Online Case 46
BMCE Bank International plc

v

Phoenix Commodities Pvt Ltd and Another

[2018] 6 Costs LO 767

Neutral Citation Number: [2018] EWHC 3380 (Comm)
High Court of Justice, Business and Property Courts of England and Wales, Queen's Bench Division, Commercial Court
19 October 2018

Before:
Bryan J

Headnote

Where the defendant's budget had been due to be filed under CPR 3.13 by 27 September 2018 but was not delivered until 11 October 2018 because the partner with conduct of the case had been away on business, it was not appropriate to grant relief under CPR 3.9 from the sanction that the budget would be treated as comprising only applicable court fees under CPR 3.14. The consequence of the late filing had been that no budget discussion reports could be served in time for them to be dealt with at the costs case management hearing, with the result that an additional appointment would be needed, thereby wasting valuable court resources. The breach of the rule had been serious and significant, there been no good reasons in terms of explanation for it, and the application had not been made promptly. Relief from sanctions refused.

From Costs Law Reports, published by Class Legal
www.classlegal.com

Cases Cited

Azure East Midlands v *Manchester Airport Group Property Developments Ltd*, unreported, 7 May 2014, Birmingham County Court (HH Judge David Grant)
Denton and Others v *TH White Ltd and Another*; *Decadent Vapours Ltd* v *Bevan and Others*; *Utilise TDS Ltd* v *Davies and Others* [2014] 4 Costs LR 752; [2014] EWCA Civ 906; [2014] 1 WLR 3926
Lakhani and Another v *Mahmud and Others* [2017] 4 Costs LO 453; [2017] EWHC 1713 (Ch); [2017] 1 WLR 3482
Mitchell v *News Group Newspapers Ltd* [2013] 6 Costs LR 1008; [2013] EWCA Civ 1537; [2014] 1 WLR 795
Murray v *BAE Systems plc*, unreported, 17 February 2016, Liverpool County Court
Page v *RGC Restaurants Ltd* [2018] 5 Costs LO 545; [2018] EWHC 2688 (QB)

Judgment

1. **Bryan J:** The parties have appeared before me today on what is the first costs and case management conference in this case. The claimants are BMCE Bank International plc, represented before me today by Mr David Walsh of counsel. The defendants are Phoenix Commodities Pvt Ltd and Phoenix Global DMCC, represented before me by Mr Brian Dye of counsel.

2. Today's hearing, which carried with it a time estimate of two hours, was to deal with case management matters, including costs budgeting. In the event, this matter was listed for 11.30 am, but in fact started at 11.45 am or shortly thereafter. The time from 11.45 am to approximately 1.10 pm was spent not debating case management issues but debating a question that has arisen in relation to what I will call relief from sanctions under CPR 3.9, but which, more accurately, concerns whether to make an order other than the normal order set out in CPR 3.14 in relation to the defendant's failure to serve its costs budget in time. The entirety of the hearing to date has been spent on

that issue, and by the time that this judgment is delivered this afternoon, the entirety of the time allocated for the costs and case management conference will have been spent on the same, even before case management can be addressed.

Service of Costs Budgets

3. Pursuant to CPR rule 3.13(1)(b), the parties were required to file and serve costs budgets no later than 21 days before the CMC, which was by 27 September 2018. The claimant complied and filed and served its budget on 26 September 2018. The defendant did not. Instead, they served their costs budget much later, on 11 October 2018 at 4.32 pm. That costs budget was served under a copy of an email from Mr Buchmann, who is a partner at Hill Dickinson LLP, the solicitors acting for the defendants. The email provided as follows:

> "Please find attached the following documents served on behalf of Phoenix [that is the defendants]. 1. CMC information sheet; 2. proposed list of issues; 3. proposed case memorandum; 4. draft CMC order; 5. costs budget.
>
> Should you not agree with the revisions made in our proposed list of issues, case memo and draft order, then we suggest you include these in the index as additional items."

4. That email was responded to by Mr Howard Colman of Colman Coyle Solicitors acting on behalf of the claimant, the following day. He said as follows:

> "I write in response to your email of yesterday evening. I note what you say with regard to your clients' information sheet and cost budget. At this stage, I simply reserve my client's position with regard to the late service/filing."

5. I note that, if the defendants' solicitors were not already aware, their attention was being drawn to the fact that there was late service of the defendants' costs budget. Mr Dye, on behalf of the defendants, accepts that his solicitors are to be taken to know the provisions of the CPR and what the consequences are of not serving a costs budget on time. In this regard, CPR 3.14 provides:

> "Unless the court otherwise orders, any party which fails to file a budget

> despite being required to do so will be treated as having filed a budget comprising only the applicable court fees."

6. Mr Buchmann responded, again on October 11, at 3.09 pm, saying as follows:

> "What late filing are you referring to? Our client's information sheet is due to be served and filed only by tomorrow. Our costs schedule is late, but so was yours."

7. There are two points to note about that. Firstly, the reference to "our costs schedule is late" shows that Mr Buchmann was aware that the defendants' cost schedule was indeed late and is to be taken to know what the consequences of that are under CPR 3.14. Secondly, there was an allegation that the claimant's costs budget schedule was late. In fact, that suggestion was erroneous, because, as I have stated, the claimant's costs budget was filed on time.

8. That email prompted a response from Mr Colman some 51 minutes later, also on October 11, in which he said, amongst other matters:

> "I do not understand why you suggest our costs schedule was late. It was served and filed on September 27. Please explain."

9. At 9.06 am the following day on October 12, Mr Colman sent a further email to Mr Buchmann, which provided, amongst other matters:

> "I continue to reserve my client's rights in respect of late service/filing …
>
> I note you have not yet responded to the question I raised yesterday as to why you were stating that my client's budget had been served late. Please do so by return, or alternatively confirm you accept that this is not correct so that we can either consider any point you raise, or not waste time unnecessarily on this.
>
> On the subject of my client's budget, I note that it is significantly lower than the budget your client has put forward. I assume, therefore, that you do not take issue with my client's budget and can agree it. Please confirm, or if not, please identify any areas of dispute."

10. It can be seen, therefore, that Mr Colman continued to reserve his client's rights in respect of late service. Secondly, he asked for a response in relation to the allegation that the claimant's costs budget

was late. Thirdly, in relation to the claimant's costs budget, there was a reference and comparison between the defendants' budget and that of the claimant. To that extent at least, there was some engagement on the part of the claimant with the defendants' late-served budget.

11. The response to that from Mr O'Brien of Hill Dickinson at 9.52 am the same day was, amongst other points, as follows:

> "We will revert further on the costs budget in due course. For the avoidance of any doubt, this is not yet agreed."

12. The position in fact is that the defendants did not revert back on the claimant's costs budget in advance of the defendants' skeleton argument, which was served at around about 1.00 pm yesterday, in compliance with the Commercial Court Guide. It is fair to say that in the skeleton argument there was substantive engagement with the claimant's costs budget.

13. Continuing with the chronology of events, as already indicated, the defendants and their solicitors were on notice of the fact that their costs budget had not been served on time, if they were under any doubt about that. However, no application was made seeking an otherwise order under CPR 3.14. Absent any such application the position is that a party which fails to file a budget, despite being required to do so, shall be treated as having filed a budget comprising only the applicable court fees.

14. It is also important to bear in mind CPR 3.13(2), which provides:

> "In the event that a party files and exchanges a budget under para (1), all other parties, not being litigants in person, must file an agreed budget discussion report no later than seven days before the first case management conference."

15. The defendants' costs budget was served at the time that the parties should have filed a budget discussion report, whether in precedent R form or any other form. The effect of the late service was essentially that no budget discussion reports were filed and Mr Walsh, appearing for the claimant, both in his skeleton argument and orally today, has confirmed to me that, given the short period of time, it is not in fact possible to deal with the question of the defendants' costs budget at this hearing today. That position, which is no doubt on instructions from his client, is not, and cannot be denied by Mr Dye,

who appears on behalf of the defendant, and he accepts, therefore, that whatever the outcome of the application, which I am going to come onto in a moment, there will have to be another hearing, i.e. a costs management and costs budgeting hearing, as a result of the events that have occurred.

16. Moving on in time, the time to lodge skeleton arguments in accordance with the Commercial Court Guide, was 1.00 pm yesterday, that is 18 October 2018. Both counsel complied with that timescale. At no stage, prior to the lodging of those skeleton arguments, was any application made or foreshadowed, still less, supported by a witness statement, or any supporting skeleton argument on behalf of the defendants, for relief from sanctions, that is, for an otherwise order.

17. In the skeleton argument served on behalf of the claimant, Mr Walsh made clear that any application for an otherwise order would be opposed, and that the default position set out in CPR 3.14 should apply.

18. The detailed skeleton lodged by Mr Dye on behalf of the defendants addressed case management issues and the costs budget of the claimant. No reference was made, nor any argument developed or foreshadowed, about an application for relief from sanctions. Still less was any evidence served or foreshadowed in relation to such an application.

19. Indeed, there was therefore no opportunity either on Thursday evening or in advance of today's list for me to prepare for such an application, if any such application was to be made. I would have expected that if an application was to be made, and in accordance with the principle that a party should act expeditiously when seeking relief from sanctions (at the very least as soon as the default has been noticed, and it has been realised that it will be necessary to make such an application), then notice should have been given to the court and to the other side immediately, even if it took time to draft the supporting evidence. In the event, I am told, the statement reached the court at 9.05 am this morning and, certainly in terms of the skeleton, it reached Mr Walsh for the claimant at just before 10.00 am. I commenced my list at 9.30 am this morning involving a substantial case management conference. The first I knew about the application for relief from sanctions and the supporting material was when this matter was called on, which therefore necessitated that I rise to read both the supplemental skeleton, which was then lodged by Mr Dye, and the

supporting witness statement of Mr Buchmann. I have given careful consideration both to the supplemental skeleton and to Mr Buchmann's witness statement, and the oral submission of both Mr Dye and Mr Walsh during the course of this morning.

The Applicable Legal Principles

20. Whilst an application for an otherwise order under CPR 3.14 is not strictly an application for relief from sanctions under CPR 3.9, it is well established that the same reasoning applies, and that was common ground between the parties before me. CPR 3.9 provides as follows:

> "(1) 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.
>
> (2) An application for relief must be supported by evidence."

21. The applicable principles on relief from sanctions are well established and well known. The leading authority remains *Denton* v *TH White Ltd* [2014] 1 WLR 3926. That case gives valuable guidance, starting at para [24], as to the applicable principles in relation to an application for relief from sanctions and the three stage process to be adopted by this court. In giving such guidance, the court had to consider the equally well-known case of *Mitchell (MP)* v *News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 WLR 795, and in particular the guidance that was given in that case at paras [40] and [41]:

> "40. We hope that it may be useful to give some guidance as to how the new approach should be applied in practice. It will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly. The principle '*de minimis non curat lex*' (the law is not concerned with trivial things) applies here as it applies in most areas of the law. Thus, the court will

usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms. We acknowledge that even the question of whether a default is insignificant may give rise to dispute and therefore to contested applications. But that possibility cannot be entirely excluded from any regime which does not impose rigid rules from which no departure, however minor, is permitted.

41. If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred if there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. 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. But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the *Jackson* reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event."

22. There were, as is well known, and as is addressed in *Denton* v *White*, criticisms of the *Mitchell* guidance, which is one reason why the Court of Appeal in *Denton* v *White* gave careful consideration to what was said in *Mitchell*, before giving further guidance, as they put it, to hard-pressed first-instance judges, so that they have a clear exposition of how the provisions of CPR rule 3.9 should be given effect.

23. That guidance is set out at paras [24] to [38] of *Denton* v *White*. In due course, I will set out the entirety of these paragraphs. However, before doing so, and by way of overview, it is common ground that there are essentially three stages. Firstly, the seriousness and significance of a breach should be evaluated. Secondly, the reason for the breach should be considered. Thirdly, in every case, the court should consider all the circumstances of the case so as to enable it to deal justly with the application.

24. In the course of identifying those three stages, the Court of Appeal in *Denton* v *White* gave helpful guidance as to how those principles are to be applied in particular cases. The court held at paras [24] to [38]:

> "24. We consider that the guidance given at paras 40 and 41 of *Mitchell* remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]'. We shall consider each of these stages in turn identifying how they should be applied in practice. We recognise that hard-pressed first instance judges need a clear exposition of how the provisions of rule 3.9(1) should be given effect. We hope that what follows will avoid the need in future to resort to the earlier authorities.
>
> *The first stage*
>
> 25. The first stage is to identify and assess the seriousness or significance

of the 'failure to comply with any rule, practice direction or court order', which engages rule 3.9(1). That is what led the court in *Mitchell* to suggest that, in evaluating the nature of the non-compliance with the relevant rule, practice direction or court order, judges should start by asking whether the breach can properly be regarded as trivial.

26. Triviality is not part of the test described in the rule. It is a useful concept in the context of the first stage because it requires the judge to focus on the question whether a breach is serious or significant. In the *Mitchell* case itself, the court also used the words 'minor' (para 59) and 'insignificant' (para 40). It seems that the word 'trivial' has given rise to some difficulty. For example, it has given rise to arguments as to whether a substantial delay in complying with the terms of a rule or order which has no effect on the efficient running of the litigation is or is not to be regarded as trivial. Such semantic disputes do not promote the conduct of litigation efficiently and at proportionate cost. In these circumstances, we think it would be preferable if in future the focus of the enquiry at the first stage should not be on whether the breach has been trivial. Rather, *it should be on whether the breach has been serious or significant*. It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which 'neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation'. Provided that this is understood as including *the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most useful measure of whether a breach has been serious or significant*. But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example of such a breach is a failure to pay court fees. *We therefore prefer simply to say that, in evaluating a breach, judges should assess its seriousness and significance*. We recognise that the concepts of seriousness and significance are not hard-edged and that there are degrees of seriousness and significance, but we hope that, assisted by the guidance given in this decision and its application in individual cases over time, courts will deal with these applications in a consistent manner.

27. The assessment of the seriousness or significance of the breach should not, initially at least, involve a consideration of other unrelated

failures that may have occurred in the past. At the first stage, the court should concentrate on an assessment of the seriousness and significance of the very breach in respect of which relief from sanctions is sought. We accept that the court may wish to take into account, as one of the relevant circumstances of the case, the defaulter's previous conduct in the litigation (for example, if the breach is the latest in a series of failures to comply with orders concerning, say, the service of witness statements). We consider that this is better done at the third stage (see para 36 below) rather than as part of the assessment of seriousness or significance of the breach.

28. 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 importance.

The second stage

29. The second stage cannot be derived from the express wording of rule 3.9(1), but it is nonetheless important particularly where the breach is serious or significant. The court should consider why the failure or default occurred: this is what the court said in the *Mitchell* case at para 41.

30. It would be inappropriate to produce an encyclopaedia of good and bad reasons for a failure to comply with rules, practice directions or court orders. Para 41 of the *Mitchell* case gives some examples, but they are no more than examples.

The third stage

31. The important misunderstanding that has occurred is that, if (i) there is a non-trivial (now serious or significant) breach and (ii) there is no good reason for the breach, the application for relief from sanctions will automatically fail. That is not so and is not what the court said in the *Mitchell* case: see para 37. Rule 3.9(1) requires that, in every case, the court will consider 'all the circumstances of the case, so as to enable it to deal justly with the application'. We regard this as the third stage.

32. We can see that the use of the phrase 'paramount importance' in para 36 of the *Mitchell* case has encouraged the idea that the factors other than factors (a) and (b) are of little weight. On the other hand, at para

37 the court merely said that the other circumstances should be given 'less weight' than the two considerations specifically mentioned. This may have given rise to some confusion which we now seek to remove. *Although the two factors may not be of paramount importance, we reassert that they are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered.* That is why they were singled out for mention in the rule. It is striking that factor (a) is in substance included in the definition of the overriding objective in rule 1.1(2) of enabling the court to deal with cases justly; and factor (b) is included in the definition of the overriding objective in identical language at rule 1.1(2)(f). If it had been intended that factors (a) and (b) were to be given no particular weight, they would not have been mentioned in rule 3.9(1). In our view, the draftsman of rule 3.9(1) clearly intended to emphasise the particular importance of these two factors.

33. Our view on this point is reinforced by the fact that Sir Rupert recommended at para 6.7 of Chapter 39 of his report that rule 3.9 should read as follows, including a factor (b) referring specifically to the interests of justice in a particular case:

> '(1) 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 including –
>
> (a) the requirements that litigation should be conducted efficiently and at proportionate cost; and
>
> (b) the interests of justice in the particular case.'

This recommendation was rejected by the Civil Procedure Rule Committee in favour of the current version. In our opinion, it is legitimate to have regard to this significant fact in determining the proper construction of the rule. It follows that, unlike Jackson LJ, we cannot accept the submission of the Bar Council that factors (a) and (b) in the new rule should 'have a seat at the table, not … the top seats at the table', if by that is meant that the specified factors are not to be given particular weight.

34. *Factor (a) makes it clear that the court must consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, that will be a factor weighing in favour of refusing*

relief. Factor (b) emphasises the importance of complying with rules, practice directions and orders. This aspect received insufficient attention in the past. The court must always bear in mind the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance is no longer tolerated.

35. Thus, the court must, in considering all the circumstances of the case so as to enable it to deal with the application justly, give particular weight to these two important factors. In doing so, it will take account of the seriousness and significance of the breach (which has been assessed at the first stage) and any explanation (which has been considered at the second stage). The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted.

36. *But it is always necessary to have regard to all the circumstances of the case. The factors that are relevant will vary from case to case. As has been pointed out in some of the authorities that have followed the Mitchell case [2014] 1 WLR 795,* ***the promptness of the application will be a relevant circumstance to be weighed in the balance*** *along with all the circumstances.* Likewise, other past or current breaches of the rules, practice directions and court orders by the parties may also be taken into account as a relevant circumstance.

37. We are concerned that some judges are adopting an unreasonable approach to rule 3.9(1). As we shall explain, the decisions reached by the courts below in each of the three cases under appeal to this court illustrate this well. Two of them evidence an unduly draconian approach and the third evidences an unduly relaxed approach to compliance which the Jackson reforms were intended to discourage. As regards the former, we repeat the passage from the 18th Implementation Lecture on the Jackson reforms to which the court referred at para 38 of its judgment in the *Mitchell* case:

> 'It has changed not by transforming rules and rule compliance into trip wires. Nor has it changed it by turning the rules and rule compliance into the mistress rather than the handmaid of justice. If that were the case then we would have, quite impermissibly,

> rendered compliance an end in itself and one superior to doing justice in any case.'
>
> 38. It seems that some judges are approaching applications for relief on the basis that, unless a default can be characterised as trivial or there is a good reason for it, they are bound to refuse relief. This is leading to decisions which are manifestly unjust and disproportionate. It is not the correct approach and is not mandated by what the court said in the *Mitchell* case: see in particular para 37. *A more nuanced approach is required as we have explained. But the two factors stated in the rule must always be given particular weight. Anything less will inevitably lead to the court slipping back to the old culture of non-compliance which the Jackson reforms were designed to eliminate.*" (emphasis added)

The Witness Evidence Before Me

25. As I have already identified, this morning Mr Buchmann, a partner in Hill Dickinson LLP, a well-known firm of city solicitors, provided a witness statement effectively in support of an application for relief from sanctions. That witness statement was served in tandem with the defendants' supplemental skeleton for the CMC, and, indeed, makes reference to it. I have already identified that I bear well in mind what is said within it, but I draw particular attention to the following at paras 9 to 13 where Mr Buchmann addresses the reasons for the late filing and preparation of the defence costs budget:

> "9. I first engaged with my firm's internal cost lawyers in the week beginning 10 September 2018, I cannot recall the exact date but would have been one of the dates of 11 to 13 September 2018, regarding the preparation of the defendants' cost budget.
>
> 10. I then travelled on a lengthy work trip to Brazil and Argentina from September 14, returning to London on 28 September 2018.
>
> 11. I returned to the office in London on 1 October 2018. By this time, I was already out of time. This was an oversight on my part whilst I was engaged in work abroad. I am sorry about that.
>
> 12. I accept that this may not be considered a good reason, but I assure the courts it arose from a genuine mistake on my part and was certainly not a deliberate disregard for the court rules.
>
> 13. However, our professional costs lawyer was used. All in all, over ten

> hours were spent in ensuring that the costs budget was prepared and presented in a detailed, considered, comprehensive and professional manner. She engaged with myself, an associate in my firm, and with counsel's clerk in compiling the costs budget. A detailed and professional costs budget was produced and I served and filed it on 11 October 2018."

26. The witness statement then goes on to address the correspondence between the parties, which I have already foreshadowed. At para 16, it is said that the defendant engaged with the claimant's solicitors in respect of certain topics. I should say some of that correspondence related to an issue which arises in the CMC, which is whether or not a cargo of sesame seeds which is being held by the claimants as security for sums which it says are due, should now be sold on the basis that it is perishable. It is common ground that the goods should be sold and indeed, when I get to the CMC, there will be a discussion, if necessary, as to the precise terms of that order. The reason that this is identified by Mr Buchmann, is to make the point that there was correspondence in relation to the furtherance of CMC matters, including that matter.

27. Mr Buchmann goes on to deal with the subsequent correspondence between the parties, which I bear well in mind. He addresses a suggestion that there had been a failure to engage on the defendants' part:

> "24. First, I do not consider it is fair to say that I 'refused' to engage in the process of discussion.
>
> 25. Second the claimant's solicitors did 'engage' with us in reference to [the] claimant's costs budget, but they did have eight days before the CMC to engage with us on aspects of the defendants' cost budget and the claimant's solicitors did not make any points with respect to the substance of the defendants' cost budget, although they could see from the cost budget its figures and the assumptions on which those figures had been prepared.
>
> 26. Third, albeit that the claimant's solicitors reserve their client's rights in respect of the late filing of the defendants' cost budget, at no point prior to October 11 until October 18 did the claimant's solicitors put forward any allegation of actual prejudice or raise any substantive objection to any calculation or assumptions, and it was only with the service of the claimant's skeleton on the afternoon of 18 October 2018,

> less than 24 hours prior to the CMC hearing, that the claimant has raised the points that it has.
>
> 27. Fourth, since the claimant has been in possession of the defendants' cost budget for eight days, if the claimant's solicitors did wish to engage in discussions as to costs budget, they did have an opportunity to do so and a Precedent R could indeed have been discussed or completed before the CMC. In this regard, whilst I am aware that the court rule 3.13(2) stipulates that a budget report (the parties are encouraged to use the Precedent R format) must be filed seven days before the CMC, there was at least the opportunity to make progress by discussion.
>
> 28. Fifth, the claimant's skeleton does not put in dispute any particular costs item(s) in the defendants' costs budget, even by way of example."

28. As I have already foreshadowed, Mr Walsh, before me today, made clear that the claimants were not in a position, either before today, or indeed, today, to address me in relation to the defendants' costs budget, and a subsequent hearing will be inevitable. Mr Dye accepted that he was not in a position to gainsay that, and that a further costs budgeting hearing would be necessary. Therefore it seems to me that there is little in the points made in paras 27 and 28 of the witness statement. I will return in due course to the point that the claimant did not, as it were, put the defendant on notice that it would take the CPR 3.14 point, or would resist an application for relief from sanctions.

29. In his witness statement, under a heading entitled "No real or detrimental effect on the proceedings and no disproportionate costs", Mr Buchmann goes on to deal with the fact that in the period between October 11 and October 18 the parties' solicitors engaged constructively on other pertinent aspects of case progression without the late filing of the defendants' costs budget becoming an impediment to progress the case. Particularly, it is said, the parties proceeded to engage constructively with respect to electronic disclosure and agreeing the list of issues and case memorandum for the CMC.

30. I would simply add before continuing in relation to Mr Buchmann's witness statement, that of course these are matters which the Commercial Court would expect the parties to cooperate on in any event in advance of a CMC. At para 30 Mr Buchmann says:

> "30. I would hope that any further discussions between the parties, or any further hearing that may be required on the topic of costs (which is

not conceded), whether in respect of the claimant's or the defendants' cost budgets, should not have any significant impact on progressing the case to, and achieving the completion of, the key milestones of disclosure, and witness and expert evidence in or up to trial, which both parties agree shall not be before 1 December 2019.

31. I submit that the effect of the delay is quite insignificant so as to have any serious or adverse impact upon proceedings and the procedural timetables. As such, the late filing of the defendants' cost budget in this case will not disrupt the process of the litigation, nor lead to any disproportionate cost, and thus should not be regarded as a serious or significant breach of the rules."

31. In fact, and although that is what is said at para 31 of Mr Buchmann's statement, Mr Dye took a rather more realistic approach in relation to the first stage of *Denton* v *White*, as I shall come on to identify. I hope it is self-evident already from the background that I have set out that the late application, for late it is, for relief from sanctions has already had a significant impact, certainly on the CMC today, the entirety of the time for the CMC having now been exhausted without even commencing the CMC, which I will move onto in due course.

32. Under the heading, "No significant prejudice to the claimant", Mr Buchmann continues at para 32:

"32. Albeit that the claimant's solicitors had reserved their client's right with respect to the late filing of the defendants' cost budget, at no point before the service of its skeleton has the claimant alleged, or particularised, any prejudice that it may have suffered.

33. The claimant alleges prejudice as arising from the late filing of the defence cost budget at para 17.3.1 of the skeleton in which the claimant asserts, 'The parties will have to waste time and money coming back to court for a further CMC to consider the *defendants*' cost budget'. [Emphasis added] [that is, Mr Buchmann's emphasis]. However, I do say there has been some opportunity to engage since October 11, but that advantage was not taken of this.

34. However, if it is necessary for the parties to return to court for a further CMC to consider the issue of the defendants' costs budget as a result of the late filing of the defendants' cost budget, I am authorised to state that my firm undertakes to cover the claimant's costs, and indeed

both parties' costs, should the court require it, on an indemnity basis for any such further CMC, and such as may be thrown away at this CMC.

35. I hope the court may also take into account the cooperative and helpful approach which the defendants have taken to the overall agreement of directions, and to a practical solution to the disposal of the sesame seeds in exercising its discretion in this case."

33. In relation to para 34 of Mr Buchmann's witness statement, it was confirmed to me orally today by Mr Dye, having instructions from Mr Buchmann, that the undertaking on the part of Hill Dickinson extends to, should this be necessary, the entirety of the costs of any subsequent costs and case management conference on an indemnity basis. That includes both the claimant's costs and the defendants' costs, regardless of the outcome of the hearing in terms of particular points, and whether or not the cost budget is approved in its entirety or reductions are made.

34. The witness statement continues at para 36 under a new heading entitled "All the Circumstances":

"36. As set out above: a) the claimant itself has not in reality engaged the defendants in relation to the defendants' cost budget although it has sought to use the defendants' figure to support its own figure; b) during the seven days after service of the cost budget and prior to the CMC, there was sufficient time for some engagement; c) the late filing of the defendants' cost budget will not, in the context of this case, have real effect on the efficient progression of the proceedings and result in disproportionate cost; d) the late filing of the defendants' cost budget has caused no substantial prejudice to the claimant, and to the effect that it may cause any financial prejudice, my firm's undertaking is given in this regard.

37. I submit that, on my fair and proper balancing of all circumstances, and given the immense and far-reaching impact that it would have on the defendants, it would be disproportionate for the court to treat the defendants as having filed and served a cost budget comprising only the applicable court fees pursuant to CPR rule 3.14 and I ask the court to order otherwise."

35. As I say, that witness statement is to be read in tandem with the defendants' supplemental skeleton for the CMC. In that skeleton argument, Mr Dye identified the three-stage approach in *Denton* v

White, and submitted as follows. At para 5, he accepted that the defendants could not submit that there was a good reason for the breach, which occurred because of a foreign business trip by Hill Dickinson. Rightly, and candidly, it is accepted that there is no good reason.

36. At para 5 Mr Dye goes on to submit:

"a) The cost budget was late; but it was nevertheless served and it was filed.

b) This was not a contumacious refusal to engage with the cost process. The lateness was a mistake and an error, and not one by the defendants themselves, but by their solicitors.

c) In fact, despite the mistake, a huge amount of time, professionalism, and care has gone into the compilation of the defendants' cost budget on the part of the solicitors. The cost budget is seven pages in length; it contains detailed costings, sometimes to the penny; it sets out the assumptions on which it has been compiled; it was drawn up by a professional cost draughtswoman; it is a serious, detailed, and considered piece of work.

d) It is important to bear in mind the need for compliance with rules and practice directions, but it is also, it is submitted, important to make the penalty fit the crime, and the quality and intensity of the work that has gone into the preparation of the cost budget, convincingly evidences, the defendants submit, that this was not a deliberate flouting of the rules.

e) The efforts the defendants have shown in the very broad agreement between the parties as to the directions of the CMC and the defendants' willingness to do what they can to facilitate the sale of the sesame seeds, evidences the defendants' cooperation with the court and the claimant to progress the litigation. The defendants' solicitor unreservedly apologises for the breach."

37. At para 6 Mr Dye deals with the question of the seriousness and significance of the breach. The defendants submit that the breach is not at the higher end of the scale of seriousness and significance but, whilst not trivial, it ranks towards the lower end of the scale because:

"a) the breach did not prevent or will not prevent the parties and the court from conducting the litigation (and other litigation). Although

it shortened the period available for discussions, there was still time available for discussions. The claimant in fact examined the defendants' cost budget and it had some ability in the time available to consider its assumptions and raise issues and the claimant did not raise questions about those assumptions, but in fact relied on the defendants' cost budget in support of its own cost budget: … [the skeleton then quotes from the correspondence referred to above].

b) the breach did not imperil future hearing dates nor has it disrupted the conduct of the litigation. The claimant has not in fact indicated any issues with the defendants' cost budget that it wishes to raise. The default, which has little effect on the course of the proceedings, is not to be regarded as serious and significant in the *Denton* case sense. This case is different to *Lakhani*."

That is a reference to the case of *Lakhani and Another* v *Mahmud and Others* [2017] 1 WLR 3482, which is a case relied upon by Mr Walsh on behalf of the claimant.

38. The submissions at para 6 continue:

"… Here there has been no intervening Xmas holiday in which the guilty party's legal representative shut its office and made herself unavailable for discussions; nor has any dispute arisen over whether the defendants were in fact in breach which has disrupted the potential for agreement as to costs;

c) Nevertheless, the breach has shortened the available period for discussion and agreement but, notwithstanding this, some part of the period was available and it is legitimate for a court to take into account not the time lost but also 'the effective amount of time available' (*Lakhani* at [30]). At least some time was available, and the claimant did have an opportunity for consideration, and time which it could, as it did, make points, if it wished to do so.

d) The claimant has not alleged that the breach so prejudiced the claimant that it was unable to consider the defendants' cost budget. Thus, while it cannot be said that lateness had no effect, it is submitted that the degree of prejudice was not such that the claimant was disabled from dealing with the topic of cost management. The breach will have caused some impact on ease and convenience but discussions were not rendered impossible and the degree is a relevant fact to be taken into account."

39. Considering now all the circumstances of the case, the defendants submit that in all the circumstances it is just, convenient and in accordance with the overriding objective to make an otherwise order under CPR 3.14. In addition to the points made at paras 5 and 6 above, the skeleton argument outlines a number of further points at para 7 which I will quote in full:

> "a) The defendants accepted once, on October 11, that their cost budget was late. The claimant reserved its position but did not say more, and this application has been made as soon as the claimant had raised its objection.
>
> b) This is not a case where there are a history of breaches of the rules, practice directions and court orders by the defendants which should be taken into account as relevant circumstances.
>
> c) The defendants have in fact filed a cost budget. There is no wilful refusal to engage in the process.
>
> d) Since the defendants' cost budget was filed, there was a period of seven days (five working days) which could have been put to good use.
>
> e) The claimant simply reserved its position once on October 11 and twice on October 12, and did not seek to progress the cost aspect of the case, but it did rely on the defendants' cost budget in support of its own budget, despite the late service. No other steps were taken, while time exhausted itself until the CMC.
>
> f) That time was available for discussion and agreement. It is submitted that the parties are very often in the position where they receive late service of documents and both parties under these circumstances have a duty to assist the court in the overriding objective by seeking to progress the case, and that the claimant did not do so …"

40. (g) related to a point about whether or not there was a defect in relation to the filing of the claimants' costs budget. In fact, Mr Dye accepted today that that was not a good point and I will say no more about it. Paragraph 7 goes on to say:

> "h) Relief was given in *Azure* (two days late in seven days period); relief was given in *Murray* v *BAE Systems plc* (unreported) [2016] (Liverpool County Court) 17 February 2016 (seven days late owing

to maladministration by the party's legal representative in 21 day period).

i) There has been an error in the present case but it was that of Hill Dickinson LLP. They accept their responsibility and offer to make good, in costs, any costs thrown away by reason of the breach. That goes to mitigate the consequences of the breach.

j) While therefore this case is not trivial, it is submitted that the degree of seriousness and significance is not at the higher end of the scale, but in all the circumstances, and taking into account the professional effort that went into the compilation of the defendants' cost budget and their cooperation in other aspects of the litigation, it is towards the lower end of the scale.

k) So far as costs issues to do with the claimant's cost budget are concerned, the only issues that arise are general ones, which it is submitted are easily capable of being dealt with at the CMC. So far as the defendants' cost budget is concerned, no issues have been raised by the claimant since the budget was served on 11 October 2018; if issues are raised they may be agreed; if issues are not raised and not agreed it is accepted that they may need to be dealt with on another occasion, but (a) to some extent this might have been avoided or minimised if the claimant had used the opportunity since October 11 to identify any issues that it had; and (b) some time in the two hour time slot allocated today may well have been saved by the very cooperative and commercial approach that the defendants have taken to agreement on directions and by their offering to cut through mechanical and technical difficulties that would otherwise arise on the claimant's sale application in relation to the sesame seeds, and the time it has saved by this cooperation can be allocated to deal with the cost budget. While, therefore, this may have impact on the court's time and diary and other litigants, that impact is mitigated by the prospective time saving today and in all the circumstances the impact can be accommodated;

l) The claimant says that the defendants' disclosure report was late. It was; but it is a one-page formal document the service of which has had no impact. The claimant also says that the defendants have not served any evidence opposing the sesame seed application. That is true, but that is because it is common ground that the seeds need to

> be disposed of and the defendants propose a solution to cut through all the problems of the claimant's proposal and achieve a resolution of the issue."

41. Then at para 8, Mr Dye cites the passage that I have already quoted from at paras 37 to 38 of *Denton* about some judges adopting an unreasonable approach to rule 3.9(1) and I confirm I bear that well in mind and apply the principles and guidance given in *Denton* v *White*.

42. At para 9 Mr Dye makes the point, which is a valid point, in relation to *Lakhani* that the exercise the judge was performing on appeal was different to the exercise of discretion that the court undertakes in the first instance. The question on appeal was whether the first decision was "so plainly wrong it must be regarded as outside the generous ambit of the discretion entrusted to the trial judge", which is particularly true in case management decisions. In all those circumstances, Mr Dye invites the court to make an otherwise order under CPR 3.14, permitting the defendants to rely on their costs budget.

43. So far as the position of the claimant is concerned, Mr Walsh submits, in accordance with the three stages of *Denton* v *White*, firstly that the failure was serious in that the defendants' budget was some two weeks late. It was not a case of a near miss.

44. Attention is drawn to *Lakhani*, where the defendants' solicitors filed a costs budget just one day late without reasonable excuse, the consequences of which was that a 45 minute hearing lasted half a day and was dominated by cost management issues, even though the parties had been able to discuss a budget in advance and only £3,000 was in dispute. The default rule in CPR 3.14 was applied by the judge and that was upheld on appeal.

45. The claimant also refers to another decision, a very recent decision of Walker J, *Page* v *RGC Restaurants Ltd* [2018] EWHC 2688 (QB), where another judge, again on an appeal, did not interfere with a decision of the judge below to refuse relief from sanction in relation to costs budgeting. Mr Walsh makes the point that these are examples of time limits in relation to costs budgeting being missed by a very short period of time, whereas this case is one where the deadline was missed by a very considerable period.

46. I make clear, however, that, as Mr Dye submits to me, every case

must be considered on its own merits and, particularly when one gets to the third stage, all the circumstances of the case should be considered. It is certainly not appropriate, and I do not and have not measured, as it were, the length of the delay in this case in comparison to any other reported or unreported decision. It seems to me I should apply the guidance in *Denton* v *White* afresh to the particular circumstances of this case and consider whether it is an appropriate case for relief from sanctions in accordance with that guidance. Limited, if any, assistance can be gained by looking at other cases, aside from the point that it is important that a consistent message is sent out in relation to compliance with the rules as to costs budgeting as it is to do with other court rules, such that any solicitor or advocates can advise their parties in relation to the rules, confident that a consistent position will be adopted whilst always bearing in mind, as Mr Walsh accepted, that every case turns on its own merits and the circumstances pertaining in the particular case.

47. Returning to the claimant's submissions. They say the failure was significant and was compounded by the fact that the defendants subsequently did not engage, they say, with budget discussions, so that discussions which ought to have happened well in advance of the CMC have not taken place. It is said that budget discussions cannot fairly take place on the hoof at the CMC, and so a further CCMC will have to be fixed to deal with the defendants' budget if the default rule in CPR 3.14 is not applied. As I say, by the time of this oral hearing it was common ground that a further CCMC hearing would indeed have to take place.

48. In terms of why the failure happened, at the time of the claimant's skeleton argument the claimant made the point that the defendant had not sought to explain, excuse or justify the lateness of their budget. As I have made clear, there is now the evidence of Mr Buchmann in that regard, to which I will return in the context of my discussion of the application.

49. In relation to all the circumstances of the case, the claimant emphasised the need, a) for litigation to be conducted efficiently and at proportionate cost, and b) to enforce compliance with rules, practice directions and orders. It is submitted that the defendants' breach has prevented the efficient conduct of litigation, unless the default order applies, and that the parties will have had to waste time and money coming back to the court for a further CCMC. It is said

that there is something of a pattern of conduct in that regard because there was a disclosure report which was served late. For my part, I do not consider that is an important factor, and I should make clear that I have not taken into account any aspect of that.

50. In terms of whether the default rule is proportionate to the breach, it is submitted that the default is intended to be significant in order to encourage compliance. The point is made, and this is the point that has been made in other cases, that if the claimant succeeds at trial the sanction will be irrelevant. If the defendants succeed, to the extent that it was their legal team that was responsible for failing to file a costs budget on time, the defendants themselves ought not to be out of pocket. It is right that in cases where there is a failure to file a costs budget, save in very unusual circumstances, it will almost always be the fault of the solicitors for failing to file a costs budget on time. It is said against this background that the default action is not unduly harsh or disproportionate. It is also said that the claimant cannot be accused of opportunism. On the contrary, it is said that it served its costs budget on time (which ought to have alerted to the defence that budgets were due), and that, even after the late service of the defendants' budget, the claimant's solicitor attempted to discuss budgets, but to not avail.

Discussion

51. Turning now to the application of the three stages in *Denton* v *White*, and bearing in mind how matters were developed and argued before me orally, Mr Dye, in the course of his oral submission, confirmed to me that he could not submit that the breach was anything other than serious. The failure was, on any view, a serious breach. This was not a case of a near miss. It was not a case of the budget being filed a day late, or indeed, seven days late. It was filed two weeks late, in the context of a time period of 21 days, during which actions are to be taken by the parties, as contemplated by the CPR. I have already drawn attention to CPR 3.13(2) and the fact that where a party files a costs budget then all the other parties, not being litigants in person, must file an agreed budget discussion report, either in Precedent R form or otherwise, not later than the seven days before the first case management conference.

52. So, essentially, all the time that would normally have been taken up prior to the filing of an agreed budget discussion report was taken

up by the non provision of the costs budget. As Mr Walsh has put forward on behalf of the claimant and as Mr Dye does not gainsay on behalf of the defendants, the reality is that even today the claimant is not in a position to deal with the defendants' costs budget, and so the entirety of the time period for agreeing costs budgets in advance of this CMC has been wasted.

53. It does seem to me, as well, that not only is the breach serious, but it is also significant. The effects of the late service of a costs budget have been such as to cause considerable inconvenience to this court and to other court users. The consequence of the application only being made this morning and at a time when the court day was either about to commence or had already commenced, was that there was no opportunity for this court to consider that matter in advance. It also meant that this court had to rise to consider the witness statement and the supporting supplemental skeleton argument and, in addition, it meant that approaching the entirety of the time allocated to the CMC has been spent addressing and giving judgment in relation to the application for relief from sanctions.

54. In this regard, not only has it resulted in the wasting of time today before this court, but the inevitable consequence, if relief was granted, would be that there would have to be another CCMC unless matters, of course, were agreed. That causes inconvenience to the court and to other court users. I will return in due course when I get to stage three to the undertakings which are proffered by the defendants, but on any view it cannot be seriously suggested that this was anything other than a serious breach of the relevant rules, and one which I consider to be significant. It was not at the low end of the scale. It was a serious breach.

55. Secondly, in terms of why the failure happened, as Mr Dye has realistically and candidly accepted in his oral submissions before me today, there is no good reason. All that can be said, at most, is that the breach was not deliberate, which would of course have been an aggravating factor, but there is no excuse for what has happened. It is quite clear that what happened was that the solicitor involved in this case, who would have been aware of the need for costs budgeting, not least because a costs draughtsman had already been instructed, took his eye off the ball. That regrettably does happen in life, but it does not amount to a good reason. It is clear that Mr Buchmann was away on business and I refer back to the passages that I have already quoted

from both *Mitchell* and from *Denton* v *White*, that however hard pressed solicitors are, there must be compliance with the rules. It seems to me that there was no good reason.

56. Therefore, when one comes onto the third stage, one is already in a position whereby there is a serious and significant breach and the reason why the failure occurred does not amount to a good reason. This is not one of those cases where there has been, for example, illness or other reasons which are a good reason for the delay that occurred. The reason is now known, but that reason is not a good one.

57. Against that background, I turn to the third stage where I must consider all the circumstances of the case, including the factors in CPR 3.9(1) subparagraphs (a) and (b). I also bear well in mind the guidance and approach in *Denton*.

58. In relation to (a) it is an important consideration that litigation should be conducted efficiently and at proportionate cost. The effects of the failure to file the costs budget in this case have meant that this litigation has not been conducted efficiently. The long and short of it is that only through the goodwill of this court will it be possible to have the CMC this afternoon, which will involve by the time of that CMC being concluded, a very considerable amount of court time in addition to the time that would otherwise have been expended. The consequences of this have an effect not only on the parties in this case, but on this court and other court users. So, that is a factor which weighs in the balance.

59. In relation to subparagraph (b), as I have already identified, and as was not seriously disputed before me, this was a serious breach of a rule and this is a rule which is an important rule, which carries with it its own regime. By that, I mean the default position under CPR 3.14 that unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees. No litigant, and certainly no city firm of solicitors, can be in any doubt about the consequences of a failure to comply with the rules as to costs budgeting under CPR 3.14.

60. That brings me onto all the circumstances of the case. One relevant consideration is the circumstances in which the application for relief from sanctions was made. It is clear from the correspondence identified above that, almost immediately after they served their costs budget on 11 October 2018, it was pointed out to the defendants'

solicitors that their costs budget was late. The appropriate and proper course at that point would have been to make a prompt application for relief from sanctions. Indeed, one of the points identified in *Denton* v *White* as a relevant circumstance to be weighed in the balance is the promptness of the application. In this case, there was not a prompt application for relief from sanctions. As I have identified, in fact what happened was initially a counter attack, which was misconceived, saying that the claimants had not served their costs budget in time, when they had done so.

61. From October 11 onwards the claimants reserved their position. It will be recalled that Mr Colman in his letter on October 11 said at this stage: "I simply reserve my client's position with regard to late service/filing" and that on October 12 in a further email at 9.06 am, he said: "I continue to reserve my client's rights in respect of late service/filing." I consider that from October 11 onwards, Mr Buchmann must have been aware that the defendants' costs budget was served late. It is suggested that the claimants could, it may even go so far as to be suggested the claimants should, have actually spelt out that at the CMC they would take the stance that the defendants' costs budget should be limited [to] applicable court fees.

62. Whilst a party in the position of the claimant might have drawn attention to that, there is limited force, it seems to me, in the defendants' submission in that regard, in circumstances where, as Mr Dye accepts, the defendants and their solicitors must be taken to be aware of the rules, the default position as set out at CPR 3.14 and the consequences that follow should no application for an otherwise order be made. It is not a particularly persuasive factor, therefore, that the stance that was taken, and strongly taken, in the claimant's counsel's skeleton was not foreshadowed prior to that. I do, however, bear in mind that the first time they gave express notice that the point would indeed be taken, was in the skeleton argument.

63. I have to say though, that I am far from persuaded that following receipt of the claimant's skeleton argument yesterday, the defendants acted promptly in relation to what then followed. I appreciate that it would have taken time for Mr Buchmann to assimilate and take instructions in relation to the defendants' response and whether or not to apply for relief from sanctions (which I would have thought was an obvious thing that would have to be done). However, since that decision was taken, and I cannot believe that it

would not have properly been taken by sometime yesterday, even if late yesterday, then I do consider in relation to promptness, that the court could at least have been forewarned about the fact that an application was being made and that evidence was being served or about to be served.

64. I say that because at that stage it might still have been possible, for example, to reorganise the court day, so that there was an opportunity to consider the material in advance of the hearing. The hearing could, for example, have been pushed back to the afternoon, instead of which, the *fait accompli* that has occurred is that the morning, and in reality the entirety of the afternoon, will have been spent on this matter. I consider that this is a further factor going to the lack of promptness of the application.

65. I turn then to the question of the undertaking which was offered by the defendants at para 34 of Mr Buchmann's witness statement. What is said as part of all the circumstances is that, as a consequence of the undertaking, the claimant will not suffer prejudice (or will at least not suffer as much prejudice as might otherwise have been the case) because the position can be remedied in costs. It is right, as Mr Walsh acknowledged before me, that, to an extent, that goes to mitigate or reduce the prejudice that his clients will suffer, but that is not to say that there is no prejudice that will be suffered by his clients. In addition, as I am going to come onto, there is also the position of the court and other litigants to be taken into consideration.

66. So far as the position of the claimants is concerned, even if the undertaking were to be an indemnification on an indemnity basis in relation to today and any further hearing, that does not mean that no prejudice has been suffered by the claimant. Firstly, and this may not be a very significant point, there is, conceptually at least, a distinction between indemnity costs and solicitor and own client costs. Perhaps more importantly, I am told that the clients within the claimant have attended throughout today and no doubt that they would also wish to attend throughout any subsequent cost management hearing. That does result in prejudice to the claimant in terms of loss of business time which they could spend doing other things for their employer.

67. That is just one aspect of it. Another aspect, and an important one which ties in and chimes with CPR 3.9(1)(a) and (b) is the position of the court and other court users. I have already identified the consequences which occurred as a result of the late application which

has inevitably meant, if not derailing this CMC, that the CMC will have to take place later this afternoon and at a time when the court would otherwise have been engaged on other judicial matters. The consequence of that is not only to prejudice today in terms of court time and court resources, but also that scarce court resources would be used in relation to a subsequent cost management hearing, unless all matters were agreed. I consider that that is an important consideration.

68. It is also said, by Mr Walsh on behalf of the claimant, that if a party seeking relief from sanctions could, as it were, pay costs thrown away with the result that no prejudice is found to be suffered and, in all the circumstances of the case, it would then be just to grant relief, then that would denude the principle that underlies CPR 3.9 of all real effect. It is an important consideration that there should be compliance with rules, practice directions and orders, and although every case is to be considered on its own merits, and with regard to all the circumstances, as I have done in this case, it is important to send a clear and consistent message that there should be compliance with rules, practice directions and orders of this court. That is necessary so that litigation can be conducted efficiently and so that court resources can be used and deployed most efficiently.

69. I reject any suggestion, that the mere giving of the undertaking offered is some form of trump card or weighs so heavily in the weight of the balance of all the circumstances so as to outweigh all other factors. It is a matter that regard is to be had to, as I have done, as part of a consideration of all the circumstances.

70. When I come to stand back, as I do, having looked at all the circumstances, and having given full weight and account to everything that was said by Mr Buchmann in his witness statement, and by Mr Dye in his supplemental skeleton and orally, and ask myself whether it is an appropriate case for relief from sanctions in all the circumstances of the case so as to enable me to deal justly with the application, I consider that this is a case where there has been a serious and significant breach of the order. Costs budgeting is an important part of case management. It is made clear by CPR 3.14 itself what the sanction is for failure to comply. Failing to comply with the provisions hinders agreement of costs budgets and cost management by the court, it causes delays, it causes inconvenience to the court and it causes inconvenience to the other party and other court users – it is also

contrary to the need for litigation to be conducted efficiently and at proportionate cost. This was a case where the deadline was not just missed. It was missed by a very substantial period of time. The breach was serious and significant. There is no good reason in terms of explanation for it, the application for relief was itself not made promptly, and when one considers all the circumstances of the case as part of the third stage, so as to deal justly with the application, I consider that it would be quite inappropriate to give relief from sanctions on the facts of this case.

71. This is an archetypal case where it would not be appropriate to grant relief from sanctions. There was a serious breach without good reason, followed by a very late application to seek relief, and a consideration of all the circumstances demonstrates that it is not an appropriate case for relief. The failure to comply with the rules has prevented the litigation being conducted efficiently and at proportionate cost, there is a need to enforce compliance with the rules of the CPR in relation to costs budgeting, and on a consideration of all the circumstances relied upon it is not appropriate to grant relief from sanctions. Accordingly, and for all the reasons that I have given, I refuse to give relief from sanctions and direct that, pursuant to CPR 3.14, the defendants will be treated as having filed a budget comprising only the applicable court fees.

72. I would only add this. It is important in all divisions of the High Court, not least the Business and Property Courts, that the parties comply with rules, practice directions and orders so that litigation can be conducted efficiently and at proportionate cost. It is also important that parties in commercial litigation before this court cooperate with each other in furtherance of the overriding objective. This means that whilst there may be cases where relief would obviously be granted, and no point is rightly taken, the rules, directions and orders of the court are there to be observed and for good reason. If there is a failure to comply, then an application for relief from sanctions should be made promptly, supported with evidence, after which it will be considered in accordance with CPR 3.9 and the established principles I have identified.

Mr D Walsh (instructed by Colman Coyle Solicitors) appeared on behalf of the claimant.

Mr B Dye (instructed by Hill Dickinson) appeared on behalf of the defendants.