IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
[2021] EWHC 845 (Comm)

No. CL-2019-000786

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 17 February 2021

Before:

THE HONOURABLE MR JUSTICE WAKSMAN

B E T W E E N :

(1) CARPMAELS & RANSFORD LLP
(2) COLLYER BRISTOW LLP — Claimants

- and -

REGEN LAB SA — Defendant

MR J. McKEAN (instructed by Carpmaels & Ransford LLP) appeared on behalf of the Claimants.

MR R. WILCOCK (instructed by Black Legal LLP) appeared on behalf of the Defendant.

J U D G M E N T

(v i a M i c r o s o f t T e a m s)

MR JUSTICE WAKSMAN:

1 I have before me an application made by the defendant company Regen Lab SA to set aside a judgment entered against it pursuant to proceedings brought by two of its former solicitors (of whom there appear to be a significant number), for payment of their fees where the respective retainers of each had been terminated by the defendant. The first claimant had been instructed between 29 March and 22 December 2017 at which point its unpaid bills were some €201,000. The second claimant replaced the first in relation to forthcoming patent litigation brought by the defendant. That firm of solicitors acted between 19 December 2017 and the termination of its retainer on 9 August 2018 which was after the litigation had concluded. The amount owing to the second claimant in terms of unpaid bills was about £320,000. That meant that the defendant had then instructed a third firm of solicitors although that firm, too, was dismissed by November 2019.

2 What happened after the particulars of claim were served was this that the defendant, who is no stranger to serious and significant litigation around the world in order to protect its patent interests, filed an acknowledgement of service on 20 March having been served in Switzerland on 25 February. No point was taken on service. The acknowledgement of service first of all purported to contest jurisdiction but, secondly, said that a defence was going to be produced. In the event, no defence was produced within the required time and, indeed, no draft defence has been produced as of today. Secondly, there was no application to set aside the claim on the basis of lack of jurisdiction which meant that under the rules such an application could no longer be made. In the event, although there was originally before me a jurisdiction element to the defendant's application to set aside judgment, that is gone and I should record, rightly so; it was entirely hopeless because all the claimants had done was seek an administrative resolution in Switzerland, as opposed to court proceedings there, and when that did not work, they brought the proceedings here.

3 Judgment was entered by Bryan J on a default basis on 19 June and on the last day that he allowed for an application to set aside to be made, the application was made on 22 July. That application is now supported by a single witness statement of Mr Okaki, the defendant's present solicitor, for the purposes of this application. There were earlier statements but as he explains, they are now redundant. There is no witness evidence of any kind from the underlying clients and as I will explain in due course, the single evidence of Mr Okaki is thin in the extreme in terms of what I have to deal with and, essentially, consists of a number of legal submissions apart from one paragraph.

4 For the claimants, I have a witness statement of Mr Kirby who is a partner at Carpmaels, the first claimant. There is also a statement from Mr Bamford who is a partner in Collyer Bristow, the second claimant. There was a statement from a Swiss lawyer but that has now gone by the board because there is no longer any Swiss law issue.

5 As this is an application to set aside judgment and as is conceded by Mr Wilcock, for whose submissions I am indebted, there is really now effectively a two-stage process. First of all, it is accepted that the application to set aside judgment itself engages the well known principles applicable to applications for relief from sanctions under *Denton*. Secondly, there is the procedure laid down in r.13.3 whereby any application to set aside judgment, an important matter is whether the application was made promptly and then either the defendant has got to show merit in the sense of a real prospect of success or, alternatively, there is some other good reason why the judgment should be set aside. Finally, because this is a case of solicitors' fees, even if there is a judgment for those fees and regardless of the time that has passed, the court has a discretion under section 70(3) of the Solicitors Act 1974 to at least entertain an application for a section 70 assessment. However, that discretion is

circumscribed because it cannot be exercised or considered except in special circumstances. As an ultimate fallback position, Mr Wilcock says that if he is wrong about everything else, he now wishes to make that application. I will deal with all of these matters.

6 First, by way of background, it is worth saying just a little bit more about the claimants. The litigation on which both sets of solicitors were to be engaged in fact resulted in almost complete victory for the defendant here, Regen, in the sense that the defendant to those proceedings was found guilty of patent infringement in every respect. However, because of the conduct of Regen's own director, it was found to have published the relevant information ahead of time, as it were, or in advance and for that sole reason, its claim was barred.

7 It is worth noting what happened after that. There were applications to appeal and cross-appeal and by both sides to the patent litigation and those applications, which then came in relation to the putative appeal, were dealt with by Floyd LJ in 2020. At that particular point, Mr Terzi, Regen's director, made various applications in person. I will just read from some of Floyd LJ's remarks which are fairly trenchant in their terms so far as the conduct of Regen is concerned. First of all, it then made an application for a stay which Floyd LJ said at para.24 was late. At para.25, it said that Regen's conduct in terms of bringing proceedings was inconsistent. At para.26, which is directly relevant to whether Regen is sophisticated so far as knowledge of legal proceedings is concerned, he said this:

> "Regen has shown itself perfectly content to launch litigation in multiple countries against Estar [which was the patent litigation defendant] with no apparent regard for saving costs. The relatively small costs saving achieved by staying the appeal carries little or no weight against that background."

He found that the factors against granting a stay came down heavily against Regen.

8 There was then an application that the appeal should be adjourned and the learned Lord Justice said that all the difficulties encountered were of Regen's own making. It had now been 14 months since the underlying judgment of Judge Hacon. So there was to be no adjournment. Then at para.30, he said this:

> "I turn next to consider whether the appeal should be dismissed on the own motion application for failing to lodge the appeal bundles. On such an application, one would expect the party in default to come forward with an explanation for non-compliance."

This was particularly important here as Regen has:

> "...a history of procedural wrongdoing. One is tempted to say procedural vandalism."

9 He said it had broken the March and July costs orders. It had launched an application for relief from sanctions in respect of those costs orders which it had then failed to support either with evidence, or attendance, or representation at the hearing. It had ignored successive directions in the appeal for the service of its response to Estar's strikeout and security for costs applications. Against that background, there was an obvious inference that its continued breaches would be treated as intentional and not warrant any further indulgence being offered by the court. One would expect an explanation with some precise and concrete proposals as to when and how the failure was to be rectified. The learned Lord Justice says he was particularly interested to learn why the appeal had not been progressed.

However, he found in para.33 there was no good explanation for any of that. He ultimately struck out Regen's appeal.

10 Turning then to the particular applications, as I say, one starts, in my view, with the application for relief from sanction. The failure to serve a defence or, alternatively, if there was anything in it, to make an application under CPR 11 to set aside for want of jurisdiction is serious and significant. Mr Wilcock wisely does not suggest otherwise.

11 One then turns to the explanation for the breach and, in particular, whether there is good reason. The only material I have before me in relation to that comes in para.32 of Mr Okaki's witness statement where he says that:

> "The defendant accepts it failed to seek representation and file a defence. While ignorance of the procedure is not an absolute defence, I am instructed that it was the defendant's understanding that the filing of an acknowledgement of service prevented judgment in default being entered. This is hardly a surprising position to take by the defendant given that the wording on the acknowledgement of service invites the defendant to confirm their position. It would certainly be a common-sense position for an overseas party unfamiliar with Civil Procedure Rules."

12 There is hardly any real evidence there at all except that it is said on a hearsay basis that someone at the defendant's, who has its own director of legal affairs, understood the filing of an acknowledgement of service prevented judgment in default being entered. As Mr McKean has pointed out, there are a number of defects with that suggested explanation. First of all, as I say, there is no direct evidence on it at all. Secondly, the acknowledgement of service makes it absolutely plain that judgment may be entered if a defence is not filed within the requisite period or an application made to contest jurisdiction. So either the evidence that has been provided to Mr Okaki is manifestly untrue and knowingly so, or, alternative to that, the defendant, notwithstanding their experienced directors, simply did not read the acknowledgement of service at all. That is hardly a good explanation. The notion that this is some unsophisticated overseas party is hopeless in the light of the extensive experience for the protection of its own interests in which this defendant has engaged. Apart from that, if the defendant chose not to instruct lawyers at the time, and one does not know whether they had any then, that is entirely a matter for them. They are perfectly well aware of the importance of keeping to procedural deadlines because Mr Terzi was in court addressing Floyd LJ on those very points the day before.

13 Floyd LJ also made the point at para.29, which I did not specifically read out, which was that if the defendant chose not to instruct lawyers, it was not because they could not afford to. They just decided not to. The fifth point is that at no stage was a defence put in. It is not actually in evidence that the defendant thought that it did not need to put a defence in because of the nature of their challenge to the claim although Mr Wilcock hinted at that. They simply say that they thought they did not have to because they filed an acknowledgement of service.

14 It is quite plain from Mr Wilcock's primary submissions that they are saying that there is a defence to this claim, that the claimant, in fact, because of provisions in the Solicitors Act 1974, were not entitled to bring proceedings in the way that they did and there has been extensive argument on that. So the notion that, for some reason, the lack of a defence can be excused does not run. Equally, it seems to me that there would, under the para.13.3 principles, have to be shown to be a real prospect of a successful defence. It is not an

irrelevance here although Mr Wilcock preferred to make that application on the basis that there is some other reason for a trial.

15 Where we have got to, therefore, on the *Denton* analysis is that there was a serious and significant breach. There is plainly no good reason for that breach having taken place. So far as the third element of *Denton*, which is to look at all the circumstances, in particular, in the light of the defendant's general conduct of proceeding, everything runs against the defendant. There is no basis for the court to indulge the defendant on all the circumstances. It has shown a history of disobedience to court orders. In my judgment, this is all tactical manoeuvring and in the patent litigation Judge Hacon said that the evidence of one of the directors in charge (and this must have been the director whose acts prevented Regen from winning outright) was unreliable.

16 I am also, in my judgment, entitled to take into account in the *Denton* analysis what actually is the defendant's underlying position about these fees. The evidence is that while the solicitors were undertaking the work and before the retainer was terminated, the fees up to a point had been paid regularly. There were some compliments about its service and there was no suggestion that there was any overcharge. Even now, there is no suggestion of an overcharge. There is no material before me to that effect. Mr Wilcock says that the defendant considers that the bill is excessive but there is absolutely no evidence about that. There is not one invoice with its supporting schedules that has been engaged with, apart from to take some technical points about the format to say this charge or that charge is unreasonable or excessive. In other words, there is nothing by way of an underlying challenge. It has not, even now, said what points could be taken by way of an assessment. In other words, this is, in my judgment, nothing but technical manoeuvring to avoid the enforcement of a judgment which the defendant let go in default.

17 On that basis, it is impossible to see how relief from sanctions could be granted because each of the three considerations which I must bear in mind all fall very heavily against the defendant. That, in fact, is the end of the matter because without any relief, the judgment must stand.

18 However, I think, since I have heard argument on it, I will say something about the underlying merits here. There is a point which has been addressed at some length by Mr Wilcock that whatever the contractual position may have been in the various bills that were issued along the way but not paid, there was a bar under section 69 of the 1974 Act; in short, because they did not amount to what are known as interim statute bills. These are said to be bills which have to be self-contained and informative so that the defendant knows or has enough material to take advice about whether there should be an assessment within the one month that is permitted after each of those interim bills was rendered.

19 Mr Wilcock concentrated on whether the retainers, in fact, as a matter of contract allowed such bills to be rendered with the consequences that follow or whether they were, in effect, no more than applications for payments on account. Leaving aside the contractual point which I do not need to decide, for reasons I will give in a moment, the second argument made by Mr Wilcock was that in any event, even if there was a contractual right, the bills were not sufficiently informative in the way that a long series of cases has explained but which I do not need to refer to.

20 In the end, those submissions effectively collapsed. First, Mr Wilcock said that the invoices did not even provide a period within which to pay. That was plainly wrong because the invoices I was taken to were all dated and then all gave a due date by when they should be

paid. Secondly, in the case of those invoices which referred to the schedule of charges, which I think was principally the first claimant's, Mr Wilcock rightly accepted that if one was to take into account that narrative, he could have no complaint that they were not sufficiently informative. All he could say was that those additional schedules had not been provided with the invoices when the particulars of claim were issued. That is not surprising since they would run to and do run to many hundreds of pages, because I have seen them. However, there is no evidence that they were not sent and, in fact, there is positive evidence from the solicitors whose witness statements I have got that they were sent. In any event, that is a point that could have been taken right from the word go in July 2020. So if I needed to look at individual bills to see whether they were sufficiently informative, they clearly were.

21 The reason why I can shortcut this analysis is because it is quite plain to me that the series of bills came to an end when the retainer was terminated for both claimants by the defendant and, at that point, they collectively amounted to a final bill. At that point, any argument about whether there was a contractual entitlement to render interim bills disappears. Even if it was on the basis of an entire contract, that contract had then come to an end.

22 I am fortified in that analysis by the judgment of Master Gordon-Saker in the case *Iwuanyawu v Ratcliffes Solicitors* [2020] EWHC B25 (Costs) where a similar situation arose and after holding that the interim bills did not comply with the statute, he went on to say at [27]:

> "...the 14 bills delivered by the defendants were not interim statute bills, but were part of a running account which should be regarded as one bill delivered on the date of the last, namely 18 October 2019... That bill has not been paid and is dated within 12 months of the issue of proceedings."

Therefore, there would still be the ability to and seek an assessment.

23 Exactly the same situation arises here. Mr Wilcox could not satisfy me that was any material difference between the facts of that case and the facts of this case, although he endeavoured to do so. So far as Carpmaels are concerned, after this defendant had failed to comply with its underlying disclosure obligations in the patent litigation and had not provided its solicitors with the relevant materials, Mr Kirby sent an email on 20 December. This said that if the outstanding bills were not paid, then they would have to cease to act and that if the solicitor and client cannot agree on the ending of their relationship, the solicitor must write to the client terminating their engagement, and said, "Either you stay with us and pay the bills or you go to someone else and you pay them." There was nothing further to be done. That is quite sufficient so far as crystallisation of bills is concerned. So far as the second claimant was concerned, again at the conclusion of that relationship, although there was not a final bill which encompassed all the earlier bills, there was a similar request then to pay. So it does not matter whether the interim bills were interim statute bills or not.

24 A point made by Mr Wilcock in relation to the individual bills but may have been made more generally as well is that they were not sufficiently informative in the sense that the client did not appreciate that there would be a right to seek an assessment, on this analysis, at the conclusion of the rendering of all of those bills. As is clear from the cases and, in particular, for example one in the Court of Appeal decision (see the leading judgment of Ward LJ), what is sufficiently informative is highly fact sensitive. The notion that this defendant did not know that there was an ability to seek an assessment is wholly unrealistic not least because having parted company from the first claimant, it then had the second claim. There was an argument about the usual solicitors' lien for unpaid bills. The

defendant could easily have consulted the second claimant about an assessment or what its rights were, if it wished, and it chose not to do so. The first claimant's retainer letter did not expressly refer to the Solicitors Act 1974 but it did refer to its own complaints procedure and Mr Kirby has set out in his witness statement that almost inevitably, or inevitably, that would engage right to have the bill assessed. That evidence has not been challenged or gainsaid.

25 So far as the second claimant is concerned, the retainer does itself refer to a right to an assessment. Mr Wilcock's skeleton argument makes the point that it said they may be entitled to an assessment and he says that is fundamentally misleading. It is not, actually, because it all depends when it seeks the assessment. If it seeks it at the early stage then it will get it. If it seeks it at a later stage, it is all up to the decision of the court under section 73 and if the bill has been paid, then after a certain period of time it cannot be assessed. So there was nothing wrong in expressing it in that way. Again, if there was any doubt about it, by the time the defendant got on to its third set of solicitors, it could have considered what steps to take. In relation to the termination of the first set of solicitors which came as a response to Mr Kirby's letter of 20 December, the response which came back specifically said that they would consider the re-evaluation of the bill by a relevant organisation or something of that kind.

26 So I have no doubt at all that the defendant was perfectly well aware throughout its experience of litigation with English solicitors that there was a right to seek an assessment. It is not even suggested, I think, now in Mr Okaki's evidence that this was something which the defendant had only discovered subsequently because someone had told him about it or told its director about it. So there is no underlying merit even if one was considering r.13.3 itself because ultimately, regardless of the position in relation to interim bills, these claimants were not barred by the Act from bringing these proceedings on the accumulation of the bills leading up to the termination of their respective retainers. That is really the only defence that there could be here and it cannot possibly run. Because of that, there is no need for me to consider a fallback argument by the claimants which is to the effect that there can be a restitutionary claim in the alternative. I have some doubt as to whether that would necessarily run but it is very much a fallback point and it is not now necessary for me to consider it. On that basis, therefore, it must follow that this judgment will stand.

27 That then only leaves the ultimate fallback adopted by Mr Wilcock which was that there should be an assessment pursuant to section 70(3). Where an application is made after a judgment has been obtained for the recovery of the costs, no order shall be made except in special circumstances and if so, it may contain such terms as "cost of the assessment" and "costs the court may think". I was not taken to the notes in the *White Book* about it but they are actually quite helpful. They begin at p.2393 of volume 2. What those notes make clear is that special circumstances mean something like there is obviously something wrong with the bill and it obviously cries out for an assessment, or, at the very least, that there are cogent points put forward as to why it is wrong, or excessive, or unreasonable. There is nothing of that kind before me and Mr Wilcock really relied upon his earlier arguments in the context of relief and a viable defence. Since there is nothing in those arguments there, equally, they cannot constitute special circumstances. For that reason, I would also reject the application for an assessment under section 70(3).

28 Accordingly, the applications made by the defendant, in whatever shape they are, must all fail and I will now deal with the question of costs.

CERTIFICATE

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