

IN THE SENIOR COURTS COSTS OFFICE

Claim No. HQ12X00160

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

Monday, 7th April 2014

Before:

MASTER O'HARE

Between:

MS CAROLYN BRETT

Claimant

-v-

COLCHESTER HOSPITAL UNIVERSITY
NHS FOUNDATION TRUST

Defendant

Counsel for the Claimant:

MR. ALEXANDER HUTTON Q.C.
Instructed by Gadsby Wicks

Counsel for the Defendant:

MR. KEN CORNESS
Of Acumension Ltd

APPROVED JUDGMENT

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- A 1. MASTER O'HARE: The case before me is a clinical negligence case. The parties ultimately came to terms and the case was settled on payment of about £250,000 plus reasonable costs. The claimant's bill of those costs totals about £700,000. Just under half that total comprises base costs and the rest comprises certain success fees. I have not looked for it, but I imagine it also includes an after the event insurance premium.
- B 2. The dispute concerns the giving of a notice of change by the Defendant from the solicitors who conducted the case (Kennedys) to the costs lawyer now conducting the costs proceedings, who is Mr Corness of Acumension. It is accepted by the parties that whether or not notice of change was given validly before, I ought to proceed on the basis that, if only as a result of these proceedings, it has been given validly now and therefore the defendant's address for service is now Mr Corness's business address and not Kennedys.
- C 3. Mr Corness's application is that I should set aside the default costs certificate obtained as irregular. His reason for saying that is that he gave a valid notice of change by email before the bill was served and when the claimant went on to serve bill at the former address for service it was acting irregularly and that irregularity has affected the default costs certificate it later obtained. The claimant does not challenge that it was open to the defendant to give notice of change by email and it frankly admits that it has had
- D problems with its email address. On some occasions, some documents sent by email have not arrived, or some attachments of documents have not arrived. The claimant is not challenging the fact that the notice of change was transmitted by email, but it denies it ever received it.
- E 4. The breach of rules the claimant complains of is a breach of the service rule, Rule 6.20. It says that service by email must be in accordance with Practice Direction 6A. Practice Direction 6A, paragraph 4.2, says that a person intending to effect service by email must "first ask the party who is to be served whether there are any limitations to the recipient's agreement" to accept service by email. It gives examples. Are there limitations as to the format in which documents are to be sent, or are there size limitations? It is accepted by both sides that, in this case, the defendant never asked any
- F such questions of the claimant.
- G 5. The defendant's riposte to that is that it has regularly served documents on the solicitors acting for this claimant and on solicitors in other cases, and no complaints about non-compliance with PD6A, para. 4.2 have ever been raised before. The defendant's agents (Acumension Ltd) are themselves willing to accept service by email and they have never received phone calls from anybody else or any other contact with anyone else enquiring what size limitations or what other limitations there may be on their agreement to accept such service. Service amongst those who are willing to accept service by email is commonly done these days without any such formality. The defendant says that the real problem here is not that the defendant did not check whether, on this occasion, service of notice of change by email was permissible. The source of the problem here is the
- H problem the claimant's solicitors were having with their email address.
6. It seems to me that the service by email in this case was valid. The reason it had not got to the awareness of the claimant is something outside the defendant's control and inside the claimant's control. The fact that a telephone call pursuant to PD 6A, para. 4.2 might have had the unintended benefit of notifying the claimant's solicitors of a forthcoming

A change of legal representative is not determinative. I do not think that such a phone call is a pre-requisite to service by email. I think PD 6A, para. 4.2 is a recommendation of good practice only, and a recommendation which has become of historic interest only. It dates back to a time when the court's own preferred method of electronic delivery was, I think, WordPerfect, something which, at that time, few solicitors used as they had already moved on to Word. Since then, not only does everyone use Word, but everyone is using broadband also and so size limitations are not now a problem either. If PD 6A, para. 4.2 has any continuing practical effect it would merely be to defeat mischief makers who want to send or receive emails on a system which nobody else can read or some similar inconvenience which amounts to an obvious abuse of service by email. That does not make it a pre-condition on everyone that these calls have to be made each time something is served by email.

C 7. In this case I am told that documents have frequently passed between Acumension and Gadsby Wicks, the claimant's solicitors. That point is not in formal evidence before me and it is not accepted, but it seems to me that that is very much the practice of most big players in clinical negligence work. The big players on the defendant's side are, of course, the NHSLA. Mr Corness's involvement in representing them is well known, and I can accept it and take judicial notice of it. Similarly, on the claimant's solicitors' side, Gadsby Wicks are well known as providers of litigation services to people bringing clinical negligence claims. They were well known to the NHSLA and their usual agents.

E 8. I think I can deal with this case simply on that basis that the service of the notice of change was regular and therefore the irregularity is in what happened later. Ordinarily, one would then enquire into whose fault it was and who should deal with the costs and so on, but before I say anything along those lines I must deal with certain other decisions I am asked to make in the alternative.

F 9. If I am wrong to say that prior contact pursuant to PD 6A, para. 4.2 is not required before using service by email then that would mean the default costs certificate was regularly obtained and I should consider whether I should set it aside or vary it under CPR rule 47. 12(2) which states as follows:

... the court may set aside or vary a default costs certificate if it appears to the court that there is some good reason why the detailed assessment proceedings should continue."

G 10. On that, the parties have locked horns as to whether the *Mitchell* guidance apply to default judgments as it does to applications for relief against the sanction of a rule, practice direction, or court order.

H 11. We have recent case authority on this. In *Samara v MBI & Partners*, Silber J held that the *Mitchell* approach did apply and, having applied it, reached his decision on that basis, which was the same as the decision reached by the court below (a decision made before the Court of Appeal decision in *Mitchell* was known). Mr Justice Silber, applying the more robust approach of *Mitchell* upheld the pre-*Mitchell* decision which was that the default judgment entered in that case should not be set aside. The learned judge stated that he had looked for any express reference as to whether a new doctrine should apply to default judgments as it applies to elsewhere. He could find no specific reference save this: that it was a universal approach and that the definition of the overriding objective has changed, which change must permeate through the whole of the

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CPR. I think he made that decision without spotting the difference in wording which applies in default judgment rules to the wording which applies to CPR rule 3.9, relief against sanctions.

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12. The *Mitchell* doctrine requires us to refuse relief from sanctions unless some good reason for the breach is shown or unless the breach is trivial. The default judgment rules look at something different. Under those rules, the question to be asked, if there has been a failure to lodge an acknowledgement of service, a defence, or, as in this case Points of Dispute, is there a good reason for the case continuing? I think there is a difference in the approach I should take because of that difference in wording. That difference in wording is relevant because a failure to serve a document on time which leads to a default judgment or a default costs certificate ordinarily has no effect on other court users except the parties themselves. Of course, those parties may have a dispute about its consequences and may come to the court to resolve that dispute, as these parties have done in this case. However, the fact that this court is here to resolve disputes between parties is not, by itself, a reason for saying, "You are in breach. You have caused another court hearing to occur and therefore the court should deal with you robustly." I do not think that is the approach I should take.

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13. It seems to me there is a difference between rule 3.9 and the default judgment rules which has been ruled upon by the Court of Appeal in the well-known case of *Henry v News Group Newspapers Limited*. One can see that difference in the approach the Court of Appeal took in the *Mitchell* case concerning rule 3.9 and the approach the Court of Appeal took in *Henry* which concerned Practice Direction 51D under which costs judges conducting detailed assessments in defamation cases in which costs budgets had been approved, were enjoined from departing "*from such approved budget unless satisfied that there is good reason to do so.*" In *Henry* the Court of Appeal held that the Senior Costs Judge who heard that case and refused the Claimant any forgiveness for exceeding her approved budget, was wrong. What he should have borne in mind was whether there were good reasons for the case continuing. There were in that case, and so there are in this case. In this case there are points of dispute which are in perfectly regular form and they raise substantial points. They may not be winning points, but they are substantial points and they are not obviously fanciful or spurious. It would be a heavy penalty upon the Defendant if it were to be forbidden the opportunity to take those points further.

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14. There is another analogy I want to draw and that is the harsh approach the court takes in respect of claimants who make mistakes at the outset: mistakes as to service of the claim form. Those claimants are allowed to begin again if limitation periods permit them. If they have left it too late then, of course, that is their problem for leaving it too late. I think similarly with defendants who make mistakes at the start of litigation, they should not find the court taking a harsh attitude to forgiveness of those mistakes. If the court did, the defendant who suffered a default judgment cannot start again in the same way as a claimant who has failed to serve in time can issue a new claim form and resolve his unhappy position with a penalty only in costs. It is for those reasons I think I should apply a different test.

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15. It occurs to me that I ought then to invite the parties to say something about another topic. Rule 47.9(3) provides that paying parties who do not serve Points of Dispute on time cannot be heard at the detailed assessment. I am about to give directions for a detailed assessment in this case so I will hear argument on whether I ought to be allowing the defendant to attend that detailed assessment.

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16. I will move on from that and deal with a further alternative decision. If I am wrong now on two counts, that the judgment was reasonably obtained and the *Mitchell* doctrine does apply, then it has to be asked whether the mistake complained of, failing to place that phone call, is a trivial mistake. In a real sense it is not trivial because service is important. In a real sense, it is not trivial in this case because it has led to further expense and a further court hearing. However, in almost any other sense it is insignificant. It is not that which has caused this case to go along this unfortunate path. That was caused by the problems of reception by the Claimant, not the problems of transmission by the defendant. Therefore it was a trivial breach, in respect of which relief has been sought promptly. If failing to check about size limitations *et cetera* on email service was a relevant breach, it seems to me that it is an insignificant breach having regard to the current practice in this area of law between parties' agents such as the agents in this case.

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End of judgment

(Discussions on directions follow)

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