Neutral Citation Number: [2013] EWHC 872 (TCC)

Case No: HT-12-355

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16th April 2013

Before:

THE HONOURABLE MR. JUSTICE COULSON

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Between:

(1) KIM MURRAY	**Claimants**
(2) JEAN STOKES	
- and -	
NEIL DOWLMAN ARCHITECTURE LIMITED	**Defendant**

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- -

Mr Darren Naisbitt (of **Just Costs Solicitors**) for the **Claimant**
Mr Luke Wygas (instructed by **CMS Cameron McKenna**) for the **Defendant**

Hearing date: 27th March 2013

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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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THE HONOURABLE MR. JUSTICE COULSON

The Hon. Mr Justice Coulson:

1. Introduction

1. This application raises a potentially important question about the circumstances in which a costs budget, which has been approved by the court as part of a costs management order, can subsequently be revised or rectified. It comes at a critical time, as the CPR is radically amended to introduce costs budgeting and costs management for most types of civil litigation.

2. The background facts are straightforward. On 26 March 2012 the claimants' solicitors entered into a Conditional Fee Agreement ("CFA") with each of the claimants. These CFAs provided for a success fee. The following day, 27 March, the claimants obtained the benefit of After The Event ("ATE") insurance. The premium was to be the subject of staged payments. There is no dispute that the day after that, 28 March 2012, the claimants served Form N251, giving notice to the defendant of both the CFA and the ATE insurance.

3. Court proceedings began in the TCC. The TCC is one of the courts in which costs management, a part of the raft of reforms being introduced following the report of Sir Rupert Jackson on the costs of civil litigation, is being piloted. The relevant Practice Direction covering that pilot scheme is PD51G.

4. The relevant parts of the PD are as follows:

> "Filing of costs budgets
>
> 3.1 Save where the court otherwise orders, as part of its preparation of the further case management conference, at the same time as filing its Case Management Information Sheet, each party shall file and exchange its costs budget substantially in the form set out in Precedent HB annexed to this Practice Direction...
>
> Purpose of Costs Management
>
> 4.3 At any case management conference or pre-trial review, the court will have regard to any costs budgets filed pursuant to this Practice Direction and will decide whether or not it is appropriate to make a costs management order.
>
> 4.4 If the court decides to make a costs management order it will, after making any appropriate revisions, record its approval of a party's budget...
>
> Revision of Approved Budget
>
> 6. In a case where a costs management order has been made, at least seven days before any subsequent costs management hearing, case management conference or pre-trial review, and before trial, a party whose costs budget is no longer accurate must file and serve a budget revision showing what, if any,

> departures have occurred from that party's last approved budget, and the reasons for any increased budget. The court may approve or disapprove such departures from the previous budget...
>
> Effect on Subsequent Assessment of Costs
>
> 8. When assessing costs on a standard basis, the court-
>
> (1) will have regard to the receiving party's last approved budget; and
>
> (2) will not depart from such approved budget unless satisfied that there is good reason to do so."

5. Although that PD remains in force for all cases where costs management orders have been made thereunder, from 1 April 2013, the relevant costs management provisions are at CPR 3.12 – 3.18 and 3EPD.1. Although the wording of these rules is not always the same as PD51G, it is very similar, and allows the court to "approve, vary or disapprove [any proposed] revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed". Revisions will only be allowed where there is good reason to do so.

2. The Problem

6. Prior to the first CMC before Stuart-Smith J on 1 February 2013, the parties exchanged costs budgets. The claimants' costs budget was not in Form HB, an omission that was the subject of adverse comment by the judge. However, because the costs budget appeared to contain all the information required by Form HB, and could therefore be said to be "substantially" in the right form, the judge considered the budgets and made a costs management order. The claimants' costs budget was approved in the sum of £82,500.

7. On 8 March 2013, the defendant's solicitor pointed out to the claimants' solicitor that their approved costs budget did not say that it excluded a success fee and an ATE insurance premium. The letter went on:

> "Accordingly, our client intends to argue at trial/on an assessment that your client should not be permitted to recover any sum (to include success fee and ATE premium) over and above the costs budget approved by the court on 1 February 2013."

8. In consequence of that clear warning, on 14 March 2013, the claimant issued an application pursuant to CPR 3.9 for relief from sanctions. I heard that application on 27 March 2013. At the conclusion of the hearing, I resolved the substantive dispute in favour of the claimant and gave brief reasons for my conclusion. However, because of the other cases that had to be dealt with on that day – the last day of term - I said that I would provide detailed reasons in writing. Those reasons are set out in this Judgment.

3. Relief from Sanctions

9. In support of his application for relief from sanctions pursuant to CPR Rule 3.9, Mr Naisbitt relied on three cases: ***Supperstone v Hurst*** [2008] EWHC 735 (Ch); ***Manning and Beggs v Kings College Hospital NHS Trust*** [2011] EWHC 3054 (QB) and ***Scott v Duncan*** [2012] EWHC 1792 (QB). Those cases were all concerned with the situation where the existence of a CFA or ATE Insurance had not been properly disclosed to the paying party and issues about the recoverability of success fees and ATE premiums had arisen at the detailed assessment of costs. It is right to say that relief from sanctions was granted in each of those cases, although this was by reference to the old r.3.9, not its significantly modified successor (see paragraph 13 below).

10. In my judgment, the situation that has arisen here is not one to which r.3.9 obviously applies. There is no sanction as such from which the claimant requires relief. Detailed assessment is months, if not a year or more, away. Unlike the cases noted above, there has been no failure of notification: the defendant here has always known about the success fees and the ATE insurance premiums.

11. Instead, in the present case, what the claimant wants is akin to permission to revise the approved budget, or for it to be rectified, or at least clarified that the approved budget excludes the success fee and the ATE premiums, because these had been mistakenly omitted from the costs budget prepared for the CMC. In my view, as Mr Wygas argued, that makes this at least similar to an application to revise the approved budget pursuant to 51GPD.6.

4. Revision of an Approved Budget

12. In the course of his helpful and concise submissions, Mr Wygas noted that there was very little authority as to the matters that the court should take into account when considering revisions to an approved budget. The best guidance comes in the case of ***Silvia Henry v News Group Newspapers Ltd*** [2013] EWCA Civ 19. There, looking to the time when costs management orders will become commonplace after 1 April 2013, Moore-Bick LJ said at paragraph 28 of his judgment:

> "In those circumstances, although the court will still have the power to depart from the approved or agreed budget if it is satisfied that there is good reason to do so, and may for that purpose take into consideration all the circumstances of the case, I should expect it to place particular emphasis on the function of the budget as imposing a limit on recoverable costs. The primary function of the budget is to ensure that the costs incurred are not only reasonable but proportionate to what is at stake in the proceedings. If, as is the intention of the rule, budgets are approved by the court and revised at regular intervals, the receiving party is unlikely to persuade the court that costs incurred in excess of the budget are reasonable and proportionate to what is at stake."

13. In addition, I consider that this rigorous approach is mirrored by many of the other changes to the CPR coming into force on 1 April 2013, including (for example) the

amendments to r.3.9(1). These amendments now place much more emphasis on the importance of complying with the orders of the court, rather than the previous lengthy 'shopping list' of matters which the court was obliged to work through. ***Fred Perry (Holdings) Ltd v Brands Trading Plaza Ltd*** [2012] EWCA Civ 224 is clear authority for the proposition that these changes mean that the courts will generally be less ready than before to grant relief from sanctions for procedural defaults.

5. Should the Approved Budget be Amended / Rectified in the Present Case?

14. Mr Wygas maintained that the appropriate course was for the court to consider whether or not the approved budget should be revised/rectified in the present case, and said that, for two reasons, it would not be appropriate to revise or rectify the approved budget figure of £82,500.

15. First, he said that the costs budget that had been provided originally was inadequate because it made no reference to the success fee or the ATE insurance. He said it was therefore flawed from the outset, a point that arose in passing in ***Henry***, but which it was unnecessary for the Court of Appeal to address in that case. He said that if a change was necessary to cure a fundamental inadequacy in the approved budget, that could not be a good reason for revision.

16. Secondly, he submitted that a mistake should not be capable of being remedied by an increase in the approved budget. If that were the cure for every mistake, he said, costs management would become irrelevant or meaningless, because all parties could seek to revise their approved budgets after the event on the basis that they had forgotten to include particular items originally (or had included them, but at too low a figure). In essence these two submissions merged into one: if approved costs budgets can be revised at a later date because of mistakes or self-induced inadequacies in the original, the whole purpose and effect of the new costs management regime may be thwarted.

17. I consider that those submissions have considerable force. In my view, in an ordinary case, it will be extremely difficult to persuade a court that inadequacies or mistakes in the preparation of a costs budget, which is then approved by the court, should be subsequently revised or rectified, for the reasons given by Mr Wygas. The courts will expect parties to undertake the costs budgeting exercise properly first time around, and will be slow to revise approved budgets merely because, after the event, it is said that particular items had been omitted or under-valued. I also agree that any other approach could make a nonsense of the whole costs management regime.

18. However, there are two particular factors here which, so it seems to me, make this a very special case. The first is that this is *not* a situation in which the other party, in this case the defendant, could be said to have been misled or confused by the information provided by the claimants. On the contrary, Mr Wygas properly accepted that the defendant has known throughout about both the success fee and the ATE premiums. The defendant cannot sensibly have thought that, in some way, its potential liability for those items had automatically disappeared simply because they were not in the budget provided by the claimants and approved by the court. Moreover, as a result of raising the issue fairly and squarely, the defendant became aware within weeks of the CMC that the claimants were saying that a mistake had been made. Thus, unlike most situations where an approved budget will be the

subject of a revision application, there has been no misleading of or prejudice to the other party in this case.

19. However, I am not persuaded that the absence of prejudice alone would be sufficient (either in this case or more widely) to justify the revision of an approved budget. The whole basis of the recent amendments to the CPR is the emphasis on the need for parties to comply with the CPR, and the court orders made under it. It will, I think, no longer be possible in the ordinary case for parties to avoid the consequences of their own mistakes simply by saying that the other side has not suffered any prejudice as a result.

20. I therefore consider that the critical point in the present case, and the reason why I allowed the application to revise/rectify the budget at the conclusion of the hearing, arises out of the particular wording of the costs budget forms themselves. Form HB (the costs budget form which the claimant should have filled out for the CMC) contains a number of tick boxes for specific items of cost which (if ticked) are thereby *excluded* from the costs budget. Both success fees and ATE insurance premiums are listed as items that could be excluded from the budget by ticking the appropriate box. I am in no doubt that the reason why Form HB assumes that such items will regularly be excluded from costs budgets is because it is not always possible to identify their precise financial value at time of the CMC. Accordingly, success fees and ATE insurance premiums are expressly dealt with differently in Form HB to the ordinary run of costs, which cannot be excluded from the budget by the tick of a box.

21. On that basis, therefore, the claimants' mistake in this case could be categorised as a failure to tick the relevant box or, more accurately, failing to fill out the correct form and therefore not seeing that there was a box there to be ticked. I am uncomfortable with the notion that a claimant should be penalised (and there is no doubt that the claimant in the present case would be significantly penalised if the budget was not revised/rectified in the way sought) merely because of a failure to tick a box.

22. That view is confirmed by the knowledge that the form to be used for costs management purposes in the future is different from Form HB. From 1 April 2013, the costs budget form is now called Precedent H (and can be found at page 16 of the Special Supplement to the White Book 2013, which sets out all the Civil Justice reforms). Instead of containing a tick box, Precedent H simply says:

> "This estimate excludes VAT (if applicable), court fees, success fees and ATE insurance premiums (if applicable)..."

23. In other words, the new costs budget form takes the earlier assumption (that these items may be excluded from a costs budget at the outset for good reason) one stage further, and expressly excludes both the success fee and the ATE premium altogether. That means in turn that, had the claimants done their costs budgeting exercise in April 2013 rather than February, there would have been no mistake: there would have been no failure to exclude success fees and ATE insurance premiums, because such exclusion is now the default setting of the new version of the costs budget form itself.

24. Therefore, on one view, the difficulty in which the claimants find themselves arises out of the costs management pilot scheme and the particular court form (with tick boxes) that was used as part of that pilot. In those circumstances, it is not appropriate

to penalise a party to litigation because, at worst, he or she failed to tick a box on a form, which form has in any event now been superseded so as not to include the box at all. Thus it seems to me that, on the particular and unusual facts of this case, it would be in accordance with the overriding objective if the approved costs budget was revised/rectified, or at least clarified to the effect that it expressly excludes the success fee and the ATE insurance premiums.

6. Conclusions

25. For these reasons, I allowed the claimants to revise/rectify the approved costs management order to make plain that the approved budget excluded the success fees and the ATE insurance premiums. For the reasons given orally at the end of the hearing, because the need for this revision arose solely because of the claimant's error, the defendant is entitled to its costs. I should add that I was greatly assisted by Mr Wygas' submissions on the underlying issues in any event. I therefore ordered that the claimant was to pay the defendant's costs of the application in the assessed sum of £3,824.20.