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Claim No. LM-2023-000033

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)
[2023] EWHC 939 (Comm)

The Rolls Building
7 Rolls Buildings, Fetter Lane
London, EC4A 1NL

Friday, 24 March 2023

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

Between:

K/S MOUNTAIN INVEST

Claimant

-and-

DUCAT MARITIME LIMITED

Defendant

MR HENRY ELLIS (instructed by Shoreside Law Ltd) on behalf of the Claimant.

MR JOHN KIMBELL KC (instructed by Preston Turnbull LLP) on behalf of the Defendant.

J U D G M E N T

JUDGE KEYSER KC:

- 1 This is my ruling on the defendant's application for relief from sanction for its failure to file its Precedent H costs budget.
- 2 The application is supported by two witness statements of Menelaos Nicolaou, the solicitor with conduct of the case on behalf of the defendant.
- 3 The date by which the costs budget ought to have been filed was 3 March 2023. It was actually filed on 17 March 2023. Whether strictly the matter be analysed as an application for relief from sanction (which is how it is framed) or as an application for an order under r. 3.14 disapplying the default position, namely that the defendants are treated as having filed a budget containing only a claim for the court fee, the relevant requirements are those for obtaining relief from sanction and the test to be applied is that established by the Court of Appeal in *Denton & Ors v TH White Ltd & Ors* [2014] EWCA Civ 906, [2014] 1 WLR 3926. I shall not recite the test, which is by now well known.
- 4 The first stage of the test is to consider whether the failure to comply with the requirement of the rules was serious or significant. Rather perplexingly, Mr Nicolaou's first witness statement in support of the application did not accept that the failure to comply was either serious or significant. However, Mr Kimbell KC rightly accepts that the breach was serious. A failure to file the costs budget until seven days before this hearing is clearly a serious delay and a serious breach in the context of a requirement to file the costs budget twenty-one days before the hearing.
- 5 For the claimant, Mr Ellis points out that the actual test at stage one is whether the breach is serious or significant; therefore one may move on to stage two of the test. Although this is correct, it is helpful, with a view to stage three, to pause and look at the matter a little more broadly. Seriousness itself is not an all or nothing concept; nor is significance. I regard the breach as very serious. In terms of significance, in one sense there is no distinction to be made in this case between seriousness and significance. In another sense, however, it will be relevant to consider significance in terms of the effect that the breach has had on the conduct of the litigation. I shall come to that point later.
- 6 At the second stage of the test, one must consider whether there was a good reason for the breach. As I understand the witness evidence, the reason for the breach in this case was a deliberate decision by the solicitor not to file a costs budget because it was believed that the parties were in direct negotiations (that is, between themselves and not through solicitors) and it was hoped that the costs of compliance with the rules might therefore be avoided. As a matter of fact, the belief that the parties were negotiating directly was both incorrect and unjustified; it does not appear that the solicitor had any reasonable grounds for the belief. Thus there is a twofold problem with the reason for the breach: first, it rested on a deliberate decision not to do what the rules required, on the basis of a hope that compliance would prove to be unnecessary; second, in forming the hope and taking the risk, the solicitor did not even have any rational grounds for his calculation. Though, even if there had been a basis for his hopes, he would still have been required to comply with the rules and the decision not to do so would not have been justified.
- 7 Mr Kimbell KC accepts that there was no good reason for the breach. He does, however, make the mitigating point that, although the breach was deliberate in the sense that there was a deliberate decision not to file a costs budget, the decision rested on a mistaken hope that no costs budget would ever fall to be considered rather than on an attitude of not being bothered by compliance with the rules or a wilful flouting of them. This is a fine distinction

and not altogether easy to express, but I accept it so far as it goes. It remains the case, however, that there was no good reason for the failure to comply with the rules.

- 8 I turn, therefore, to the third stage of the test, when one is required to consider the justice of the matter. This stage is not simply divorced from the previous two. One must have regard to all relevant matters but, in particular, to the two matters identified in r. 3.9(1): the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with rules, practice directions, and orders. In the light of what I have said already, the position of the defendant is thus a difficult one, because the conduct of its solicitor was not conducive to efficient and proportionate conduct of litigation and involved, in the circumstances and for the reasons that I have described, a deliberate decision not to comply with a rule.
- 9 It is necessary, therefore, to form a judgment whether these weighty considerations are, in this particular case, outweighed by other factors that I shall mention. First, when the defendant's solicitor discovered that he had been acting (or not acting) on the basis of a misapprehension, he acted promptly. Second, it appears that the breach only delayed the exchange of costs budgets between the parties by one day. Mr Ellis accepts that the degree of disruption to the parties' preparation for costs management was not great. Third, the parties have in fact been able to reach agreement as to the budgets (conditional, in the case of the claimant's agreement to the defendant's budget, on the outcome of this application). In respect of this third point, I bear in mind that, as Mr Kimbell acknowledges, it may be that the circumstances led the defendant to be willing for pragmatic reasons to agree a higher budget for the claimant than it might otherwise have done and to accept proposed reductions to its own budget that it might otherwise have resisted. Even so, budgets in a substantial amount—the estimated costs being c. £347,000 for the claimant and c. £356,000 for the defendant—were agreed in advance of this hearing on the basis that I have indicated.
- 10 Mr Ellis submits to the effect that to grant relief from sanction in this case would give more or less carte blanche to parties to disregard the rules, provided only that they were willing to roll over in respect of their own budgets and their opponents were cooperative. Although I see the force of the submission, it seems to me to put the matter too strongly with regard to the facts of this particular case, and of course each case must be considered on its own facts in accordance with the single legal test in the *Denton* case.
- 11 It may well be the case that the defendant has the good fortune that the claimant has behaved very responsibly and cooperatively in a manner to be hoped for but not always encountered. The fact remains that the prejudice occasioned in this case really relates to costs and, it must be said, to a degree of wasted time in the course of the hearing. Costs management has been capable of proper consideration by the parties. There is a substantial, uncontested budget which would be wiped out if relief were not granted. I am bound to say I regard the matter as borderline but it seems to me that the balance of justice in the circumstances of this case indicates that application of the sanction would be disproportionate and that relief ought to be granted, on terms however that the defendants pay the costs of and occasioned by the application and (although I will hear argument on the point, if need be) that the costs ought to be either assessed on the indemnity basis or at least assessed generously.
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CERTIFICATE

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