempore* judgments. Some factors may be considered at more than one stage. In this case, even had HH Judge Lochrane concluded that the breach was not serious, he would have been entitled to conclude at the third stage that the manner in which it was sought to be remedied, including the dispute over whether there was a breach and the lateness of the application, meant that relief from sanctions should not be ordered. That being so, it is somewhat artificial to criticise his judgment on the footing that factors which were legitimately considered at the first stage but which might better have been considered at the third stage also came in at the first.

B. Reasonable excuse

51 The next issue is whether there is any basis for challenging the judge's conclusion that there was no reasonable excuse for the default. In my view, there is not.

52 The defendants contend that the judge gave too little weight to the reason for the non-compliance and that it was a reasonable misunderstanding of the rules. I cannot accept that argument.

53 First, it appears from the evidence that the defendants' solicitors only started to prepare the costs budget after receiving the claimant's costs budget. On any view, this was work undertaken at the last minute.

54 Second, in *Jamadar* cited above, the Court of Appeal said of an evaluation of whether there was a good reason for not serving a costs budget until the last minute where the solicitor responsible had taken the incorrect and "rather arrogant" decision that none was required because of his reading of the rules, that the judge was entitled to make harsh comments about such conduct which the Court of Appeal would not overturn. The position is similar here.

55 Third, although the mistake was explicable I am not satisfied that it was properly described as an "understandable mistake" (cf the calculation of the relevant date in *Fung Oi Chiu v. Waitrose* [2011] EWHC 1356 at [37] where the court was, in a pre-*Mitchell* case, sympathetic to the reasons for the error). The judge did not think so and, while it is true that some judges may have taken a more charitable view as to the calculation of time and whether days had to be clear or not, I am unable to say that the judge's evaluation was clearly wrong in this case.

56 This was a mistake by the party's legal representative and the judge did not expressly say that he had taken this into account. Ramsey J said in that case at [41] "it is evident that a failure by the legal representative is treated as weighing in favour of granting relief, as compared to a failure by the party itself". In *Fui Oi Chiu* the court took into account the fact that the error was made by a legal representative as providing support for the grant of relief against sanctions. However, it does not seem to me in the present case that this factor should have been treated as of significance.

Conclusion on reasonable excuse

57 The finding that there was no reasonable excuse was open to the judge on the evidence.

Overall conclusion

58 In my judgment, the approach taken by HH Judge Lochrane did not involve errors of principle and was not wrong on the facts. The conclusion was open to him in the exercise of his discretion and is of a kind which the Court of Appeal has recommended should normally be upheld.

59 The decision was, perhaps, on the tougher end of the spectrum as to substance and on the leaner end of the spectrum as to analysis. But the defendants have not been deprived of a trial altogether. Had that been the consequence, the situation would have merited more detailed scrutiny than the judge gave it. HH Judge Lochrane's decision operates to deprive the defendants of their budgeted costs in the event that they succeed at trial. If the claimants succeed at trial, the decision will have had a limited adverse impact on the defendants other than enabling the claimants to litigate without significant risk of having to pay the defendants' costs. In those circumstances it is hard to criticise it as disproportionate.

60 Nor is this a case in which the claimants were using the rules as a tripwire. The claimants' solicitors pointed out correctly and promptly following late service of the defendants' costs schedule that without an application for relief from sanctions the

consequences of CPR 3.14 would follow. They were not obliged to consent in advance to an application for relief from sanctions which had not been made and which was not provided to them until the day of the hearing, giving them almost no opportunity to address it fully.

61 For the reasons given and despite the excellent submissions of counsel for the defendants, the appeal is dismissed.