

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Monday, 9 December 2024

BEFORE:

DEPUTY COSTS JUDGE ROY KC

BETWEEN:

RASHID HYDER

Claimant

- and -

(1) ROBERT AIDAT-SARRAN
(2) HUMWATTIE AIDAT-SARRAN

Defendants

MS F MUKITH appeared on behalf of the Claimant
MR S GIBBS appeared on behalf of the Defendants

JUDGMENT
(Approved)

Digital Transcription by Epiq Europe Ltd,
Lower Ground, 46 Chancery Lane, London WC2A 1JE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

1. THE COSTS JUDGE: This is my extempore judgment on two applications before me today. I am very grateful to both advocates for their very able help and submissions in assisting me resolving what I confess has been not an easy decision.
2. The two applications are in effect:
 - (1) The claimant's application for relief from sanction for late service of his bill of costs
 - (2) What has been narrowed into the defendant's application under CPR 44.11 to strike out the claim for costs due to multiple failures across two bills.
3. I am not going to rehearse the background for two reasons. First of all, it is very well known to the parties. Secondly, it is uncontroversial. I have not been able to identify any material disputes of facts as set out in the chronology within the bundle, the two witness statements in the bundle (as far as they go in relation to the claimant) and Ms Mukith's skeleton argument.
4. Dealing first of all with the application for relief, on my reading of *Denton v TH White* [2014] EWCA Civ 906, it is clear that stage 1 is looking at whether the breach in question was serious or significant in isolation. If it is not, that is the end of the exercise and relief should be granted, save for some unusual circumstances. It is thus clear from my reading of *Denton* that stage 1 involves looking at the breach of the index order itself and not any other breaches.
5. Therefore, in my view here the critical question is whether the service of a defective bill -- the phrase fairly deployed was seriously defective -- a day late constitutes belated compliance with the order. It is definitely a breach. The point here is that, if the service of the defective bill a day late constitutes belated compliance, then the only operative breach for the purposes of the sanction is one day's delay. Mr Gibbs realistically accepts that, if that is the only breach, then relief would almost automatically follow.
6. I see the force in Mr Gibbs' argument that the bill really this is so defective that its service cannot be described as complying with the order. However, I am ultimately against him on this for a two of reasons.

7. First of all, the order does just say service of a bill at a time when there was no expectation or anticipation there would be any serious problems with the compliant nature or otherwise of the bill. One does sometimes see and make orders where, because there has been such a problem, the order specifies service of a fully compliant bill. That is not the case here.
8. Secondly, authority points in that direction. I am looking at a case called *CNM Estates (Tolworth Tower) Limited v Carvill-Biggs* [2023] EWCA Civ 480 per Males LJ at [45], when he says this:

"I would accept that it is possible to envisage a case where a party who is required to comply with an unless order, for example by serving a pleading, does something within the deadline which cannot properly be regarded as compliance, for example by serving a document which contains gibberish or blank sheets of paper or that a party may serve a Response to a Request for Further Information which provides some but not all of the information which a party has been ordered to provide. In such a case, it would be obvious that there has been non-compliance and the sanction takes effect."
9. Here we are not in that territory. There was a bill served within the meaning of the order, albeit seriously defective. It was only a day late. This was neither serious or significant. Relief should therefore be granted.
10. I then move on to CPR 44.11, which again I will not read out. I make the following seven findings here.
11. First of all, I accept there are multiple significant failures with the bill which was originally served as set out in Mr Gibbs' witness statement, which is not essentially challenged in this regard. Again, I will not list them. The relevant parts of the statement should be read into this judgment.
12. Some defects are more serious than others. I pause there to say, for example, claiming costs which clearly are irrecoverable because there is no order giving rise to any entitlement to them is serious, albeit perhaps easily detected. But, looking overall at the defects in the round, I would describe the failures here as egregious.

13. Secondly, none of these defects, as far as I can see, were rectified in the second bill, the electronic bill. This is despite their having been flagged up very clearly in the points of dispute. I unfortunately have to say that I find this absolutely astonishing.
14. Thirdly, the second bill, the e-bill, not only failed to rectify the serious problems with the paper bill; it added further defects. Again, I accept what is set out in Mr Gibbs's witness statement in this regard. I find that even more astonishing in the circumstances where there need to ensure that the bill was defect free had been clearly flagged up in the points of dispute.
15. Fourthly, all these failings, as I have already alluded to, were clearly set out Mr Gibbs's witness statement of 22 August 2024.
16. Fifthly, it is I am afraid to say almost beyond belief that the claimant's solicitors in the face of that statement, which was made in support of an application to strike out: (a) still did not rectify these defects and still have not rectified them as we sit here today in December: (b) did not serve any evidence to explain or otherwise address these failings; and (c) completely failed to not just apologise but even acknowledge these failings before this hearing. That only came via the counsel at around midday today. This displays a serious and troubling lack of insight and contrition on behalf of the claimant's solicitors. This is highly relevant to the level of appropriate sanction.
17. Sixthly, I find that it is not open to the claimant's solicitor to blame the costs draftsman for the following reasons:
 - (1) As a matter of law. That is made clear by the leading case on this rule, ***Gempriede v Bamrah*** [2018] EWCA Civ 1367. The costs draftsman is the solicitor's agent. The solicitor is vicariously responsible for all the costs draftsman failings as if the solicitor had performed the work himself.
 - (2) In any event, there have been serious direct failings (i.e. leaving aside vicarious responsibility and agency) on the solicitor's part:
 - (a) A solicitor in my view must apply some superintendence and oversight to what a costs draftsman does, although obviously not to the point of duplication. Here, in my view, the defects were so obvious, or should have been so obvious, that the

solicitor should have been identified them. This is certainly so in relation to the second bill if nothing else. The solicitor had direct supervisory responsibilities which they clearly did not fulfil.

- (b) Whilst I take the point that the solicitor only received the bill from the costs draftsman a very short time before it had to be served in compliance with yet another unless order, they should have been proactive in such circumstances to ensure that compliance was achieved out (i) in time; and (ii) fully and properly.
- (c) Further in this regard, some of the failings, such as failures to certify, are purely those of the solicitor and are very basic.
- (d) At the very latest by 22 August, in light of Mr Gibbs's statement, the solicitors could not have had any basis to place any reliance upon the costs draftsman, and yet the compounding failures which I have identified continued.

- 18. Seventhly, I am entirely satisfied that both limbs of CPR 44.11(a) and (b) are met here. Under (a), there has clearly been non-compliance with the rules, et cetera. Under (b), there has certainly been unreasonable conduct, simply meaning conduct which does not admit a reasonable explanation.
- 19. I am not quite in a position today without the full picture to make a positive finding of improper conduct. I will say however that serving an unchecked bill without any caveat must come very close. It is at least arguable that in so doing solicitors were reckless as to the possibility of the court and/or the defendant being misled by omission into assuming that it had been properly checked, which would be a very natural assumption against the background of the points in dispute.
- 20. In summary, I find there have been multiple compound breaches. They have been serious. They have been persistent. They are unexplained, and they are inexcusable for the most part.
- 21. That brings me on to the question as to whether to simply strike out under CPR 44.11 or whether to peruse some lesser still serious sanctions. On very narrow balance, Ms Mukith has persuaded me that lesser sanctions are appropriate primarily for the following three reasons.

22. Firstly, the Court of Appeal said in numerous contexts and numerous cases that strikeout is the most draconian tool in the court's armoury. A judge should therefore always give very anxious consideration whether any other lesser sanction could properly meet the justice of the case.
23. Secondly, I note that in *Gempride* itself, despite what on any view was very serious misconduct, there was a substantial reduction but the bill was not struck out entirely. This tends to point against strikeout being the appropriate sanction here.
24. Thirdly, and building on those last two findings, the very powerful and legitimate concerns Mr Gibbs raises about proportionality and whether or not the court and the defendant can have confidence in any redrawn bill can, I have decided, be addressed by the orders that I am proposing to make. We have not got in any detail to what orders I should make if I went down this road, so I am open to further argument about the detail although not as it were the substance.
25. Taking all these matters into account, strike out would be too draconian. However, a severe sanction is in my view clearly warranted. The appropriate level of sanction is a 75% reduction.
26. I pause there. I recognise that this is that is a stern sanction by CPR 44.11 standards. I have reflected on whether it is too stiff. I remain of the view that it is an appropriate one given that the claimant and his solicitors can consider themselves quite fortunate that the bill is not struck out entirely.
27. Therefore, for the reasons given:
- (1) I grant relief from sanction.
- (2) Pursuant to CPR 44.11, I disallow 75 per cent of the claimant's bill, ie. whatever the bill is assessed at, the claimant will recover 25 per cent of that.
28. I disallow interest on the claimant's costs from 30 July to whatever dates it is agreed that the redrawn bill should be served by. My initial inclination was to disallow all interest.

However, Ms Mukith has persuaded me that this would, in circumstances where I have already disallowed 75 per cent of the costs, amount to double jeopardy.

29. In this context, there is force in the point that there has been historically unhealthy conduct by the defendant in this regard in not paying and so forth. I consider that this historical conduct by the defendant is relevant to this element of sanction (i.e. deprivation of interest. However, I do not consider with any materiality to the later misconduct relating to the bill. That seems to me an entirely distinct matter.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 46 Chancery Lane, London WC2A 1JE

Email: civil@epiqglobal.co.uk