Neutral Citation Number: [2020] EWHC 704 (QB)

Case No: QA 2019 -000090

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2020

Before:

MR. JUSTICE CHAMBERLAIN
SITTING WITH AN ASSESSOR (MASTER ROWLEY)

- -

Between:

MICHAEL WILSON & PARTNERS LIMITED

Appellant

- and -

(1) T.I. SINCLAIR (2) SOKOL HOLDINGS, INC.

Respondents

- -
- -

Joshua Munro (instructed by **Michael Wilson & Partners, Ltd.**) for the **Appellant**
The Respondents did not appear and were not represented
Hearing dates: 17th March 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.

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MR JUSTICE CHAMBERLAIN

MR. JUSTICE CHAMBERLAIN :

Introduction

1 This is an appeal from the order of 12 March 2019 by Master Gordon-Saker, the Senior Costs Judge ('the SCJ'). The SCJ ordered that, provided the first and second defendants file and serve points of dispute by 4 pm on 19 March 2019, a default costs certificate obtained by the Appellant dated 22 January 2019 be set aside. The SCJ's reasons were given in an *ex tempore* judgment.

2 Permission to appeal was initially refused by Stewart J, but granted by Murray J after a hearing on 18 October 2019.

3 Shortly before the hearing, Mr Sinclair, who represents both himself and the Second Respondent, applied by email to the court for an adjournment of the appeal hearing on the basis that he had to travel to New Zealand to attend his father's funeral. At the outset, I indicated that, rather than determining the adjournment application, I would hear submissions from Mr Munro on behalf of the Appellant. After the hearing I indicated that, after consulting with the assessor, I would consider further whether it was necessary to adjourn the hearing in order to permit Mr Sinclair to make submissions.

Background

4 The Appellant, Michael Wilson & Partners Ltd, is based in the Republic of Kazakhstan. It provides legal and consultancy services. It has been in dispute since 2006 with the Respondents and a third party, John Emmott, a sometime director and employee of the Appellant. There have been proceedings in many different fora, including England & Wales, the Bahamas, the British Virgin Islands, New South Wales and New Zealand. Given the limited scope of this appeal, it is not necessary to describe or summarise those proceedings, save to say that they have been hard fought on both sides.

5 Indeed, it would take a long time to describe fully even the proceedings in this jurisdiction. I do not attempt to do so. The background up to 13 January 2017 can be found in the judgment of Simon LJ of that date in the Court of Appeal: [2017] EWCA Civ 3. The more recent history of the 'seemingly interminable, unhappy background saga' is to be found in the judgments of Gross and Peter Jackson LJJ of 26 February 2019 in proceedings between the Appellant and Mr Emmott: [2019] EWCA Civ 219, [2019] 4 WLR 53. (Mr Munro criticises the SCJ for referring to an excerpt from Peter Jackson LJ's judgment, but, for reasons which follow, I am wholly unpersuaded by that criticism and have found both judgments illuminating and helpful.)

6 The chronology that is directly relevant to this appeal begins in 2006, when the Appellant began arbitration proceedings against Mr Emmott, alleging that he had received shares and funds as a bribe or secret profit from the Respondents. The main part of those allegations were determined against the Appellant (though there have been satellite proceedings to determine what issues remain undetermined). As a result of a series of arbitral awards, the last of which was in 2014, the Appellant was ordered to pay Mr Emmott approximately £3.2 million and USD 841,000. A freezing order against

the Appellant was granted in Mr Emmott's favour. It has been varied but remains in force.

7 In 2010, the Appellant brought a claim against the Respondents and others in the Commercial Court, raising similar allegations. The Respondents and Mr Emmott applied to strike out the claim as an abuse of process. That application substantially succeeded before Teare J in 2012. The Appellant appealed to the Court of Appeal, which on 13 January 2017 allowed the appeal and ordered the Respondents to pay the Appellant's costs of the application and appeal, to be subject to detailed assessment if not agreed. There was an order for an interim payment of about £670,000, which has been satisfied by way of set-off against sums owed to Mr Emmott in other proceedings. An application by the Respondents and Mr Emmott for permission to appeal to the Supreme Court was refused in September 2017.

The costs proceedings

8 The Appellant's bill of costs ran to some 268 pages. It was sent to the First Respondent, Mr Sinclair, by email on 24 December 2018, over a year after the refusal of permission to appeal by the Supreme Court. It was served in hard copy, together with a notice of commencement, on the same day. The notice of commencement provided that points of dispute should be served by 21 January 2019. The First Respondent filed evidence before the SCJ indicating that he was busy at the time, working on business projects in Oman. Neither Respondent filed points of dispute by 21 January 2019. The Appellant therefore obtained, on 22 January 2029, a default costs certificate in the sum of £1,342,122.93 (the total amount claimed, making no allowance for the interim payment which had been made).

9 On 28 January 2019, the First Respondent emailed the Appellant suggesting the setting aside of the default costs certificate and suggesting an extension of time for service of the points of dispute. That was refused and the Respondents made the application to set the certificate aside on 1 February 2019. The application was not accompanied by draft points of dispute.

The SCJ's judgment

10 In a detailed *ex tempore* judgment after a hearing on 12 March 2019, the SCJ set out the terms of CPR r. 47.12(2), which confers a discretion to set aside a default costs certificate 'if it appears to the court that there is some good reason why the detailed assessment proceedings should continue', and of CPR 47PD para. 11.2. He noted that relief from sanctions was required pursuant to CPR r. 3.9 and applied the three-stage test outlined in *Denton v T.H. White Ltd* [2014] 1 WLR 3296.

11 At the first stage, the SCJ concluded that 'this was a serious breach' by the Respondents. They knew the rules and failed to comply with them: [15].

12 At the second stage, the SCJ noted that oversight was not a good reason for the failure to serve the points in dispute by the required date: [16].

13 At the third stage, the SCJ drew attention to the remarks of Peter Jackson LJ reported at [2019] EWCA Civ 219, [70], which included the observations that Mr Wilson (the

principal of the Appellant) 'will stop at nothing to prevent Mr Emmott from the receiving the award to which, for all his deceit, he is entitled' and the description of the litigation as 'pathological'. In view of this, it was, the SCJ said, 'surprising that neither party in this case has behaved as they should have done': [17].

14 The Appellant was criticised for serving a 268 page bill of costs for £1.3m on Christmas Eve (rather than after the Christmas holiday or after the New Year) and for obtaining a default costs certificate for that sum, rather than for the balance of £776,000-odd, which was due after giving credit for the interim payment. The First Respondent, for his part, was criticised for not serving his points of dispute 'or, perhaps more realistically, asking the claimant for an extension of time in which to do so' by 21 January 2019: [20]. At [21] the SCJ said this:

> 'Given the size of the bill, both in terms of money and in terms of length, no reasonable solicitor would have refused any prospective application for an extension of time and I have no doubt that no court would have refused an extension of time had it been made prospectively. Instead, Mr Sinclair did nothing until the default costs certificate was brought to his attention. He did then act promptly insofar as he made his application within about a week but he did not do what the practice direction requires and that is to exhibit a copy of the bill and a copy of his draft points of dispute. Mr Sinclair tells me that he has been working on the points of dispute but has not yet completed them, although he would hope to complete them by the end of this week, so within five days.'

15 In relation to the 'justice of the case', the SCJ noted at [23] that he was in some difficulty in answering the question whether a detailed assessment should be allowed to continue because he had not seen the bill. He had, however, assessed another bill relating to proceedings between the Appellant and the first respondent. On that occasion, the first respondent did serve points of dispute, though he did not attend the detailed assessment hearing. He recalled that, because of the way the Appellant charged for its time and because of the hourly rates sought, there was a substantial reduction. This was supported by an email dated 23 January 2019 from Mr Wilson to the First Respondent, among others. The email was in these terms:

> 'We note and remind you that, unfortunately, MWP never received any reply from you to our letter of 03.12.18, further copy attached.
>
> As we set out in paragraph 2 on page 2 of that letter, we then conservatively estimated that at least a further £275,933 would be certified in MWP's favour, however that amount has now been certified as per the attached as at 22 January 2019 in the net amount now payable by Sinclair and Sokol to MWP of £776,209.28 (of course, plus interest from the date of judgement/order in our favour, plus assessment, enforcement and recovery costs, plus on-going interest at the relevant judgement rates).
>
> In addition to this, we are now also proceeding to have our 2cnd JCPC Appeal and 2cnd Bahamian Court of Appeal and the English Bankruptcy costs awarded in our favour by Judge Briggs on 4 December 2018, also

> certified, which amount we currently estimate will be in excess of a further US$1.75m, probably much more.
>
> In such circumstances, your continued cooperation with Emmett, Robinson and Shepherd, simply makes no sense and is yet further evidence of the on-going fraudulent conspiracy to injure MWP, in which you have participated since 2004.'

The SCJ said that the second paragraph of this letter, whilst 'not a concession', was 'perhaps an indication that the claimant itself considers that about half a million pounds may reasonably be disputed'.

16 At [24], the SCJ said this:

> 'clearly that is a substantial sum and it is that fact which seems to me to weigh the most heavily. If I do not set aside this default costs certificate, although clearly it would need to be amended to the correct sum, I would in essence be shutting out Mr Sinclair from achieving any result which would favour him by possibly as much as half a million pounds. Placing that against his default in failing to serve points of dispute by 21 January or possibly within an extended period if such had been requested and agreed, it seems to me that the balance is in favour of setting aside the default costs certificate, so that there can be a detailed assessment of these costs.'

17 At [25], the SCJ rejected an alternative argument that the setting aside of the default costs certificate should be conditional upon payment of the balance. This, the SCJ held, would not be appropriate in circumstances where a substantial interim payment had already been made. It was, however, appropriate to make the setting aside conditional upon the defendants filing at court and serving points of dispute by 4pm on 19 March 2019.

18 In the event, the Respondents did file points of dispute, which state on their face that they were served on the Appellant on 19 March 2019. I understand from Mr Munro's submissions that there is a dispute about the time of service and also about whether the points of dispute are adequate.

The Appellant's submissions

19 For the Appellant, Mr Munro accepts that the decision of the SCJ was taken in the exercise of his discretion. (It might be more accurate to say that the decision involved a multi-factorial judgment, but the test for appeal is not materially different.) Mr Munro accepts that he must demonstrate that the SCJ's decision involved an error of the kind indicated in *Tanfern Ltd v Cameron-Macdonald* [2000] 1 WLR 1311. In that case, Brooke LJ at [32] drew attention to the speech of Lord Fraser in *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, at 652:

> 'the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is

> different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible.'

In essence, it is necessary to identify an error of approach, which could include taking account of an irrelevant consideration or failing to take account of a relevant one. If I can identify such an error then, pursuant to CPR r. 52.20, I can either re-take the decision myself or remit it to the lower court.

20 Mr Munro relies on six errors of approach. First, he contends that the SCJ failed properly to take into account or give proper weight to the two specific factors referred to in CPR r. 3.9(1), namely 'the need (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders'.

21 Second, Mr Munro criticises the SCJ's failure to take into account past breaches by the Respondents that are similar to the breach in this case. In particular, he draws attention to a number of costs certificates in the Appellant's favour, which the Respondents have failed to satisfy.

22 Third, Mr Munro submits that the SCJ should not have criticised the Appellant for serving notice of commencement on Christmas Eve. There was no reason why the notice should not be served on that day. In any event, the notice allowed extra time for service of points of dispute.

23 Fourth, the SCJ failed to appreciate that CPR 47PD, para 11.2(3) creates a presumption that a default costs certificate will not be set aside unless the applicant filed with the application a copy of the bill of costs and a draft of the points of dispute.

24 Fifth, the SCJ erred in referring to and placing reliance on the Appellant's email of 23 January 2019. Properly construed, that email was chasing a response to the Appellant's without prejudice letter of 3 December 2018. It was therefore itself protected by without prejudice privilege.

25 Sixth, the SCJ should not have referred to the comments of Peter Jackson LJ in a separate case between different parties. Those comments were not admissible and were not part of the 'circumstances of the case' for the purposes of CPR r. 3.9.

26 Finally, it is said that the SCJ should not have relied on his own recollection of a previous assessment hearing in which he had substantially reduced one of the Appellant's bills 'because of the way the Appellant charges for its time and because of the hourly rates that are sought': see [23] of the judgment.

Discussion

27 I shall consider each of these points in turn.

28 Mr Munro's first point elevates form over substance. The SCJ set out the terms of CPR r. 3.9 in full at [13]. Although he did not refer back to the matters in paragraphs (a) and (b) of r. 3.9(1) *in terms* when addressing the third stage of the Denton test, he did so in

substance at [24]. There, he balanced the fact that if the certificate were not set aside the Respondents would lose the opportunity to dispute a very substantial liability against their 'default in failing to serve points of dispute by 21 January or possibly within an extended period if such had been requested and agreed'. That (read with the SCJ's earlier recognition of the seriousness of the default and the lack of good reason for it) was, in substance, a reference to the needs (a) for litigation to be conducted efficiently and (b) to enforce compliance with rules, practice directions and orders. The SCJ might have added that depriving a party of the ability to contest a contestable bill because of a default that did not prejudice the Appellant could itself be regarded as inconsistent with the need to ensure that litigation is conducted at proportionate cost.

29 The second point concerns the Respondents' failure to discharge their liability under costs certificates relating to previous instalments of this litigation. The SCJ did not deal with this, but in my judgment it was not directly relevant to the question whether, in principle, detailed assessment proceedings should continue. Failures to discharge liabilities under previous costs certificates might justify making the continuation of detailed assessment proceedings conditional (a subject to which I shall return), but it is difficult to see how such failures could justify a decision to refuse relief from sanctions at all.

30 The third point concerns the SCJ's criticism of the Appellant. For what it is worth, I agree with Mr Munro that there was no reason to criticise the Appellant for serving the notice of commencement together with the substantial bill of costs on Christmas Eve, particularly as the notice allowed extra time for service of points of dispute. But looking at the SCJ's reasoning as a whole, it does not appear that this criticism played a major part in the overall decision. As can be seen from [24], the principal factors weighed in the balance were, on one side, the fact that a refusal of relief from sanctions would deprive the Respondents of the opportunity to contest an eminently contestable liability to about £500,000 in costs and, on the other, the default and (implicitly) the needs referred to in [27] above. It may be noted that the SCJ's criticism of the Appellant does not figure among these principal factors.

31 Mr Munro's fourth point is again formalistic. The SCJ plainly appreciated the terms of CPR 47 PD para. 11.2(3), which he set out in full at [12] of his judgment. The bill of costs in this case was, as the SCJ said, some 268 pages long. That being so, and given the amount at stake, the SCJ was undoubtedly correct to say that 'no reasonable solicitor would have refused any prospective application for an extension of time and no court would have refused an extension of time had it been made prospectively'. This, therefore, was one of those cases in which there was reason to depart from the 'general rule' in CPR 47PD para. 11.2(3).

32 The fifth point concerns the email of 23 January 2019. That document, from Mr Wilson, began with a reminder that no reply had been received to a previous letter of 3 December 2018 (which was attached). I have not seen the attachment, but Mr Munro said it was undoubtedly without prejudice. The question for the SCJ was whether the email of 23 January 2019 was itself 'made for the purpose of a genuine attempt to compromise the dispute between the parties': *Phipson on Evidence* (19th ed.), §24-13. He answered that question in the negative, because – as he said at [11] – the true purpose of the email was 'to explain that the claimant has obtained a judgment by way of the default costs certificate in the sum of £776,000-odd', and not 'with a view to

negotiating or compromising that claim for costs'. In my judgment, that conclusion was properly open to the SCJ and, if to the extent that it is necessary for me to say so, I agree with it. The email came from a lawyer who was qualified in England. It was not headed 'without prejudice'. That fact, though not conclusive, is significant: *Best Buy Co. Inc. v Worldwide Sales Corp Espana SL* [2011] EWCA Civ 618, [2011] FSR 30, [40]. The first line drew attention to the failure to reply to a previous without prejudice communication, but the thrust of the email was concerned with the certificate which the Appellant had just obtained and with other costs which the Appellant was in the process of having certified. Viewed as a whole, the ostensible purpose of this email was to put pressure on the Respondents to end their 'continued co-operation with Emmott, Robinson and Shepherd'. Even if the letter of 3 December 2018 was a 'genuine attempt to compromise the dispute', the email of 23 January 2019 was not. It did not attract without prejudice privilege. The SCJ was therefore entitled to rely on it. He was also entitled to regard it as significant, because it disclosed that as recently as 3 December 2018, the Appellant's (admittedly 'conservative') estimate was that 'at least a further £275,933' would be certified in its favour. That was a perfectly proper basis on which to infer that there was scope to dispute the Appellant's entitlement to about £500,000 of the costs covered by the certificate.

33 Sixth, there is Mr Munro's complaint about the SCJ's reference to Peter Jackson LJ's remarks in litigation between the Appellant and Mr Emmott. In my judgment there was nothing wrong in referring to those remarks by way of background, notwithstanding that they were made in litigation between different parties. It is, of course, trite law that findings of fact made against party A in proceedings between A and B do not give rise to issue estoppels in proceedings between A and C. Indeed, as the Court of Appeal's judgment of 13 January 2017 in the Appellant's favour shows, the lack of identity between the parties may also be fatal to an abuse of process argument. But that does not mean that it is impermissible to have regard to general comments about the nature of the litigation between the Appellant and Mr Emmott such as the ones cited by the SCJ here. Even if it were, the error was not material because the observations of Peter Jackson LJ was not among the principal considerations weighed in the balance in [24].

34 Finally, I see no reason why a costs judge should not rely on his own recollection of previous assessments provided that such recollection is accurate. I asked Mr Munro whether he was submitting that the SCJ's assessment was inaccurate. He was not in a position to make that submission. I am unimpressed with the suggestion that the Appellant did not know which assessment the SCJ was referring to. Even a party as litigious as the Appellant could be expected to know if it was untrue that a previous bill had been substantially reduced on assessment for the reasons given by the SCJ. If it was untrue, I have no doubt at all that the Appellant would have said so and exhibited documents to show that. I therefore work on the basis that the SCJ's recollection was accurate. That being so, it was a factor that he could properly take into account in reaching his decision.

35 For all these reasons, I do not consider that the SCJ's judgment on the question whether the certificate should be set aside is vitiated by any material error of approach. If I am wrong about that, I would in any event have reached the same decision as the SCJ. My reasons can be shortly stated. The bill of costs in this case was large, both in detail (it was 268 pages long) and in amount (£1.3 million-odd). The Appellant had taken over a year since the conclusion of the proceedings to produce it. The points of dispute (which

I have seen and the SCJ did not) indicate that 275 hours have been claimed for producing the bill of costs. Although the Appellant cannot be criticised for serving it, together with the notice of commencement, on Christmas Eve, it is unsurprising that the Respondents would need considerably longer than the time given to respond to it. They should have sought extra time by making an application by 21 January 2019. Through an oversight, they did not. An oversight is not a good reason for failure to comply with procedural rules. But they made the application to set aside the default certificate reasonably promptly, on 1 February 2019 (having properly invited the Appellant to consent to the certificate being set aside). It has not been, and could not be, suggested that the delay itself prejudices the Appellant. Even if the 23 January 2019 email, the remarks of Peter Jackson LJ and the recollection of the SCJ are left wholly out of account, the points of dispute have now been served. I have considered those and, without descending to the detail of them, consider that the objections under the headings 'Proportionality', 'Hourly expense rate charges' and 'Counsels' fees for preparing for hearing/Brief fee in Court of Appeal' are all proper objections which may lead to a significant reduction. Overall, having regard to all the circumstances of the case, including (pursuant to CPR 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, I am satisfied that it is appropriate to grant relief from sanctions in this case.

36 The appeal against the SCJ's judgment will therefore be dismissed insofar as it seeks to challenge the decision in principle to allow the detailed assessment to proceed.

37 I will invite further submissions from the parties limited to the following points:

(a) whether the SCJ erred in declining to make the setting aside of the default costs certificate conditional on payment of costs certified in previous assessments;

(b) if so, whether I should vary the SCJ's order so as to impose such a condition;

(c) if so, precisely what condition should be imposed.

38 Given the difficulties caused by the Covid-19 pandemic, these further submissions should be in writing as follows:

(a) submissions from the Appellant by 4pm on Friday 27 March 2020;

(b) submissions from the Respondents by 4pm on Monday 6 April 2020.

39 I will then determine the outstanding matters in writing.