Relief from sanctions: An overview and case law update

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1. In light of the current COVID-19 pandemic, applications for relief from sanctions may become more frequent as deadlines are missed and court orders are not complied with. In three recent cases, the High Court has considered the applicable principles and provided guidance. Now, therefore, seems the ideal time to revisit the applicable principles.

Overview

2. With reference to first principles, the Court of Appeal's guidance, in the case of *Denton v TH White [2014*] EWCA Civ 906, provides a three-stage approach to addressing applications for relief from sanctions:
   a) The court should identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order;
   b) The court should consider why the default occurred; and
   c) The court should evaluate all of the circumstances of the case so as to deal with the case justly.

a) The seriousness and significance of any failure to comply

3. It is largely a matter of judicial discretion as to whether a breach is serious or significant. It should, however, be noted that a breach may well be considered serious even if it does not affect the efficient progress of litigation. For example, the failure to pay Court fees was specifically mentioned as a serious breach (*Denton v TH White [2014]*, paragraph 26). Breaches that cause a trial date to be vacated are also likely to be considered serious and significant (*Denton v TH White [2014]*, paragraph 54).

4. The failure to comply with an unless is order is indicative of a serious and significant breach, but the court should not focus solely upon the breach of the unless order. The court should also consider the underlying breach (*British Gas Trading Ltd v Oak Cash and Carry Ltd [2016]* EWCA Civ 153).

5. Where relief from sanctions applications are made in relation to multiple sanctions, with regard to the Denton criteria, each sanction should be considered separately at the first stage and cumulatively at the third stage (*McTear v Englehard [2016]* EWCA Civ 487).

6. The Court in *Denton v TH White [2014],* suggested the following approach in relation to the first stage of the test:

"If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater important." (paragraph 28).

b) Why the default occurred

7. Should the court be satisfied that a serious and significant breach has occurred, it should proceed to consider the reasons why. The Court of Appeal in *Denton v TH White [2014]* considered it to be "inappropriate to produce an encyclopaedia of good and bad reasons for a failure to comply with rules, practice directions or court orders" (paragraph 30).

8. The Court of Appeal in the case of *Andrew Mitchell MP v News Group Newspapers Limited [2013]* EWCA Civ 1537 listed a number of scenarios that may be considered good reasons for a serious and significant breach:
   a) If a party, or his solicitor, suffered from a debilitating illness or was involved in an accident (paragraph 41);
   b) If "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" (paragraph 41); and
   c) That "good reasons are likely to arise from circumstances outside the control of the party in default" (paragraph 43).

9. The Court of Appeal in *Mitchell v News Group [2013]* was clear that merely "overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason" (paragraph 41). The judgment of *Denton v TH White [2014]* is clear that these should be considered no more than examples (paragraph 30).

c) All the circumstances of the case so as to deal with the case justly

10. Civil Procedure Rule 3.9(1) specifically details two factors that the court must consider when addressing all of the circumstances of the case:

"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."

11. The Court of Appeal in *Denton v TH White [2014]* was of the view that the draftsmen specifically outlined these two factors in the rule as they are of particular importance (paragraph 32). The court also listed a number of additional factors to be considered:
   a) Whether the sanction imposed is proportionate to the breach;
   b) Whether an application for relief from sanctions was made promptly; and
   c) Other past or current breaches of the rules, practice directions or court orders.

12. The third stage of the court's assessment should not be viewed as a 'get out of jail free card', with the court being clear that "the old lax culture of non-compliance is no longer tolerated" (paragraph 34). A non-defaulting party should not, however, unreasonably and opportunistically oppose a relief from sanctions application. The court will penalise such opportunism, with the Court of Appeal specifically stating that indemnity costs orders may

be made in such circumstances (paragraph 43). Such an approach was taken in the case of *Viridor Waste Management Ltd v Veolia ES Ltd [2015]* EWHC 2321 (Comm).

Procedural aspects

13. An application for relief from sanctions must be supported by evidence (Civil Procedure Rule 3.9(2)). Applications will normally be made under Pt23, with a supporting witness statement.

14. It should be noted that the Court can consider relief from sanctions of its own motion (*Cutler v Barnet LBC [2014]* EWHC 4445 (QB)).

Case updates

15. The High Court has recently considered applications for relief from sanctions in three separate cases:
    a) *Heathfield International LLC v Axiom Stone (London) Ltd [2020]* EWHC 1075 (Ch);
    b) *Depp II v News Group Newspapers Ltd & Anor [2020]* EWHC 1237 (QB); and
    c) *Razaq v Zafar [2020]* EWHC 1236 (QB).

a) *Heathfield International LLC v Axiom Stone (London) Ltd [2020]* EWHC 1075 (Ch)

16. This case concerns a party, the Second Defendant ("D2"), who failed to provide a costs budget within time. As provided by Civil Procedure Rule 3.14, D2 was therefore treated as if they had filed a costs budget for only the applicable Court fee. An application was therefore made for relief from sanctions.

17. Evidence was provided contending that the breach was neither serious nor significant, as the failure to provide a costs budget had no impact upon the litigation nor inconvenienced the Claimant. The explanation as to why the default had occurred was that the fee earner had diarised the incorrect date in their calendar. In relation to the final stage of the *Denton v TH White [2014]* guidance, it was submitted that:
    a) Ensuring compliance should not take priority over the interests of justice;
    b) That this was a complex, high value case that required a great deal of time and cost to manage;
    c) That litigation had otherwise been conducted efficiently and at a proportionate cost; and
    d) Somewhat contrary, that the breach had no effect upon the conduct of litigation (paragraph 22).

18. It should be noted that there were also a number of procedural difficulties. The application was unsealed and supported by a witness statement that contained a non-CPR compliant statement of truth. The application was made shortly before a CCMC such that other parties only had one day to consider their response (paragraph 22).

19. HHJ Simon Barker QC did consider the failure to provide a timely costs budget as a serious and significant breach. In his judgment, it placed an unreasonable burden upon the

Claimant in preparing for the CCMC, along with the Court. He commented that "the time required to be devoted to this application is time diverting judicial attention from other litigation and thereby affecting other court users" (paragraph 30).

20. The explanation provided that the cost budgeting exercise had been incorrectly diarised was not considered to be a good reason for the non-compliance. The Judge commented that the explanation advanced was brief, vague and "unquestionably less than complete" (paragraph 31).

21. The Judge then proceeded to consider all of the circumstances of the case. Particular consideration was given to the relatively high value of the claim for two reasons:
    a) "First, this is the sort of litigation where each party's costs may easily become disproportionate to the sum in issue and effective conduct of the litigation is of paramount importance"; and
    b) "Secondly, it follows that cost control and costs budgeting are all the more important" (paragraph 35).

22. The number of procedural errors were considered cumulatively, with comment that it "demonstrates an abysmal approach on D2's part to conducting this litigation efficiently including, but also going well beyond, costs budgeting" (paragraph 37).

23. The Judge went on to consider the overriding objective and the effect of not obtaining relief upon D2. In his view, obtaining "full relief" would "fly in the face of the overriding objective and the particular criteria considered on relief applications" (paragraph 45). Consideration was also given to "a form of hybrid relief" in which relief may be granted in relation to costs incurred after the pre-trial review (so as to reflect the gravity of D2's conduct) on the condition that all budgets were filed and served in less than five working days. Such an approach was ultimately rejected:

"… because of the additional burden it will place on C and the court, and the knock-on effect on other court users, but mainly because I consider both the attitude and the conduct apparent from the evidence and chronology in this case to be outstandingly bad" (paragraph 47).

24. As such, the application for relief from sanctions was dismissed and D2 was treated as if a costs budget had only been filed for the applicable court fee.

25. The approach of the High Court in this case highlights a number of distinct points as to how a relief from sanctions application should be formulated. It is clear that evidence in support of such an application must be detailed and meaningfully engage in the lines of enquiry prescribed by the case of *Denton v TH White [2014]*; an explanation as to why a default has occurred cannot be brief and vague. If one applies this reasoning to the current pandemic, it seems unlikely that applications will be successful if they rely upon the mere mention of COVID-19 as a good reason for non-compliance with a rule, practice direction or order. The Court is likely to want meaningful evidence as to what effect this has had upon a party's ability to comply.

26. This case also highlights the broad discretion that is afforded to the Court when considering all the circumstances of the case. Procedural errors are unlikely to assist in making a successful application. HHJ Simon Barker QC's discussion on "a form of hybrid relief" shows that while creative solutions maybe available in the event that relief from sanctions are not granted in their entirety, such an approach is likely to come with practical difficulties.

b) *Depp II v News Group Newspapers Ltd & Anor [2020]* EWHC 1237 (QB)

27. This application for relief from sanctions arises from Johnny Depp's libel case against News Group Newspapers Ltd, which is due to be heard in July 2020. The Claimant served two witness statements one day later than had been directed by the Court. A relief from sanctions application was therefore made.

28. On behalf of the Claimant, it was conceded that any breach of a court direction is somewhat serious, however the delay in this case was minor. The trial in this case had already been adjourned by a significant period of time and, as such, there was an eight-week period between the late service of the statements and the start date of the trial. It was therefore submitted that there was more than ample time for additional disclosure that arose from the witness statements and the Defendant could provide any evidence in response, should they wish to do so (paragraph 7).

29. Mr Justice Nicol was in agreement that "in view of the adjournment of the trial, future hearing dates are not imperilled by the breach and the conduct of the litigation has not otherwise been disrupted (or not to any serious extent)" (paragraph 8). The court "must consider the application for relief from sanctions against the background of the circumstances as they exist now, rather than as they existed at the date of the breach" (paragraph 10). Mr Justice Nicol was therefore of the view that this breach was neither serious nor significant.

30. Paragraph 3.9.4 of the White Book was quoted:

"If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stage. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater importance."

31. In light of the above, the discussion as to the second and third stages raised by *Denton v TH White [2014]* was relatively brief and the relief from sanctions application was successful.

32. The approach of the High Court emphasises how there is often a degree of overlap in considering all the circumstances of a case and whether a breach is serious and significant. Although the breach of a court order is always serious, if it has no material effect upon the conduct of litigation, the court may be of the view that the first stage raised by *Denton v TH White [2014]* is not met. Should a court deadline be missed by a relatively short period of time, an application for relief from sanctions is more likely to succeed.

c) *Razaq v Zafar [2020]* EWHC 1236 (QB)

33. This application for relief from sanctions concerns the later service of the Claimant's list of documents by some six weeks, along with the late service of witness statements by some three weeks. The explanation advanced as to the delay was that the Solicitors Regulation Authority had taken the Claimant's file for auditing. Upon its return, the Claimant was abroad and, following a further short delay, the application for relief from sanctions was made. At first instance, the application for relief from sanctions was refused and then subsequently appealed to the High Court.

34. Mrs Justice Yip was of the view that the Judge of instance had erred in the exercise of his discretion as he:
    a) "Had misdirected himself on the assessment of seriousness at the first stage";
    b) "Made material errors of fact in the factors he put into the balance against granting relief"; and
    c) "Did not stand back and look at the consequences of the breach or consider the impact of the sanction" (paragraph 38).

35. The delay in serving witness statements was a significant and serious breach. Its effect was that the order of sequential exchange directed by the court had been reversed; the Claimant had the opportunity to read the Defendant's evidence before serving his own and the Defendant lost the opportunity to respond to his evidence (paragraph 39).

36. It was noted that despite the non-compliance, the list of documents and evidence had been served six weeks prior to when the trial was due to commence. In the judgment of Mrs Justice Yip "no procedural steps remained outstanding and there was no reason to think there would be any further delay" (paragraph 40). By the time of hearing the relief from sanctions application, the Defendant had exchanged further witness statements. The non-compliance therefore did not jeopardise the trial date or cause any increase in costs, excluding those that had arisen from the relief from sanctions application. Mrs Justice Yip therefore concluded that "that the breach was not insignificant, but it was certainly not at the upper end of the scale of seriousness" (paragraph 41).

37. The High Court agreed with the court of first instance that there was no good reason for the breach; "it was fair to describe the excuses put forward by the Claimant's solicitor as 'poor'. It cannot be said that there was a good reason for the default, albeit it was not wholly unexplained" (paragraph 42).

38. Under the third stage set out in the *Denton v TH White [2014]*, Mrs Justice Yip considered the following:
    a) The breach did not affect the efficient conduct of this or any other litigation;
    b) It had not significantly increased costs;
    c) Granting relief would not result in further delay;
    d) Granting relief would not take up any further time and impact upon other court users;
    e) There was no history of non-compliance;
    f) Litigation had been conducted appropriately up until this breach; and
    g) Upon noting the breach, an application for relief from sanctions had been made relatively promptly.

39. This had to be weighed against that which appears in Civil Procedure Rule 3.9(1)(b); it "was right to say that litigants and their solicitors cannot ignore directions and then expect the court to indulge them" (paragraph 44).

40. The effect of not granting relief was also considered. Mrs Justice Yip commented that:

"The Claimant may still be able to have a trial, but he will be at a very significant disadvantage. In my view, this claim ought to be tried with the benefit of all the available evidence so that the Court can reach a fair decision, particularly as a finding of dishonesty on one side or the other is likely to be made. Of course, this is not a decisive factor but it is a factor to be weighed in the balance along with all the other circumstances." (paragraph 46)

41. Considering all of these factors, it was determined that the judge of first instance had been wrong in refusing to grant relief and the appeal succeeded.

42. Although by no means should it be treated as an exhaustive list, the judgment of Mrs Justice Yip provides a comprehensive list of factors that the Court may consider under the third stage of the guidance given by *Denton v TH White [2014]*. This is likely to provide a useful framework to consider when either preparing, or responding to, a relief from sanctions application. It should be noted that in this case particular weight appears to have been given to the fact that granting relief had no material effect upon the timetable of the case and conducting the litigation efficiently.

Conclusions

43. As a consequence of the current COVID-19 pandemic, it is likely that there will be an increase in incidence of non-compliance with rules, practice directions and court order. Tasks as simple as the preparation of witness statements may prove lengthy in a world of social distancing. The Court of Appeal in *Denton v TH White [2014]* has provided some clarity as to the approach to be taken, but applications remain largely a matter for judicial discretion. The cases listed above provide some useful guidance as to the factors that the courts will consider and the weight that is assigned to them. The common thread appears to be that prompt, reasoned, procedurally compliant applications, which meaningfully engage in the matters raised in *Denton v TH White [2014]*, are more likely to succeed than those that do not.

Harry Marriott

Law is correct as at 21st May 2020

Whilst every effort has been taken to ensure these notes are as correct, they are intended to give a general overview of the law. Delegates are respectfully reminded that they are not intended to be a substitute for specific legal advice. No liability is accepted for an error or omission contained herein.