Neutral Citation Number: **[2021] EWHC 3236 (QB)**

Case No: QB-2018-003709

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before :

Deputy Master Toogood

- -

Between :

PHILIP EDWARD DAY **Claimant**

- and –

WOMBLE BOND DICKINSON (UK) LLP **Defendant**

- -
- -

Roger Stewart QC (instructed by **Elliot Mather LLP**) for the **Claimant**
Ben Hubble QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendant**

Hearing date: 9 November 2021

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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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DEPUTY MASTER TOOGOOD

Deputy Master Toogood :

1. The history leading to this application is protracted. In November 2010 the Claimant caused the unauthorised cutting down of 43 trees, together with the construction of a vehicle track, in the Gelt Woods near Carlisle, a Site of Special Scientific Interest. In May 2012 he engaged the Defendant to represent him in relation to a criminal prosecution brought by Natural England alleging three contraventions of the Wildlife and Countryside Act 1981. On 18 July 2012 the Claimant attended the Magistrates Court where he pleaded not guilty to all three charges and elected trial in the Crown Court. A preliminary issue was tried in the Crown Court in April 2013, following which the Claimant pleaded guilty but on the basis that he had no relevant knowledge of the matters alleged. Following a Newton hearing in July 2013, HHJ Hughes found that the Claimant's culpability was *"very considerable"* and fined him £450,000 with an order to pay £457,317.74 in costs. The Claimant appealed against both conviction and sentence but both appeals were rejected by the Court of Appeal in a judgment dated 18 December 2014. A letter from the Claimant's solicitors dated 22 April 2020 indicates that the Claimant incurred costs in relation to the European Court of Justice but this is not included in the Claimant's chronology and I have no further information in this regard.

2. On 6 July 2018, at the very end of the six year limitation period, the Claimant commenced this action against his former solicitors. A stay was then agreed because the Defendant had not had prior notification of the claim in accordance with the relevant pre-action protocol. In December 2018, the Defendant filed a Defence and issued an application to strike out the claim and/or for summary judgment on the grounds that the claim was barred by illegality and was an abuse of process as an attack on the criminal proceedings. That application was heard by HHJ Deborah Taylor on 2 April 2019. On 29 April 2019 she struck out the entirety of the Claimant's claim and entered judgment for the Defendant. Subsequently Males LJ granted the Claimant permission to appeal on limited grounds, one of which was that the solicitors gave negligent advice as to venue. A hearing took place in the Court of Appeal on 4 March 2020 and in a judgment dated 26 March 2020 Coulson LJ, with whom Floyd and McCombe LJJ agreed, permitted the appeal only to the extent that it was arguable that the Claimant incurred additional legal costs himself as a result of allegedly negligent advice regarding choice of venue, on the basis that this did not involve an attack on the Claimant's conviction, the level of the fine or the costs he had been ordered to pay to Natural England.

3. An order was subsequently agreed between the parties and made by McCombe LJ on 8 April 2020 which stated:

   "1. The appeal in respect of the additional legal costs said to have been incurred by the Appellant as a result of the advice given by the Respondent as to choice of venue (as defined in paragraph 3 (iii) b) of the Judgment) is allowed.

   2. The appeal is otherwise dismissed.

3. The Appellant shall serve a further draft Amended Particulars of Claim, limiting the ambit of the claim so as to reflect the terms of the Judgment herein, by 4pm on 9 April 2020.

4. By 4pm on 23 April 2020, the Respondent shall inform the Appellant in writing that either:

a. The Respondent consents to the draft Amended Particulars of Claim in which case:

i. There shall be permission for such draft Amended Particulars of Claim and the Appellant shall file and serve the Amended Particulars of Claim by 4pm on 30 April 2020; and

ii. The Respondent shall serve an Amended Defence by 4pm on 14 May 2020; or

b. The Respondent does not consent to the draft Amended Particulars of Claim in which case the Applicant shall issue an application to amend the Particulars of Claim by 4pm on 7 May 2020 to be heard by a Master of the Queen's Bench Division."

4. On 9 April 2020 the Claimant provided draft Particulars of Claim to the Defendant in accordance with the order. By letter of 17 April 2020 the Defendant requested revisions to the draft Particulars of Claim, removing some parts and seeking details of the costs claimed. The Claimant responded on 22 April 2020, declining to make the revisions requested and stating that the increased costs of the Defence were £708,827.99 which included the appeals to the Court of Appeal and ECJ. On 23 April 2020, the Defendant notified the Claimant that it did not consent to the draft Particulars of Claim and concluded the letter by stating *"our client will seek to recover from your client the costs it incurs in dealing with the application your client must now make, in accordance with the Court of Appeal's Order dated 8 April 2020"*.

5. No such application was made. On 22 April 2020 the Claimant did apply to the Supreme Court for permission to appeal the decision of the Court of Appeal, which was refused by the Supreme Court on 6 August 2020.

6. On 3 September 2020 the Defendant's solicitors wrote to the Claimant's solicitors, noting that no application had been made to amend the Particulars of Claim and therefore, following the decision of the Supreme Court, the action was at an end.

7. I have not seen any direct response to that letter but by application dated 4 September 2020, supported by a witness statement from Mr Lee Edwards dated 7 September 2020, the Claimant applied for relief from the sanctions for failing to comply with the order and for an extension of time to make the application to amend. That application was made to the Court of Appeal and on 9 October 2020 McCombe LJ considered the application on the papers and ordered that it be considered by the High Court. In giving reasons for his decision, he stated:

"In my judgment, there are matters arising upon the application which can more readily explored upon an oral application inter partes before the Master than on a paper application in this court. The Master will be able to question the parties upon a number of matters and indeed he/she may be more knowledgeable about the realities of conduct court business in the QBD during the pandemic, including the following: (a) whether (as asserted in the applicant's witness statement) the application could not have been issued at all during late April/May, (b) what steps (if any) were taken by the applicant to try to issue the application, (c) how there was ability to pursue the application to the Supreme Court, notwithstanding the problems within the applicant's solicitors' firm, but not the short step of issuing the application in the High Court. It seems to me to be more expedient generally for both relief from sanctions and the substantive application to amend to be before the court at the same time. While not tying the hands of the Master, I would assume that the relevant delay then for consideration would be up to the date on which the present application was issued in this court."

8. Between November 2020 and March 2021 the Claimant made various attempts by email and telephone to chase the listing of the application. Eventually the Claimant's solicitors were given the correct advice to submit the application by CE File and did so successfully on 30 March 2021. On 6 April 2021 the Claimant's solicitor informed the Court's Delivery Manager for Masters Listing, Mr Heavey, that he would revert with dates to avoid by the end of the week, but I am not aware of any further communication until 11 May 2021, a month later, when the Claimant's solicitor indicated that his counsel was unavailable until August 2021. The Claimant's solicitor filed a PRA form (as required by the Queen's Bench Guide 2021 before a hearing can be listed) on 2 July 2021 and a Notice of Hearing was sent to the parties on 6 September 2021, listing the matter before me on 9 November 2021.

9. On 9 November 2021, I heard oral submissions from Mr Roger Stewart QC on behalf of the Claimant and Mr Ben Hubble QC on behalf of the Defendant. I also read three witness statements from Mr Lee Edwards on behalf of the Claimant dated 7 September 2020, 27 October 2020 and 15 June 2021 and three witness statements from Mr Edward Foss on behalf of the Defendant dated 8 October 2020, 11 December 2020 and 8 June 2021, together with the exhibits to these statements.

The Applicable Principles

10. Although there is no explicit sanction for failing to comply with the order dated 8 April 2020, the parties agree that the application is correctly framed as a relief from sanction application. The case had already been struck out in its entirety by HHJ Deborah Taylor, the application to extend time for making the application to amend is made out of time (see paragraph 3.9.15 of the White Book 2021), the case is unable to proceed unless the Particulars of Claim are amended and in any event the court may strike out a statement of case where there has been a failure to comply with a court order pursuant to CPR 3.4(2)(c).

11. The ***Denton/Mitchell*** principles are well-known and are not in dispute between the parties. The court must decide:

    i) Whether the failure to comply with the court order is serious and/or significant;

    ii) Whether there is a good reason for the failure;

    iii) Whether, on consideration of all the circumstances of the case, it is just to grant relief from sanction, bearing in mind the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders.

12. In addition to the cases of ***Mitchell v News Group Newspapers Ltd*** [2014] 1 WLR 795 CA and ***Denton v TH White Ltd and another*** [2014] 1 WLR 3926 CA, the parties also drew my attention to ***Stanley v Tower Hamlets*** [2020] EWHC 1622 QB and ***Boxwood Leisure Ltd v Gleeson Constructions Services Ltd*** [2021] EHC 947 (TCC). The parties also made additional submissions in writing when I drew their attention to the Court of Appeal decision of ***Diriye v Bojaj*** [2020] EWCA Civ 1400. I will consider these cases further below to the extent that they are relevant to the circumstances of this case.

Applying the principles

13. The order of McCombe LJ required the Claimant, in the absence of the Defendant's consent to the draft Amended Particulars of Claim, to issue an application to amend the Particulars of Claim by 4pm on 7 May 2020 to be heard by a Master of the Queen's Bench Division. No such application was made but on 7 September 2020 this application for relief from sanction was sent to the Court of Appeal. The period of delay is therefore four months at the minimum, but if this application is granted the Claimant still has to issue the application to amend the Particulars of Claim.

14. The first issue is whether the breach is serious and/or significant. Mr Lee, in his first and second witness statements, accepted that the breach was not trivial. However in ***Denton*** the Court of Appeal stated that the focus of the inquiry at the first stage should not be on whether the breach has been trivial but whether it has been serious or significant.

15. Mr Stewart QC, on behalf of the Claimant, accepted that the breach was serious. He *"quibbled"* (his word) the significance on the grounds that the application would not have been heard before the autumn in any event due to the application to the Supreme Court and the summer vacation. He submitted that, even if the breach was both serious and significant, the effect (or lack thereof) of the breach on the progress of the litigation was relevant when the Court considered all the circumstance of the case. I will therefore return to this point below.

16. The second issue I must consider is whether there was a good reason for the failure. In his first witness statement dated 7 September 2020, Mr Lee accepted that the failure to issue the application *"was an oversight of mine"*

(paragraph 15), but in his second witness statement dated 27 October 2020 he stated that the reason for missing the date to make the application was not an oversight but a mistake (paragraph 10). I do not think that this semantic argument assists the court, but I accept that the failure to issue the application was not intentional. Was there good reason for the failure? Mr Lee blames the Covid-19 pandemic. He states that members of his department were furloughed or made redundant so that remaining members of staff had to deal with increased workloads. I note that in paragraph 41 of ***Mitchell***, the Court of Appeal commented that pressure of work was rarely a good reason even where solicitors are facing serious financial pressures. Mr Stewart QC sought to distinguish these comments as managing a workload was not possible in the midst of a pandemic. I have some sympathy with this submission, but only up to a point. It was up to individual firms of solicitors whether to furlough their staff or make members of staff redundant. It was the responsibility of the firm to ensure that there were adequate remaining staff to perform the work that needed to be done. If the delay had been a matter of days or even a few weeks in the initial stages of the pandemic, I might have come to the view that the reorganisation and new ways of working required due to the pandemic constituted a reasonable excuse for missing a deadline. But I do not consider that the pandemic can excuse a four month delay. It is also of relevance that during this period the Claimant's solicitors were able to pursue the application for permission to appeal to the Supreme Court, indicating that they were able to continue working effectively despite the pandemic.

17. Mr Lee stated in his first witness statement that he contracted Covid-19 and was unwell in early April 2020. Whilst he has my sympathy, this cannot be a reasonable excuse for missing a deadline on 7 May 2020 and for the four subsequent months.

18. In paragraph 20 of his first witness statement, Mr Lee stated that he would have been unable to make the application due to the closure of the Courts. This was plainly wrong and in his second witness statement, he accepted that the application could have been filed electronically, although he does not accept that it would have been heard during the four month period of delay.

19. Mr Stewart QC relied on the judgment of Julian Knowles J in ***Stanley v London Borough of Tower Hamlets*** [2020] EWHC 1622, who found that the defendant in that case had a good reason for failing to respond to the service of a claim:

"That reason is the unprecedented national health emergency which was unfolding at precisely the time Mr McConville posted his documents to the Council. From 23 March 2020 onwards the country was grinding to a halt and every employer and business in the UK - and indeed across the world - was suddenly having to develop new ways of working and to find ways of coping with employees not being able to travel into work. There were myriad problems and challenges to be faced, including, for example, establishing technological links and putting in place new systems of working. Parents had to worry about children no longer being able to go to school and all the associated child care issues related to that. Emergency plans were having to

be implemented and rapid adjustments made across all sectors of the economy."

20. However there are important distinctions between these cases. In ***Stanley***, the documents were served on 25 March 2020 by post to an office which had been closed two days earlier in accordance with the national lockdown. No attempt had been made by the Claimant's solicitors to ascertain whether the office was open or how proceedings could best be served. The judgment does not give the date of the Defendant's application, but the hearing took place less than three months after the proceedings had been served and the indications are that the application to set aside default judgment had been made within a few weeks at most of judgment being entered.

21. Further, in ***Stanley*** the Defendant's solicitor proactively wrote to the Claimant's solicitors stating that she was instructed to accept service and thus discovered that judgment had been entered. In this case, no application was made until after the Defendant's solicitors' letter of 3 September 2020 which noted that the case was at an end. It is odd that this letter was not mentioned in Mr Lee's first witness statement, but in his second witness statement he acknowledged that the letter resulted in the mistake being recognised (paragraph 20). This was a month after the Supreme Court had rejected the application for permission to appeal and the Claimant had taken no steps at all to progress the case further in that time.

22. There is no doubt that, as Knowles J stated, the pandemic caused myriad problems and challenges to be faced. However I do not consider that it provides a good reason for failing to issue an electronic application for a four month period between 7 May 2020 and 7 September 2020 when the Claimant's solicitors had sufficient resources to pursue an application to the Supreme Court in the same case. I note that O'Farrell J in ***Boxwood Leisure Ltd v Gleeson Construction Services*** did not find that the pandemic excused a diary error or mistake which was partly caused by remote working. It remained the claimant's solicitors' responsibility to ensure that deadlines were met.

23. I therefore turn to the third stage of the ***Denton*** test and consider whether, even though there has been a serious breach of an order for which there is no good reason, relief from sanction should be granted in order to deal with the case justly.

24. I must exercise my discretion in accordance with the overriding objective of enabling the court to deal with cases justly and at proportionate cost, including the need for litigation to be conducted efficiently and enforcing compliance with rules, practice directions and orders (CPR Rules 1.1 and 3.9).

25. When considering all the circumstance of the case, I take into account the fact that the Claimant does not have a history of failing to comply with rules, practice directions or court orders. I have also considered carefully that the effect of refusing relief from sanction in this instance would be to preclude the Claimant from bringing the limited part of his original claim in respect of

which the Court of Appeal allowed his appeal from the decision of HHJ Deborah Taylor striking out his claim.

26. However I also consider that the application for relief from sanction was not made promptly. Four months passed during which the Claimant and his advisers made no attempt to pursue the limited claim remaining against the Defendant. For three of those months, the Claimant and his legal team were seeking permission to appeal to the Supreme Court and it thus appears that the Claimant had more interest in challenging the Court of Appeal's decision than in complying with its Order. A further month passed after the decision of the Supreme Court refusing permission to appeal during which the Claimant took no steps in relation to the action. As I have already noted, this application was only issued after the Defendant's solicitors wrote to the Claimant's solicitors on 3 September 2020.

27. I consider that the delay of four months is particularly significant when set in the context of this claim. Proceedings were not issued until the very end of the limitation period, six years after the allegedly negligent advice. Both at first instance and before the Court of Appeal, the Claimant attempted to pursue a claim to undermine his conviction and its consequences which Coulson LJ described as *"inappropriate, wasteful of resources, and likely to bring the law into disrepute"* (paragraph 78 of the judgment of the Court of Appeal). It was therefore nearly eight years after the alleged negligence that the Claimant was required to serve Amended Particulars of Claim limiting the ambit of the claim to reflect the Court of Appeal's judgment. It is unsurprising that there was a tight timetable for serving those Amended Particulars.

28. As noted above, Mr Stewart QC submitted that the delay had no effect on the progress of the litigation as the application to amend would not have been heard while the Claimant's application for permission to appeal to the Supreme Court was outstanding, nor would it have been listed during the vacation. It is not possible to know for certain when an application issued on or before 9 May 2020 would have been listed before a Master in the Queen's Bench Division, although the Masters were hearing applications remotely during this period. I find it hard to believe that such an application would not have been heard significantly earlier than November 2021 when this application has eventually been listed. Although I have considered the criticisms made by the Defendant's solicitors of the Claimant's solicitors' conduct in pursuing the listing of the application, it does appear that the Claimant's solicitors were making reasonable, if not heroic, efforts to obtain a date for the hearing. Time was taken transferring the application from the Court of Appeal to the QB Masters and there was further delay caused by the need for the application to be CE filed which had not been made clear to the Claimant's solicitors. However if an application had been made in compliance with the original order, it would have been made directly to the QB Masters and the majority of this delay would not have occurred.

29. In any event, the effect of the delay on the litigation is not a decisive factor. As Coulson LJ stated in ***Diriye v Bojaj and another*** [2020] EWCA Civ 1400:

"If a breach was required adversely to affect the court timetable before it could be called serious or significant, that would be uncomfortably and unacceptably close to the pre-CPR regime, where the defaulting party could get away with repeated breaches of court orders simply because the other side could not show that they had suffered specific prejudice as a result. That is not now the law".

30. In this passage the Court of Appeal was considering Stage 1 of ***Denton***, but I consider that this also has relevance when considering all the circumstances of the case. Mr Stewart QC conceded that the breach was serious and although the effect on the court timetable is one of the factors that may be considered by the court in relation to Stage 3, it is only one of many relevant factors.

31. In ***Diriye***, Coulson LJ also noted that:

"Parties to civil litigation need to make clear the important elements of their respective cases at an early stage. Gone are the days of ambush and keeping important points up your sleeve. The aim of much civil litigation is to bring about a cost-effective settlement. If a claimant delays in providing critical information, particularly where he has been ordered to provide it by way of an Unless Order, that delay adversely affects the other side's ability to take a view about the strength or weaknesses of the claim they face. The effect on the litigation in question should not be measured simply by whether or not the trial date can still be met; in properly run litigation, the aim must be to avoid having a trial date altogether".

32. The Defendant submits that the Amended Particulars of Claim do not particularise the loss which the Claimant seeks to recover. This criticism was first raised by the Defendant's solicitors in their letter of 17 April 2020 and repeated in their letter of 23 April 2020. Mr Stewart QC submits that it was never in the contemplation of the parties that the Claimant should provide *"clarity on precisely what sums it is that your client claims"*, as requested by the Defendant's solicitors, within the short time permitted to amend the Particulars of Claim. However the Defendant's solicitors also noted that the Defendant needed to know the case it has to answer in its Amended Defence. The Amended Particulars of Claim make no attempt to plead the basis on which the additional costs sought are to be calculated. The pleading does not set out the Claimant's case on causation, other than to state that the Claimant would have elected trial in the Magistrates Court *"regardless of his plea"*. Clearly the costs incurred would have been dependent in part on whether the Claimant would have pleaded guilty or not guilty and therefore it is difficult to see how the Defendant can respond if the Claimant does not set out a positive case as to his plea. The Amended Particulars of Claim also ignore Coulson LJ's observations in paragraphs 66 and 67 of the Court of Appeal's judgment that it was likely that the Magistrates would have sent the case to the Crown Court in any event as there is no averment that the case would have remained within the Magistrates Court.

33. The Claimant's solicitors' letter of 22 April 2020 does not assist matters. It indicates that the increased costs of the Defence are the entirety of the costs incurred in defending the case in the Magistrates and Crown Court and the

appeals to the Court of Appeal and ECJ (over £700,000). This appears to demonstrate a fundamental misunderstanding of the Court of Appeal's judgment. The letter promised *"an updated schedule in this regard in due course"*. No schedule has been disclosed and there has been no attempt to explain the basis on which the additional costs should be calculated. The Defendant remains in the dark about the case it has to meet, which precludes any attempt to resolve the matter despite nine and a half years having elapsed since the alleged negligence.

34. The decision whether to grant relief from sanction is a difficult one in this case. There are factors weighing in both sides of the scales. Considering all the circumstances of the case, I am not persuaded that I should exercise my discretion to grant the Claimant relief from sanction. The Claimant's case is therefore dismissed.