BRIEFING

COVID: PRACTICE AND PROCEDURE

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INTRODUCTION

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Although the start of 2021 has not been as auspicious as we would have wished, Happy New Year from all at 1 Chancery Lane.

Despite everyone's hopes that 2021 would start more favourably than 2020 ended it seems restrictions to protect the public from the Covid 19 pandemic will be with us for some time. Inevitably the difficulties this poses and the new challenges for many of home schooling will make for some difficult litigation decisions about trials and other oral hearings. Increased pressure on litigators might also lead to court deadlines being missed and other mistakes being made. This briefing provides some practice points to assist you with these scenarios.

Ian Stebbings provides a helpful summary and analysis of the recent High Court decision of *Bilta (UK) Ltd v TFS Limited* [2021] EWHC 36 (Ch), which was an unsuccessful application for the court to adjourn an imminent trial because key witnesses did not wish to attend given the public health risks, but their evidence was too important for it to be dealt with remotely. Smith J sets out key principles and the approach the courts should take to applications of this sort.

Robert Parkin's article on Relief from Sanctions and Covid 19 is a comprehensive guide to the law and procedure for making (or resisting) such applications. Hopefully none of you will need this sort of assistance but mistakes happen and this guide will help you rectify them, or to defeat applications that lack merit.

TO ADJOURN OR NOT TO ADJOURN- NOT A LINEAR QUESTION

IAN STEBBINGS

Following on from the cases of Re *Blackfriars Limited [2020] EWHC 845* and *National Bank of Kazakhstan and others v Bank of New York Mellon and others [2018] EWCA Civ 1390* highlighted in my previous article regarding how the courts are run during the current pandemic, another case came before the Business and Property courts on the 8th of January 2021. This again looked at how the courts are running during the pandemic and whether matters should be adjourned given the current lockdown.

The case of *Bilta v Traditional Finance Services Limited (TFS) & orths [2021] EWHC 36* centred on a dispute of dishonest assistance. Four witnesses were due to give evidence on behalf of TFS in a trial that is listed to last for five weeks commencing in late January 2021. The TFS witnesses in the case wanted to give live 'in person' evidence. The judge commented that their evidence would not only affect the outcome on behalf of TFS but also their own reputation and future employability. The stakes in the case were said to be very high.

Due to the worsening of the pandemic, three of the four witnesses changed their mind about wishing to give evidence 'in-person'. The fourth was unable to give evidence at all for unrelated medical reasons, although there was a prospect that this could change in the future. Whilst the three witnesses still wanted to attend trial, it was submitted on behalf of TFS who was seeking the adjournment that no judge properly considering the circumstances of this case, given the high stakes and dishonesty that went to the central issues of the case, could order a hearing in-person given the current lockdown circumstances. It was submitted that any such order would be plainly 'wrong'.

The judge said given that the evidence needed to be tested using the engine of cross examination that he accepted what had been said by Wigmore on Evidence 2nd edition 1923 that *"cross examination was beyond any doubt the greatest legal engine ever invented for the discovery of the truth"*. He went on to quote the recent case of *R (Dutta) v General Medical Council [2020] EWHC 1974 Admin 414*, *"the general rule is the oral evidence given under cross examination is the gold standard because it reflects a long established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness"*. The Judge went on to say that any form of artificial intermediation interposed between the questioner or a witness and a judge hearing that witness evidence must be a derogation from the gold standard but it does not mean that the process cannot be fair or proper.

The Judge considered the guidance given in *Re A [children] 2020 EWCA Civ 583* to be of considerable help and expressly drew heavily on it. Although that decision occurred within family proceedings the judge noted that the "decision is extremely helpful in all proceedings". The relevant principles from that decision cited by the judge were:

- The decision whether to conduct a remote hearing is a matter for the judge who is to conduct the hearing. It is a case management decision in respect of which the court has a wide discretion based on the ordinary principles of fairness and justice.
- Guidance is exactly that and cannot abrogate a judge's judicial decision as to the conduct of the hearing.
- Where all parties oppose a remotely conducted final hearing this will be a powerful factor in not proceeding remotely. Equally if all parties agree or appear to agree to a remote hearing this should not necessarily be treated as a green light to conduct a hearing this way.
- In Re A the Court of Appeal identified a number of relevant factors that feed into the judge's decision about the format of the hearing although the range of these factors was not closed:
  "The factors that are likely to influence the decision on whether to proceed with a remote hearing will vary from case to case, court to court and judge to judge.
  We consider that they will include:

(i) The importance and nature of the issue to be determined; is the outcome that is sought an interim or final order?
(ii) Whether there is a special need for urgency, or whether the decision could await a later hearing without causing significant disadvantage to the child or the other parties.
(iii) Whether the parties are legally represented.
(iv) The ability, or otherwise, of any lay party (particularly a parent or person with parental responsibility) to engage with and follow remote proceedings meaningfully. This factor will include access to and familiarity with the necessary technology, funding, intelligence/personality, language, ability to instruct their lawyers (both before and during the hearing), and other matters.
(v) Whether evidence is to be heard or whether the case will proceed on the basis of submissions only.
(vi) The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence.
(vii) The scope and scale of the proposed hearing. How long is the hearing expected to last?
(viii) The available technology; telephone or video, and if video, which platform is to be used. A telephone hearing is likely to be a less effective medium than using video.
(ix) The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology.
(x) Any safe (in terms of potential Covid-19 infection) alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge or magistrates."

The judge confirmed that the particular nature of the issues caused by the pandemic meant that the ordinary principles the court would take into account in an application to adjourn a trial (for example the lateness of the application, the previous adjournment and the fact that the first application to adjourn was successful) were "at best irrelevant and at worse unhelpful".

The Judge noted that question as to whether hearings go ahead should not be considered in a linear fashion but rather holistically. It is not appropriate to ask:

a) can an in-person hearing fairly and properly take place? If yes then proceed no further, if no then:

b) can a remote hearing fairly and properly take place? If yes, then proceed no further. If no, then adjourn.

Mr Justice Smith considered that this approach misses the fundamental interconnected nature of the questions under consideration. The reality was that these questions are linked and should be considered together.

Mr Justice Smith being the trial judge stated that he could control the proceedings with stringent measures being taken as to regards the courtroom and appropriate social distancing. A 'super court' was requested, the witness box would be as far removed from other persons as possible to a distance of five metres or so, and a remote zone would be set up which would include the court usher. Witnesses would be sworn at a distance. No paper files would be handed to witnesses by solicitors as is usual and a witness could be accompanied by one other person from their household who would be able to sit within the five-metre distance to reduce the witness's sense of isolation. The number of persons in court would be strictly limited, the Judge further stated that there was no need for an associate, usher or clerk to be present in court. The Judge also limited the substantial legal teams to only two persons being physically in court when the witnesses were giving their evidence and further the court considered sitting 'Maxwell hours' as opposed to general opening hours. The Judge considered this as a baseline or starting point and sufficiently robust to allow the matter to go ahead. The application for an adjournment was denied.

It is clear from the stance taken by the Judge in this case that the courts will go the extra mile in getting matters heard, what other innovative measures judges will come up with during the current lockdown and going forward remains to be seen but practitioners can take from the stance of the Judiciary that the ends will be attained by juggling the means. Practitioners should carefully consider applications for an adjournment and canvass what means could be put in place for an in-person, hybrid or virtual hearing to take place.

RELIEF FROM SANCTIONS - PRACTICAL GUIDE TO THE BASICS AND UPDATE

ROBERT PARKIN

It is no secret that, since 2013, civil litigation has been subject to increasingly strict time limits with serious consequences for making mistakes; and, to add to those difficulties, the COVID-19 pandemic has caused and continues to cause very significant administrative problems for firms seeking to comply with those time limits.

Things are likely to go wrong; and will often require a formal application to put it right. Most commonly, though not in every case, this will mean an application for relief from sanctions under CPR 3.9.

This article aims to provide a straightforward summary of the basics, and to provide a guide for the circumstances where such an application is likely to be needed, how it is to be made, and how to ensure it has the greatest prospect of success. An update of recent case law is also provided.

Common Situations

An application for relief from sanctions under CPR 3.9 should be made where the client or representatives have breached a rule, practice direction, or order, and as a result, some form of sanction is imposed.

Prevention is always better than cure, and certain areas of litigation are particularly prone to mistakes of this kind (or, at least, have the most serious consequences) and it is worth paying particularly close attention where any of these apply or could apply:

1. Failure to serve a costs budget in compliance with CPR 3.14, leading to a severely restricted claim for costs.
2. Breach of an unless order under CPR 3.8; as a result of which, the claim has been struck out.
3. Late service of Particulars of Claim, breaching CPR PD16 para.3.2, again, leading to a claim being struck out.
4. Failure to comply with directions for disclosure or witness statements, usually implying a sanction of refusal of permission to rely on the witness statement or disclosure, as may be.

Common Mistakes

1. It is not unusual for an application to be made for relief where it is not needed. This is common where: Where no sanction has (yet) been imposed. For example, a notice under CPR 3.7 to pay a trial fee is not a sanction, the sanction only applies if the claim has been struck out as a result under CPR 3.7A1(10).
2. If there is another form of application which should be made, e.g. a client cannot be granted relief for late service of a Claim Form in breach of CPR 7.5 (unlike late Particulars) because a specific form of application is required under CPR 7.6.

Both of the above can apply:

1. Where an extension of time to serve witness statements is sought in time: no sanction has been imposed (as there has been no breach) and another form of application is being sought- specifically, under CPR 3.2(1)(a).
2. No defence has been filed within the period provided by CPR 15.4: the sanction is exposure to default judgment, and if that has not yet been imposed, there is no sanction, and if it has, there is another form of application appropriate under CPR 13(2) or (3).

An application for relief would not be required or appropriate in either case, and is likely to be an expensive mistake.

Requirements

CPR 3.9 provides that:

3.9
(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.

These rules are heavily circumscribed by case law.

The current position is still as set out at paragraphs 25-38 of Vos LJ's judgment in *Denton v TH White [2014] EWCA Civ 906*[1]. There are three questions:

1. Was the breach serious or significant?
2. If so, was there a good excuse?
3. If not, looking at all the circumstances, should relief be granted so as to deal with the case justly?

The meaning of these questions was recently reviewed in the determination of Mrs Justice Yip in *Razaq v Zafar* [2020] EWHC 1236 (QB)[2]. From this judgment, and from the precedents in *Denton*, it is possible to identify certain relevant considerations.

Serious or Significant

The courts have been reluctant to accept that breaches of an order are not significant and this is not likely to be the best point in any application. Even so, breach is particularly serious if:

1. Compliance is very late, or, worse, there has been no compliance at all.
2. An unless order has been breached, usually because this implies a repeated breach of the same order.
3. The breach causes a trial date to be vacated, or to a lesser extent, another type of hearing; or otherwise wastes court time or resources.
4. The failure involves non-payment of court fees.
5. It puts the other side to significant additional time or expense.
6. It is part of a pattern of inefficient conduct of the litigation, for example if it is not the first breach (particularly if there have been previous serious breaches).
7. There are other procedural problems with the application for relief, e.g. the statement of truth is in the wrong format or unsigned.

Several good practice points flow from this:

1. Normally the best thing to do if you discover the client is in breach is to comply as soon as possible. This will minimise delay, wastage of costs or court time.
2. Take particular care in circumstances where there have been previous mistakes.
3. Take extreme care to ensure that the application itself is made correctly.
4. If none of the above apply, it is worth arguing that it is not a serious or significant breach. Otherwise, it may be better to concede seriousness and move on.

A Good Excuse

This is an extremely high threshold. The position has not significantly improved since *Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537[3]:

41… If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal. But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason.

Thus, a serious illness or an accident on the part of the client or representative is likely to satisfy the requirements. That is plainly of potentially enormous significance in light of the COVID-19 pandemic. A client who could not, for example, attend a hearing because they are self-isolating is likely to attract considerable sympathy. The other potential good excuse identified is where a later unanticipated development makes compliance unreasonable.

The clear emphasis is that these must be factors

beyond the parties control and a good excuse is unlikely to be found otherwise. A misunderstanding, oversight, or overwork generally explains most non-compliance - but these are explicitly said not to be enough.

Nor is a litigant in person likely to expect a lighter touch- the Supreme Court has made this very clear in *Barton v Wright Hassal LLP* [2018] UKSC 12[4].

This is, again, a difficult requirement to meet. That said, it is always better to provide even a partial explanation for the defect than none at all, so this should always be included unless the conduct has been truly inexcusable.

All the Circumstances

Increasingly, as was the case in *Razaq v Zafar*, the courts have come to regard the third limb of the *Denton* test as the most important. Again, certain recurring factors can be identified. Relief is more likely to be granted where:

1. The application for relief from sanctions had been made promptly. This generally means very promptly, within a week or two. In *Pepe's Piri Piri Ltd & Anor v Muhammad Ali Junaid Food Trends Ltd (Now Dissolved) & Ors* [2019] EWHC 2769[5] a delay of two months was regarded as "serious".
2. The breach did not affect the efficient conduct of this or any other litigation, or the costs of that litigation, and granting relief would not result in further delay or have an impact upon other court users;
3. There was no previous history of non-compliance and the litigation had been conducted appropriately up until this breach;
4. That this was a complex, high value case that required a great deal of time and cost to manage; where modest degrees of error may be more understandable.

How to Apply

The application is made using form N244 and must be supported by a £255 fee, and a correctly formatted witness statement explaining exactly what took place, ideally from the solicitor responsible, as well as a draft order. Plainly an error in preparation could be very serious.

Reacting to an Opponent's Breach

A mistake by an opponent must be carefully handled. It is capable of being a windfall, but poor management can backfire.

The first question is whether to notify the opponent that you consider them to be in breach or that a sanction has been imposed. If you do, and the breach goes uncorrected, that will plainly aggravate the seriousness and reduce the quality of the excuse, but, of course there is a risk that steps will then be taken to set it right.

On the one hand, there is no obligation to notify an opponent of a breach, and failure by the innocent party to draw attention to the breach is a very poor argument - *Phoenix Healthcare Distribution Ltd v Woodward & Anor* [2018] EWHC 2152 (Ch)[6]. It follows that it is open and proper to be more cynical- simply do not raise the breach until after any application for relief would already be significantly late.

On the other, opportunism is not tolerated. From Denton:

43 The court will be more ready in the future to penalise opportunism. The duty of care owed by a legal representative to his client takes account of the fact that litigants are required to help the court to further the overriding objective. Representatives should bear this important obligation to the court in mind when considering whether to advise their clients to adopt an uncooperative attitude in unreasonably refusing to agree extensions of time and in unreasonably opposing applications for relief from sanctions. It is as unacceptable for a party to try to take advantage of a minor inadvertent error, as it is for rules, orders and practice directions to be breached in the first place.

For this reason, a clearly reasonable application for relief should not be opposed. Costs were imposed against a party who did so in *Viridor Waste Management Ltd v Veolia ES Ltd* [2015] EWHC 2321 (Comm).

The situation has to be judged carefully. Against a chaotic or careless opponent, particularly a litigant in person, it is probably wiser to take extra steps to notify them of the breach- knowing that any application is likely to be slow and of poor quality. Against a more professional or experienced opponent, particularly if there is a significant delay, this may be unnecessary.

Either way, it is open to the innocent party to apply for an order acknowledging whatever sanction has been imposed, such as the entry of summary judgment after striking out under CPR 3.5.

{1}https://www.judiciary.uk/wpcontent/uploads/2014/07/denton-decadent-utilise.pdf
{2}https://www.bailii.org/ew/cases/EWHC/QB/2020/1236.html
{3}https://www.bailii.org/ew/cases/EWCA/Civ/2013/1537.html
{4}https://www.bailii.org/uk/cases/UKSC/2018/12.html
{5}https://www.bailii.org/ew/cases/EWHC/QB/2019/2769.html
{6}https://www.bailii.org/ew/cases/EWHC/Ch/2018/2152.html

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