[2015] EWHC 3905 (QB)

No: QB/2015/0421

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 2 December 2015

BEFORE:

MR JUSTICE GREEN

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BETWEEN:

JOSHI & WELCH LIMITED

Claimant/Applicant

- and -

TAY FOODS

Defendant/Respondent

- - - - - -

Mr Caley Wright (instructed by Olephant Solicitors) appeared on behalf of the Applicant
Mr Michael Smith (instructed by Harris Da Silva) appeared on behalf of the Respondent

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Judgment

Wednesday, 2 December 2015

MR JUSTICE GREEN:

A. INTRODUCTION

1. There is before the court today an application by the appellant, Joshi & Welch Limited, for relief from sanctions imposed by order of His Honour Judge Wulwik on 24 August 2015. Upon that occasion the judge upheld the defendant's application for summary judgment on a counterclaim.

2. I remind myself that this is not a re-hearing; this is an appeal. I must first decide whether the judge erred in principle or has ignored relevant considerations or taken account of irrelevant considerations. If such an error exists, and it is material, then the appellate court will consider the exercise of discretion itself or perhaps remit the matter to be reheard. In evaluating the judgment below, I must also give due weight to the fact that the judgment below was delivered upon an *ex tempore* basis.

3. Permission to appeal was granted by Wilkie J on 21 October 2015 upon the basis that there was a real prospect that the appeal would succeed. In order to understand the application, it is necessary to set out the main stages in the procedure adopted in the course of the trial to date.

B. THE HISTORY OF THE PROCEEDINGS

4. The claim relates, in essence, to fees for services provided by the appellant to the defendant firm. The defendant denies owing the fees claimed and argues that the work was not authorised and/or that the fees represent over-charges.

The work in issue related to legal and practical advice in relation to intellectual property, and in particular trademarks. The defendant has counterclaimed for sums allegedly overpaid.

5. The claim (issued by the appellant as claimant) was initially issued in June 2014. The defendant served a Defence on or around 23 July 2014. An Amended Particulars of Claim was served on 1 October 2014. On or around 2 October 2014, the defendant served an Amended Defence and Counterclaim. Paragraphs 23-32 of this pleading relate to the Counterclaim. Paragraph 23 repeats paragraphs 1-22 of the Defence. It then goes on to challenge various invoices dated variously 29 June 2011, 31 March 2010, 7 May 2010 and 28 January 2010. These relate to work performed on behalf of the defendant in relation to a claim brought by the defendant against a company called Cofresh Snack Food Limited.

6. In paragraphs 29 and 30 of the Counterclaim, the defendant pleads as follows:

> "29. JMW Solicitors LLP paid the claimant £19,405.56 from funds held on the defendant's behalf and the settlement sum of £40,000 received and held by JMW Solicitors LLP in part-payment of invoice no.101009, which invoice states, 'Taj v Cofresh dispute. Our services generally in respect of the above matter since it was first instructed including advising thereon on the dispute, the outcome seizures, liaising with enforcement officers. JMW Solicitors and lawyers for the defendant including investigator's costs and Indian lawyer's costs'.
>
> 30. The defendant denies that the claimant is entitled to the sum of £19,405.56 and claims that it was unjustifiably paid that sum. The defendant was never given an estimate for this work and the invoice number 101009 was not sent to the defendant until after the payment of £19,405.56 was made by JMW Solicitors LLP to the claimant. Upon receiving the invoice, the claimant for £19,405.56 from

JMW Solicitors Limited, the defendant disputed the figure."

7. The appellant did not serve a reply or defence to counterclaim. Time for service of a Defence to Counterclaim expired on or around 29 January 2015. On 26 January 2015, disclosure was given. Witness Statements of fact were served in February 2015. In particular, a Witness Statement from Mr Manesh Joshi was served on 9 January 2015. This is 28 paragraphs long. It does not specifically differentiate in its content and substance in a clear way between the Defence to the Particulars of Claim and the Counterclaim.

8. However, it is possible to identify certain paragraphs of the Witness Statement which, plainly, take issue with the defendant's Counterclaim. This is in particular the case with paragraphs 23-26. It suffices for present purposes to refer to one example. Paragraph 25 of the Witness Statement addresses paragraph 30 of the Counterclaim. It states:

> "The payment of £19,405.56 through JMW Solicitors was in respect of the claimant's services on the Cofresh dispute. The payment of these fees was correctly made from the payment of £40,000 as part of the settlement by Cofresh to JMW Solicitors. An invoice for the fees particularising the work was sent to JMW Solicitors and this was accounted to the defendant by JMW Solicitors. Therefore, the payment of £19,405.56 was nothing to do with the other matters that the claimant was handling on behalf of the defendant."

9. As such, although there was no formal pleading to the Counterclaim, there was a Witness Statement which put the Counterclaim squarely in issue. That statement was signed on behalf of the appellant by the director, Mr Joshi, with a statement of truth. It is relevant also to observe that paragraph 23 of the Counterclaim simply cross-refers to and "repeats" paragraphs 1-22 of the Defence and in general terms the Witness Statement of Mr Joshi responds to

those paragraphs.

10. It is thus clear that the Counterclaimant (i.e. the respondent to the present proceedings) considered that the issue had in fact been joined. Indeed, Mrs Solanki on behalf of the Counterclaimant served a Witness Statement dated 8 April 2015 in which she expressly addresses the appellant's Defence to the Counterclaim in paragraphs 64 and following.

11. Nonetheless, on 23 April 2015, the defendants sought judgment in respect of the counterclaim upon the basis that there had been no formal Defence served, notwithstanding the witness statements to which I have made reference. On 20 August 2015, the appellant sought relief from sanctions and/or an extension of time to serve a Reply and Defence to Counterclaim. The matter came before His Honour Judge Wulwik on 21 August 2015. He dismissed the application made by the appellant for relief from sanctions and refused the requested extension of time. He granted judgment to the defendant upon its Counterclaim.

C. THE JUDGMENT BELOW

12. In his judgment, the learned judge set out the procedural history. In paragraph 7, the judge stated as follows:

> "It seems that the absence of a reply and defence to counterclaim was not noticed or appreciated until the defendant issued its application for judgment in default dated 23 April 2015, it appearing to be the case that the parties had proceeded on the basis that the defendant's counterclaim was in fact defended. As I say, the claimant has now issued an application for an extension of time and/or for relief from sanctions to permit it to file and serve its reply and defence to counterclaim. I note from the bundle prepared for this hearing that a reply and defence to

> counterclaim has been prepared, being dated 19 August 2015."

13. In paragraph 8 of his judgment the judge set out the well-known three-part test articulated in Denton & Ors v White [2014] EWCA Civ 906 ("Denton") governing the grant or refusal of relief from sanctions. It is not necessary for me to set out the three parts of the test.

14. In relation to the first stage of the Denton test, the judge stated this at paragraph 9:

> "Looking at the first stage of the Denton test, namely whether the breach is serious or significant, it appears to me that it cannot sensibly be argued that the failure to file and serve a defence to counterclaim in accordance with the rules is anything other than serious or significant, albeit that it may have had a minimal effect on the proceedings, it appearing to me that this is probably more relevant to consider under the third stage of the Denton test when taking into account all the circumstances of the case."

15. In relation to the second stage of the Denton test the judge stated the following at paragraphs 11 and 12:

> "11. So far as the reason for the breach is concerned, it is said on behalf of the claimant that until recently the claimant was, in effect, acting as a litigant in person. It is said also that none of the orders that were made by the court in this matter referred to the necessity to file a reply and defence to counterclaim. It is therefore suggested that in the circumstances that the failure to file a defence to counterclaim might be more readily understandable on the facts of this case. However, I have been referred by the defendant to the decision of the Court of Appeal in the case of Hysaj v SSHD [2014] EWCA Civ 1633 where it was made clear by Moore-Bick LJ at paras 44-45 that the mere fact of a party being unrepresented does not provide a good reason for not adhering to the rules. He went on to say in that case that, if proceedings are not to become a free-for-all, the court must insist on litigants of all kinds following the rules and, in his view, being a litigant in person with no

> previous experience of legal proceedings, was not a good reason for failing to comply with the rules.
>
> 12. The defendant in this case goes a little further and says that the claimant was, in fact, clearly aware of the time limit set down in the Civil Procedure Rules to submit a defence, given that on 1 December 2014, the claimant unsuccessfully applied for judgment in default of service of an amended defence by the defendant. It seems to me in the light of Hysaj that I am unable to conclude other than there is no good reason in this case for failing to file a defence to counterclaim in accordance with the rules."

16. In relation to the third stage of the Denton test, the judge could identify no good reason, having regard to all the circumstances, why relief should be granted. In this connection, the judge made the following points. First, the explanation given by the appellant for being late in applying for relief was inadequate. The appellant submitted that a delay in service of the application for summary judgment on the Counterclaim by the defendant was the cause. However, the judge observed that this did not explain or justify the delay occurring after receipt of that application.

17. Secondly, the judge rejected the explanation that the appellant acted in person at the relevant time. The judge cited the Court of Appeal in Hysaj where it was made clear by the court, as I have already observed, that a litigant in person will not necessarily or inevitably be treated in any other way than would a professional litigant. In any event, in the present case, the appellant's business is in the provision of legal and intellectual property advice and directors of the firm include experienced trademark attorneys who have hitherto worked in-house in major international law firms.

18. Thirdly, the judge rejected the attempt by the appellant to raise the merits of its

defence to the counterclaim. The judge cited the recent judgment of the Supreme Court in HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Limited [2014] UKSC 64 ("Apex Global Management"), and in particular the observations of Lord Neuberger that generally the merits were irrelevant.

19. At paragraph 19 of his judgment, the judge below stated as follows:

> "I have been referred in particular by the defendant to paragraph 30 of the judgment [in Apex Global Management] where Lord Neuberger said this:
>
> > 'Further, it would be thoroughly undesirable if, every time the court was considering the imposition or enforcement of a sanction, it could be faced with the exercise of assessing the strength of the parties' respective cases: it would lead to such applications costing much more and taking up much more court time than they already do. It would thus be inherently undesirable and contrary to the aim of the Woolf and Jackson reforms.'
>
> It seems to me that precisely those sentiments ought to apply in the present case."

D. ANALYSIS AND CONCLUSIONS

20. I turn now to my conclusions on the present facts.

(a) Appellant's submissions

21. Mr Wright, who appears for the appellant, submits that the judge erred in essentially the following two ways.

22. First, the judge failed to apply the correct test of seriousness under Denton limb

one, and in particular he failed to apply the materiality test as required by paragraph 26 of the Court of Appeal's judgment in Denton and he failed in any event to draw the correct inferences from his own conclusion that the effect of the breach upon the proceedings was minimal.

23. Secondly, it is submitted that the judge erred in excluding any consideration of the merits of the defence to counterclaim as required by CPR 13.3 and/or, as is required under the third Denton test.

(b) Analysis: The issue of materiality under Denton limb 1

24. It is right to record that, so far as it goes, the judge's analysis may be said to be unexceptional. I can detect no significant error in his rendition of the tests in Denton, Hysaj (cited in paragraph 15 above) or Apex. I am also un-persuaded that there was no delay or that the fact that the appellant was unrepresented is relevant. Where I part company from the judge is in his analysis of the seriousness of the breach and in the implications of his correct observation at paragraph 9 that the failure had minimal effect upon the proceedings. I also take issue with the judge in his black and white refusal to countenance any consideration of the merits under Denton limb three.

25. On the facts the position seems to be that, upon expiry of the time for service of the Defence to Counterclaim, the claimant served a Witness Statement which addressed squarely the issues arising in the Counterclaim. This was on 9 February 2015 and was only a week or so after expiry of the time for service of a Defence. It was therefore technically served a breach of the rules for no Defence to Counterclaim to have been served. However, as I have already

recorded, the parties proceeded *as if* a Defence *had* been served. This was because it is plain that the defendant was well aware of the appellant's answer to the allegations contained within the Counterclaim and had sought to rebut the answer in its own Witness Statement evidence. In a real and substantive sense issue was joined between the parties on both the Claim and the Counterclaim.

26. Viewed in this light, the violation upon which the judge entered summary judgment was a violation rooted in appearance only but not in substance. When the judge said that it exerted minimal effort upon the proceedings it would have been better to describe the effect as virtually non-existent. I have in this regard considered the observations of the judgment of the Master of the Rolls and of Vos LJ in Denton at paragraph 26 on the relevance of materiality. In that case the court stated as follows:

> "… we think it would be preferable if in future the focus of the enquiry at the first stage should not be on whether the breach has been trivial. Rather, it should be on whether the breach has been serious or significant. It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which 'neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation'. Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most useful measure of whether a breach has been serious or significant. But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example of such a breach is a failure to pay court fees. We therefore prefer simply to say that, in evaluating a breach, judges should assess its seriousness and significance. We recognise that the concepts of seriousness and significance are not hard-edged and that there are degrees of seriousness and significance, but we

> hope that, assisted by the guidance given in this decision and its application in individual cases over time, courts will deal with these applications in a consistent manner."

27. In my judgment, the Court of Appeal was, at least in some degree, endorsing a test of materiality as a useful guide in determining the seriousness and significance of a violation. Of course, the other side of the coin has to be acknowledged. Rules exist for good reason. Non-observance can create adverse ripple effects in the administration of the court service which litigants are rarely cognisant of. The High Court has repeatedly emphasised the real and practical importance of strict observance of procedural rules on a number of recent occasions: see, for example, Akciné Bendrové Bankas Snoras v Antonov & Yampolskaya [2015] EWHC 2136, paragraphs 20 and 21. However, whilst in no way under-playing the importance of observance of the rules in Denton, the Master of the Rolls and Vos LJ were, at the end of the day, anxious to emphasise that the CPR was not to be used as a tripwire (see paragraph 37). The Court of Appeal stated as follows at paragraph 38:

> "It seems that some judges are approaching applications for relief on the basis that, unless a default can be characterised as trivial or there is a good reason for it, they are bound to refuse relief. This is leading to decisions which are manifestly unjust and disproportionate. It is not the correct approach and is not mandated by what the court said in Mitchell: see in particular para 37. A more nuanced approach is required as we have explained."

28. The present case is one where, on analysis, the defendants have, in my view, used the rules as a tripwire. They knew or must have known full well what the Defence to the Counterclaim was and they acted upon this basis. At some point, the defendant identified a clever ruse and deployed it. With all due respect to the judge, he should have adopted the more nuanced approach advocated by the

Court of Appeal in Denton. Robustness is good but it sometimes needs tempering.

29. In many cases of relief against sanction, the consequence of refusing leave will be to deny a litigant a right to adduce certain evidence to a litigant or to pursue an appeal on the merits. In the present case, the consequence of refusal is at the most extreme end of the scale of consequences. Here default judgment is awarded on a Counterclaim. The Master of the Rolls in Denton in paragraph 38 reminded judges that ultimately proportionality and justice needed to be borne in mind. In my view, it was neither proportionate nor just to order default judgment in circumstances such as these. The judge should have held that the violation was wholly technical and exerted no impact at all upon the proceedings and caused no prejudice or harm to the Counterclaimant. He should then have drawn the inference from these findings of fact that the test for refusing relief in Denton limb 1 was not met. I therefore conclude in relation to Denton limb 1 that the judge erred.

(c) Analysis: The underlying merits under Denton limb 3

30. I have come to the conclusion that the judge erred without having had regard to the underlying merits of the Counterclaim. I now need to turn to this aspect of the case which forms the second part of the appellant's challenge.

31. The appellant submits that the merits are relevant. Attention is drawn to CPR 13.3 which concerns the setting aside of default judgments. In such circumstances merits may be relevant. It is recognised that at the time of the application for relief in the present case from sanctions, no default judgment had

at that point been ordered. However, since that was an integral part of the dispute before the judge, it is contended that both in principle and upon the basis of logic, the principles in CPR 13.3 should apply.

32. Mr Wright for the appellant submitted as follows. As a matter of principle it would be contrary to the overriding objective and to logic if the CPR 13.3 criteria did not apply. First, if this were not so, a party against whom judgment in default had already been entered would be in a better position than one against whom an application for judgment in default was pending. This, he submits, is illogical. Secondly, again if this were not so, whether or not CPR 13.3 was applicable would turn upon whether or not the court happened to have already entered judgment as an administrative exercise which could easily have happened in the present case. Again he submits this is arbitrary and illogical. Thirdly, in theory, a party would therefore be better off waiting until judgment was entered and then applying to set aside, rather than applying expeditiously before this happened, which would be contrary to the overriding objective of efficiently run litigation. Fourthly, a default judgment could be entered in circumstances where the criteria for setting aside judgment were met, which would be illogical.

33. Mr Wright accepted that in the ordinary application for relief from sanctions, the merits of the claim would be essentially irrelevant. However, he submitted that cases involving judgment in default were a special category with a separate and discrete rules, articulated in CPR 13 which explicitly mandated consideration of the merits and there was no basis for distinguishing between situations when judgment had in fact already been entered and those where an application for

judgment has been made but not yet determined.

34. As to the factual merits, the appellant submitted that it was plain that the Counterclaimant had agreed to the making of the payments in dispute. Email correspondence was referred to in order to support this proposition. It is thus said that there is, at the very least, a strongly arguable defence to the Counterclaim based upon documentary evidence.

35. For the defendant's part, it is submitted that as a matter of principle the combined effect of the Court of Appeal in Hysaj and the Supreme Court in Apex Global Management means that the merits are irrelevant. The rules for seeking relief from sanctions are different to those relating to the setting aside of default judgments and, whether for good or for ill, the present facts do not fall within the scope of CPR 13.3. A different regime applies and that must be enforced.

36. I turn now to my conclusions on this point. First, the starting point is that in relation to cases involving relief from sanctions, there is a strong *prima facie* reluctance on the part of the courts to allow the merits to be argued. This is clear from a growing body of authority from the Court of Appeal and Supreme Court. The position reflects sound policy considerations.

37. Secondly, that reluctance is not unshakeable. It reflects a policy which, whilst strong, may on occasion yield to other policy considerations. In Apex Global Management, for example, Lord Neuberger concluded that merits were "*generally*" irrelevant (see paragraph 29) and later in paragraph 30 that merits were irrelevant "*at least normally*". The Supreme Court gave as an example of

cases where merits might be relevant, a case where a party was able to refer to facts warranting summary judgment, i.e., very strong compelling cases on their merits.

38. Thirdly, it is undeniable that CPR 13.3 articulates a policy pursuant to which judgment should not be ordered against a litigant without proper regard being paid to the merits. Mr Wright argued that CPR 13.3 applied *sensu stricto* to the facts of this case. On its strict wording it would appear that CPR 13.3 would not apply since it arises only after judgment has been entered. However, I do accept the submission that it would be illogical to address the merits in order to set aside a default judgment, but not to defeat the default judgment being entered in the first place. Were that to be so it would create perverse incentive to litigants to delay applying to the court for relief or an extension prior to judgment but, instead, to sit on their hands and apply only after judgment had been entered.

39. For the defendant it was argued that this was not a real problem and that the way round this was, first, for the appellant to seek relief from sanctions and an extension of time, but if and when that failed (in circumstances where the litigant was forbidden from arguing the merits) to then return to court and argue that the judgment could now be set aside upon the basis of the merits pursuant to CPR 13.3. There is, in my view, a Dickensian logic about this contention which runs counter to the overarching principle of efficiency and cost saving which underpins the CPR. Yet this approach was in fact implicitly endorsed by His Honour Judge Hand QC on 18 September 2015 who held in the present case that such an application could not in fact be made on the basis that it was an abuse of process to do so, in circumstances where the prior order was in the course of

being appealed. The implicit logic behind this order was that such a second application could be made in circumstances where there was no such appeal.

40. In my judgment, the logical way around this conundrum is to permit the merits to be addressed as if there was an application under CPR 13.3. The analysis would occur under the 3rd limb of the Denton test. It might, or might not, in a given case be decisive. It would simply be one of the overall circumstances for the court to take into account. The court would, no doubt, be astute to ensure that any parade of the evidence relating to the merits did not get out of hand.

41. Fourthly, this conclusion seems to me to be consistent with the thrust of such limited case law that does exist on the point. This includes the judgment in Albesher v Ryan [2015] EWHC 3058. It also includes the judgment of Neuberger J (as he then was) in Coll v Tattum, 21 November 2001. On page 6 of the transcript of that judgment, Neuberger J stated as follows:

> "In my view, where there has been no application to seek judgment in default of defence or judgment in default of acknowledgement of service, the claimant can frequently be expected to accept a late acknowledgement of service or a late defence. However, in my judgment, the claimant and indeed the court, would be entitled to insist in an appropriate case on the defendant seeking an extension of time. The rules are there to be observed, and it seems to me that the general thrust of the rules is such that, where there is no defence or acknowledgement of service or where it is served late, the claimant should have the right to apply for judgment in default without the defendant automatically trumping such an application by the service of a late defence. Having said that, I think that if an application for judgment in default were made after a late acknowledgement of service or after a late defence, it may very well be dismissed with costs, even though technically justified."

42. In Lexi Holdings v Shahid Luqman & Ors [2007] EWHC 2497 Briggs J (as he

then was) at paragraphs 7 and 9 expressed similar views.

43. None of these authorities expressly address CPR 13.3, but they evince a judicial policy which underscores the desirability of courts hearing applications for default judgment reviewing the merits at the same time. In my view, these support my earlier conclusion that, where an application for relief is against a sanction of a proposed default judgment, the leeway recognised in Apex Global Management by Lord Neuberger for courts to consider the merits applies. As I have said, it will be for the court in each case to control the exercise and to consider how the merits are to be adjudicated upon.

44. Fifthly, and without rehearsing the evidence, applying these principles to the present case, I am satisfied that there is solid *prima facie* evidence that the appellant has a defence to the Counterclaim.

45. In these circumstances, it is my view that the judge erred in concluding that the merits were wholly irrelevant. He should have held that they were relevant, and he should then have gone on to address the strength of the Defence and taken it into account in the overall circumstances.

E. CONCLUSION

46. For all of the reasons that I have given I consider that the judge erred in principle and I exercise my discretion to allow the appeal and grant relief from sanctions.