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Court of Appeal affirms prejudice based approach to applications for relief from sanctions

On 13 October 2015, the Court of Appeal in *Mishcon de Reya v Caliendo [2015] EWCA Civ 1029* dismissed an appeal by the Defendants against the decision of Mr Justice Hildyard to grant the Claimant relief from sanctions in respect of their failure to notify the Defendants of funding arrangements.

BACKGROUND

The Claimants had entered into Conditional Fee Agreements (CFA) with their solicitors (DLA Piper) and Counsel, in conjunction with an After the Event (ATE) policy, in early 2013. Under the relevant rules, notification to the Defendant was required promptly and in any event within 7 days of entering into the funding arrangement. The sanction for failing to notify promptly was that the ATE premium was irrecoverable in its entirety (which had an estimated maximum value of £1,430,000) and the uplift under the CFA was irrecoverable for the period where notification had not been provided (approximately £60,000).

Notification was belatedly given in June 2013, when the Claimant issued proceedings. In the interim, the legislative changes introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") had been implemented on 1 April 2013. This meant that (subject to certain exceptions) success fees and ATE premiums provided for in agreements after that date were irrecoverable from the Defendant.

The Claimant applied for relief from sanctions at the same time as issuing proceedings. The Defendants resisted the application, arguing that they had suffered prejudiced through being given the false impression that the Claimant had either (a) not entered into a funding arrangement prior to 1 April 2013 or (b) had entered into a funding arrangement after 1 April 2013, where the success fee and/or ATE premium would be irrecoverable. They also asserted that had they known of the correct position it may have influenced their stance in settlement negotiations.

THE DECISION AT FIRST INSTANCE

At first instance Mr Justice Hildyard applied the three stage test when considering an application for relief from sanctions (as per *Denton & Ors v TH White Ltd & Ors*), namely (1) to identify and assess the seriousness and significance of the failure to comply with the rule, practice direction, or court order engaging Civil Procedure Rule 3.9(1) (2) to consider why the default occurred, and (3) to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application.

The Judge found that the failure to give the requisite notice of the funding arrangement represented a serious breach of the rules, and the Claimant's solicitors should have been especially vigilant to ensure compliance with the rules in light of the imminent changes to recoverability of success fees and ATE premiums.

However, assessment of the significance of the breach required consideration of the prejudice caused to the Defendants as a result of it. In this case, pre-action correspondence had been exchanged since 2009 without any indication that the Defendants were amenable to settlement. Furthermore there was no evidence that the Defendants changed their stance in negotiations once they became aware of the funding arrangements. Accordingly, the Court found that the breach was not sufficiently significant to prevent the granting of relief.

Having reached this conclusion, the Judge considered that it was not necessary to spend much time on the second stage (the reason for the default). Indeed, unlike in *Mitchell v News Group Newspapers Ltd*, where the Claimant's solicitors attributed their failure to submit a costs budget to pressures of work and lack of resources, no reason for the breach was advanced other than oversight (the solicitor having been under the mistaken belief that notification of the funding arrangement was only required at the time of issuing proceedings). Although the Judge found that this error meant the Claimant appeared to have a strong claim against their solicitors for any loss suffered as a result of the breach, he found it preferable to grant relief rather than encourage satellite litigation between the Claimants and their own solicitors.

The third stage of the test saw the Judge evaluate all of the circumstances of the case (including the effect of the breach on the conduct of the litigation and the use of court resources) and grant the application for relief.

THE APPEAL

The Defendant appealed, contending that the Judge had erred on a number of grounds, including that he had failed to adequately consider the prejudice to the Defendant that would be caused by granting the application, had placed insufficient emphasis on the fact that the Claimant's solicitors had advanced no reason for the breach, and had failed to take sufficient account of the changes introduced by LASPO.

The Court of Appeal rejected the Defendant's appeal, finding no justification for any interference with the exercise of the Judge's discretion.

The Court found that the Judge had taken into account all relevant facts when reaching his decision, including the fact that granting relief exposed the Defendant to a liability to meet an ATE premium which could total as much as £1,430,000. They affirmed the correct approach was to focus on the effect of the breach, rather than the consequence of granting the relief - the Defendant's potential liability for the ATE premium/success fee arose as a result of the relevant (pre LAPSO) rules, and not from the decision to grant relief from sanctions. The fact that the Claimants were attempting to take advantage of the old regime was not in itself a reason for denying relief from sanctions.

The Court also rejected the Defendant's complaint that the real beneficiary of the application was the Claimant's solicitors, who had by virtue of the application, avoided a negligence claim, describing this as "*somewhat unrealistic*". The reality was that, if a claim was made, the detriment would be to the solicitor's professional indemnity insurers.

CONCLUSION

Whilst the issues surrounding recoverability of CFA success fees and ATE Premiums are less likely to arise, this case sets an important precedent for dealing with applications for relief from sanction. The decision is likely to be welcomed by most litigators. It is hoped it will discourage resistance to applications for relief from sanctions where no material

prejudice can be demonstrated, as well as on the grounds that the defaulting party could litigate against their own solicitors to recoup losses suffered.

It provides a further example of the court departing from the approach taken previously in the case of *Mitchell*, referred to above. Indeed, the only solicitors likely to view the Judgment with a degree of irony are the Claimant's solicitors in the *Mitchell* case, who may increasingly feel as though that decision was the precursor to the Court taking a more considered approach.

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