

IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURT IN BIRMINGHAM  
ON APPEAL FROM THE COUNTY COURT AT BIRMINGHAM

Neutral Citation Number: [2022] EWHC 2414 (CH)

Civil Justice Centre  
The Priory Courts  
33 Bull Street  
Birmingham  
B4 6DS

Monday, 17<sup>th</sup> January 2022

Before:  
MR JUSTICE ZACAROLI

B E T W E N:

BRENTON CARL SMITH

Appellant

and

JOHN LLOYD

Respondent

MR S CUTHBERT appeared on behalf of the Applicant  
MR M ZAMAN QC appeared on behalf of the Respondent

APPROVED JUDGMENT

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*This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court..*

MR JUSTICE ZACAROLI:

1. This is an appeal against the order of HHJ Rawlings dated 18 May 2021, whereby he refused to grant the appellant, Mr Smith, relief from sanctions. The relevant sanction was that the remaining part of his defence was struck out for having failed to pay £10,000 into court by a deadline set by an order of HHJ Truman. That order was made on 9 April 2021 but in fact sealed only on 6 May 2021.
2. For the appellant, Mr Cuthbert referred to each of the three stages of the well-known *Denton* test, although the main focus of his submissions was on the third stage. As to the first stage of the test, whether the breach was serious or significant, Mr Cuthbert referred to the decision of *Khandanpour v Chambers* [2019] EWCA Civ 570, a decision of the Court of Appeal (Males LJ and Sir Timothy Lloyd). Mr Cuthbert suggested that this established a two-stage approach, that there must be a breach of prior orders and then an unless order, although he did not go so far as to suggest this precludes a finding of seriousness or significance unless there had been a breach of a prior order before an unless order. However he does say it diminishes the seriousness or significance, as in this case there is merely one order which had the effect of being an unless order. He said that is a matter of significance when one comes to look at the matter in the round at the first stage.
3. The *Khandanpour* case is distinguishable because there the relevant order was a payment on account of costs. Its non-payment had no impact on the conduct of the proceedings, and it was less than one day late. Here, in contrast, the payment was required to be made within 28 days so as to avoid the action of being struck out. Its non-payment had a clear effect on the proceedings. The respondent was entitled to regard the proceedings as over once the date passed and no payment had been made. Moreover, it was at least five or six days late, which in the context of an order requiring it to be paid in 28 days, is clearly, in my view, significant and serious.
4. The second stage of the test is whether there is a reasonable excuse for the default. The judge held that there was a good excuse for the period up until the sealed copy of the order of HHJ Truman was received by the appellant, on 7 May 2021 at 2.30pm. In other words, there was a reasonable excuse for the whole of the 28 days, less about an hour and half, the payment being due at 4pm on 7 May. That was because it was reasonable for the appellant's solicitors to take the view that the sealed order was required before the payment into court

could be made: that belief was engendered by the terms of the form which was required to accompany the payment in.

5. The judge found however, that there was no reasonable excuse for the delay thereafter because there was no reasonable excuse for the funds not having been provided to the appellant's solicitors by 7 May, so that they could be paid into court forthwith on receipt of the sealed order. The judge in this regard relied particularly on the email that the appellant's partner sent on 10 May, stating that the appellant did not want to pay the money into court unless the respondent agreed to extend time under the order, not wishing to suffer the consequences of the loss of the £10,000 and no extension.
6. I note that the appellant's evidence before the judge was that the reason the money was not paid was because his solicitor did not want to send the money without written confirmation of BACs details. The exhibits to the statement in which that was said did not bear that out. I note it is contradicted by the email of 10 May which gives an entirely different reason.
7. Mr Cuthbert does not say that the judge was wrong to conclude that there was no sufficient excuse for the delay. In any event, I conclude that the judge was clearly entitled to come to the view that he did, that there was no sufficient reasonable excuse for the delay as from 2.30pm on 7 May.
8. Mr Cuthbert says however, that the further the delay would not have happened had the order been sent out (by the Court itself) in good time. This, he said, should diminish the importance of this point when considering all the circumstances.
9. I turn then to the third stage of the *Denton* test, which requires the court to exercise a broad discretion based on all the circumstances of the particular case. It is well established that an appeal against an exercise of discretion faces a high hurdle. It must be shown that the judge went wrong in law, for example by taking into account extraneous matters or failing to take into account relevant matters. It is not enough, as Mr Cuthbert appears to suggest, that I consider the judge applied more weight to the particular factors than I might have done, or that the degree of seriousness of breach or degree of sufficiency of the excuse for the default is different than the judge considered it to be. Those are matters which lie in the balance in every exercise of discretion, and the fact that different emphasis might be placed by another judge on one or more factors does not indicate an error of law in the exercise of discretion.
10. Mr Cuthbert does nevertheless contend that the judge took into account extraneous or irrelevant factors in that he wrongly took into account what he called a catalogue of prior breaches, when in reality some at least were not breaches at all. In the end, this comes down

to the submission that the judge's reliance on two matters was wrong. Those matters are that the acknowledgement of service and the defence were filed late by Mr Smith. It is now common ground that neither of those documents was in fact served late. Mr Cuthbert says that is enough to establish that the exercise of discretion was vitiated entirely such that it is open to me to re-exercise the discretion.

11. Mr Zaman who appears for the respondent says that is not so and that these were, in essence, matters that were minor, if relevant at all, the absence of which would have no impact on the judge's overall exercise of discretion. He points to three matters which were breaches of a much more serious nature, which undoubtedly were breaches, and which would undoubtedly have led the judge to reach the same conclusion in any event.
12. The most important of these is the failure to comply with an injunction made against the appellant requiring him to send notices to tenants requiring them to make payments of rent differently to that which had been done before. The evidence of this is limited. There is in evidence a draft letter with a heading of 16 April 2021. The appellant said he had sent this to his solicitors seeking their approval, and the delay in sending it out was due to the delay in obtaining his solicitors' approval. The judge considered it had indeed been reasonable to get advice on the terms of the letter, but nevertheless found that there was a delay in complying, such that the "forthwith" element of the injunction had clearly been breached.
13. The order actually required the appellant to do three things; one, serve notice on tenants and the council. Secondly, provide the tenants and the council with a copy of the order. Thirdly, serve copies of notices on the claimant. There is no evidence that the notice or the order, or copies of them, were provided to the tenants or anyone else in compliance with that order.
14. It was said on behalf of Mr Smith, on instructions but with no evidence to support it, that a letter had in fact been sent to tenants by hand, sometime shortly before the hearing of the application for relief from sanctions took place. As I say, there is no evidence of that, but even if it is correct, the appellant clearly remained in default of this order in very material respects as at the date of the hearing. No notice was sent to the council and no confirmation was sent to the claimant, at least there is no evidence that that ever took place.
15. I consider this was a serious breach of a court order, indeed an order made at the very same time as the one in respect when sanctions were sought. It seems to me it is a highly material factor, when considering all the circumstances, that defaults had been made under that order and were still to be rectified.

16. The second matter relates to the late filing of evidence for the summary judgement application. The hearing was listed for Friday, 9 April 2021. The evidence was due in accordance with the rules at least seven days before that, so at the latest, by Thursday, 1 April. The evidence was in fact only sent by email at 17.52 on 1 April. That was an hour and twenty-two minutes after the deadline, and thus was deemed served on the next working day. As the following day was Good Friday, this meant that it was deemed served on Tuesday 6 April, the next working day. The judge was therefore correct to note it was served too late, giving only three days' notice as opposed to the required (at least) seven. He was also justified in saying that no good excuse had been given for it being served so late. That is in circumstances where the evidence in support of the application had been served many months previously, in October 2020, and the appellant had been reminded by the court in December of the need to get his statement in at least seven days before the hearing.
17. Mr Cuthbert says that in itself this was a particularly minor breach, amounting to a delay of only one hour, twenty-two minutes. I do not think that this properly takes into account the full circumstances, however. It is true that the evidence was only required to be served by 4pm on that date, but a party that deliberately waits until the final moment and then ends up serving late has nobody to blame but themselves in respect of the consequences that follow.
18. Against the background of the very extensive period of time that the appellant had had the respondent's evidence, and the reminders to him to get his evidence in on time, I do consider this was a material default in itself. The final matter is that there was an application made before HHJ Truman at the hearing for an adjournment so that the appellant could apply for the assistance of a litigation friend; it was dismissed. There was clearly some misunderstanding on the part of the appellant as to what a litigation friend might be required for, particularly in circumstances where he already had the benefit of solicitors and counsel acting for him. However the real complaint here is that the application was made late with a view to getting an adjournment, and it was that factor that was taken into account by HHJ Rawlings. It seems to me he was entitled to do so.
19. I accept that the judge's finding that in all the circumstances it was just to refuse to give relief from sanctions was based, in one respect, on a misunderstanding, namely that the acknowledgement of service and the defence had been filed late. The question for me however, is whether that vitiates his exercise of discretion altogether, such that it should be undertaken again. In my judgement, it does not vitiate that exercise of discretion. The lateness of the pleadings was at best a very minor consideration. It was not something that

was even alluded to in the respondent's skeleton argument placed before the judge at the hearing. The other matters were manifestly much more serious and sufficient in themselves to justify the judge's conclusion. Accordingly, I find no error of law in the judge's approach, and I dismiss this appeal.

**End of Judgment.**

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