Neutral Citation Number: [2020] EWHC 164 (Comm)

Case No: CL-2018-000332

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/02/2020

Before:

Lionel Persey QC sitting as a Deputy Judge of the High Court

- -

Between:

Manchester Shipping Limited	**Claimant**
- and -	
(1) Balfour Shipping Limited	**Defendants**
(2) Nikolay Nikolayevich Sochin	

- -
- -

Stephen Cogley QC and Simon Goldstone (instructed by **Wikborg Rein LLP**) for the **Claimant**
James Willan (instructed by **Byrne & Co LLP**) for the **Defendants**

Hearing date: 17 January 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

LIONEL PERSEY QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Lionel Persey QC:

Introduction

1. On 17 January 2020 I heard the CCMC in this matter. As Mr Willan for the Defendants put it, the proceedings have not had a happy history, for which each party must bear its own share of responsibility. In October 2019 the Defendants admitted liability for procuring a breach of contract and (in the case of the Second Defendant) a breach of fiduciary duty, although they continue to deny the allegations of dishonesty against them. The only live issue remaining in the case is what, if any, loss was caused by the Defendants' admitted breaches.

2. There was insufficient time at the CCMC hearing to address with all of the matters with which the Claimant wanted the court to deal. Some of these had only been raised by the Claimant shortly before the hearing and well after it had advised the Respondent that it did not envisage making any applications at the CCMC. I was able to deal with costs budgeting at the hearing although there was insufficient time for me to make a ruling in relation to the Defendants' failure to file a budget on time. It is this issue with which I now deal in this ruling.

Procedural background

3. The parties' costs budgets should have been filed and exchanged by not later than 21 days before the date fixed for the first CMC: CPR 3.13(1)(b). On 16 December 2019 the parties' solicitors agreed a timetable of 19 pre-CMC procedural steps to the CMC with tight deadlines for compliance. This timetable did not require any steps to be complied with between 21 December 2019 and 6 January 2020. Nor did it make any mention of the filing and exchange of costs budgets.

4. The Claimant filed and served its Precedent H budget on 24 December 2019. On 9 January 2020 the Claimant's solicitors (Wikborg Rein) advised the Court that it had been served with the Defendants' Precedent H budget at 1655 on 8 January 2019 (the Defendants' budget was also filed with the court on 8 January). The Claimant reserved its position with regard to this late service/filing. The Defendants' solicitors (Byrne & Partners) replied that same day, noting that the Claimant was not applying for relief or directions and advising that the Defendants proposed to raise the issues addressed at the hearing of the CMC. Byrne & Partners advised the court that the parties had agreed a procedural timetable which had significantly varied the ordinary procedural steps leading up to the CMC but which did not make provision for any costs management steps. Byrne & Partners said that in light of this they had not appreciated that the Claimant intended that costs management should take place at the CMC. They further observed that if the Claimant maintained that there had been a breach or that any sanctions should be imposed, the Defendants would if necessary apply for relief from sanctions at the CMC in order to be permitted to rely on their Precedent H costs budget. The Defendants did not make an application under CPR 3.9 for relief from sanctions.

5. CPR 3.14 provides that:-

> "... Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees ..."

6. The Defendants did not file their Precedent H budget in accordance with rules and Mr Willan did not seek to contend otherwise. The budget was filed 8 days before the dated fixed for the CCMC hearing, that is to say 13 days late.

Applicable principles

7. The default position under CPR 3.14 is that any party failing to file a budget in time is subject to the "Draconian" sanction for which the rule provides "unless the court otherwise orders". Mr Cogley QC for the Claimant submitted that it is incumbent upon a party seeking relief from the sanction to make a timeous application for relief from sanctions under CPR 3.9. He derived support for this proposition from the unreported judgment of Bryan J in *BMCE Bank International Plc v Phoenix Commodities PVT Ltd & Anor* [2018] EWHC 3380 (Comm) in which Bryan J concluded by observing that where there is a failure to comply with rules, directions and orders of the court, then an application for relief from sanctions should be made promptly, supported with evidence, after which it would be considered in accordance with CPR 3.9. Although this was said in the context of a CPR 3.14 case I do not consider that Bryan J. was there holding that it was in every case necessary for the defaulting party under CPR 3.14 to make an application for relief under CPR 3.9. This would be contrary to the guidance in paragraph 3.14.2 of the White Book where the learned editors say this:-

> "... A party in default of r.3.14 need not make a separate application for relief from sanctions under r.3.9. Instead it may seek to invoke the saving provision in r.3.14 itself ("Unless the Court otherwise orders") by seeking to persuade the court to adopt that course at the hearing convened for costs management purposes ..."

There will no doubt be cases (*BMCE* being one such) where a party seeking to invoke the saving provision would be well advised to do so by making a prompt CPR 3.9 application. This is not, in my judgment, one of those cases. As set out above, Byrne and Partners clearly set out the Defendants' position in their letter of 9 January 2020.

8. It is common ground that, following the guidance give by the Court of Appeal in *Denton v TH White Ltd* [2014] 1 WLR 3926, the court should conduct a three stage exercise in determining whether to give relief from sanctions. First, the seriousness and significance of a breach should be evaluated. Secondly, the reason for the breach should be considered. Thirdly, in every case, the court should consider all the circumstances of the case so as to enable it to deal justly with the application. Although it can be helpful to look at decisions in other cases, as Bryan J observed in *BMCE* at [46] every case must be considered on its own merits and the guidance in *Denton v White* should be applied afresh to the particular circumstances of the case before the court, save always that a consistent message should be sent out in relation to compliance with the rules as to costs budgeting.

Discussion

Stage 1 – Seriousness and significance of the breach.

9. The failure to submit a costs budget in due time was serious – the Defendants' budget was filed nearly two weeks late. Mr Willan submitted that although the breach was not trivial, it was of limited significance because the budget was submitted over a

week before the CCMC and the Claimant had had sufficient time to consider the budget in advance of the CCMC and to file a Precedent R. I accept this. The paperwork was all in order by the time the bundles were filed for the CCMC and the Claimant was able to deal without difficulty with the Defendants' budget at the hearing. More importantly, I was able to hear full argument and rule upon both parties' costs budgets at the hearing. This was a very different set of circumstances to those, say, in *BMCE* where the late service of a costs budget caused considerable inconvenience to the court and to other court users and would have necessitated a further CCMC if relief had been granted.

Stage 2 – The reason for the breach.

10. The detailed timetable provided for the undertaking of a number of pre-CMC and CMC-related steps to be taken from 15 November 2019 up to 16 January 2020, the eve of the CMC. The breach occurred because Byrne & Partners had assumed that all of steps to be completed before the CMC had been identified in that timetable. Mr Cogley QC submitted that, in making this assumption, Byrne & Partners had dropped the ball and that, as Bryan J observed in *BMCE* at [55], dropping the ball or taking one's eye off the ball is not a good reason for breaching of the rules. I accept Mr Willan's submission that the default was inadvertent given that the Defendants were relying on the agreed table of procedural steps. The default was understandable in that context, although the Defendants should not have allowed themselves to be distracted in this way. The parties had not agreed that costs budgets would not be dealt with at the CCMC. I do not, however, regard Defendants' default as egregious in the particular circumstances of this case.

Stage 3 – All of the circumstances.

11. Standing back and looking at all of the circumstances I consider that this is an appropriate case in which to grant relief from sanctions. The breach, although serious in terms of lateness, did not prevent the litigation from being conducted efficiently or at proportionate cost. No inconvenience was caused to the court or to other court users. Against this background, and on the particular facts of this case, it would not in my view be proportionate to deprive the Defendants of the potential to recover their own costs should they ultimately be successful at trial.