In brief: Relief from sanction refused for late filing of costs budget (Lakhani v Mahmud)

13/07/2017

Dispute Resolution analysis: Shail Patel, barrister at 4 New Square considers Lakhani & Anor v Mahmud in which Daniel Alexander QC, sitting as a Deputy Judge of the Chancery Division, dismissed an appeal from the decision of HHJ Lochrane QC refusing the defendant relief from sanction for filing its costs budget one day late. The circuit judge had been entitled to conclude that the breach was serious and significant, and there was no good reason for it.

Original news

Lakhani v Mahmud [2017] EWHC 1713 (Ch)

What are the practical implications of this case?

Following the re-casting of the *Mitchell* guidelines by the Court of Appeal in *Denton v White* [2014] EWCA Civ 906 many practitioners have tended to assume that short delays in complying with procedural deadlines will not be regarded as 'serious or significant' (in accordance with the *Denton* three-stage test), and that obtaining relief from sanction for such a breach will therefore be a formality.

Lakhani is an important reminder that matters are not so simple.

The key take home lessons are:

- that a party in breach should not make a 'mountain of procedural annoyance out of a molehill'. The party should be realistic about admitting to its default and, moreover, not waste the parties' time and resources arguing at length about whether or not there was a default in the first place
- an application for relief should be made very promptly, and certainly not on the eve of the case management conference (CMC)
- the defaulting party should seek to minimise the impact of its default on the opposing party and the court
- if the defaulting party gets 'rough justice' at first instance, it cannot necessarily expect to do better on appeal

What was the case about?

This was a property dispute of modest proportions. The parties were ordered to exchange costs budgets 21 days before the CMC. The claimant served a budget claiming circa £100,000. The defendant, upon receipt, took steps to prepare its own budget which was served the next day, for £50,000.

The parties were, in fact, able to reach a measure of agreement on budgets; the defendant's was agreed subject to two points worth around £3,000 in total. Thus, the claimant had largely agreed that the defendant's costs were appropriate.

Nevertheless, the parties' time was wasted on correspondence regarding whether there was a breach by the defendant at all (an argument which was ultimately abandoned). The 21 days given to discuss budgets pre-CMC was curtailed by the defendant's solicitor's office being closed for most of it, over Christmas.

The defendant then made his application for relief late, on the eve of the CMC itself, leaving the claimant no proper time to respond. The 45 minute CMC turned into half a day of argument about relief from sanction. Ultimately, therefore, there was no time to budget the defendant's costs, which would (perhaps) have required a further hearing.

What did the case decide?

The Judge had obvious sympathy for the defendant, describing this as a 'borderline' case, on the 'tougher end of the spectrum'.

Nevertheless, he emphasised guidance in *Mannoin v Ginty* [2012] EWCA Civ 1667 that it is vital that appeal courts uphold robust fair case management decisions made by first instance judges.

HHJ Lochrane QC had been entitled to take into account the matters described above when determining whether or not the breach was serious or significant; he was not confined to looking at how late the budget was. Prejudice to the litigation or the other side will often be decisive evidence of seriousness. Moreover the court can also look at the difficulty created by the breach even if ultimately no procedural disruption results. Here there was distraction, disruption and time was wasted, even if it might have been possible to budget the defendant's costs at the CMC.

In all the circumstances the appeal judge could not say that the first instance judge had applied the guidelines in *Denton* incorrectly, or otherwise fallen into any error of principle, even if the *ex tempore* judgment had been thinly reasoned. That might be different where the effect is to deprive a party of its claim or defence, but the consequences under CPR 3.14 (no future costs recovery) were less draconian, and were proportionate in this case.

Case details

Case name: *Lakhani & Anor v Mahmud & Ors* [2017] EWHC 1713 (Ch)

Court: High Court

Judge: Mr Daniel Alexander QC

Date of judgment: 5 July 2017