Case No: A17YJ761

THE COUNTY COURT AT SHEFFIELD

50 West Bar
Sheffield
S3 8PH

30th January 2017

B E F O R E:

HIS HONOUR JUDGE ROBINSON

Shaun Wadsley	Claimant
-v-	
Sherwood Forest Hospitals NHS Foundation Trust	Defendant

Approved Judgment

Mr Joseph P A P O'Brien for the Claimant

Mr Robert Marven for the Defendant

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1. **His Honour Judge Robinson :** The litigation in this case concerns a claim for damages arising out of the alleged clinical negligence of the defendant NHS Foundation Trust . Breach of duty is admitted. At issue are causation and damage.

2. The defendant had commissioned what is commonly called surveillance evidence with a view to establishing that, at the very least, the claimant is exaggerating his symptoms. The evidence comprises visually recorded moving images and written commentary in the form of log books and the witness statements of those performing the surveillance.

3. The raw footage, if I can describe it thus, was delivered to the claimant's solicitors in mid June 2016. By Order dated 14th July 2016 then defendant was ordered to serve and file all of its surveillance evidence, including the written evidence, by 20th July 2016. The footage was served electronically on 20th July, however some at least of the written evidence was not. The balance of the evidence was not served on the claimant's solicitors until 29th July. All of the evidence was filed at Court on 5th August 2016. Thus there had not been full compliance with the order 14th July by the dates specified in the order.

4. By application dated 7th October 2016 the defendant applied for relief from sanctions. A witness statement in support is dated 18th January 2017. On the face of it this would appear to be a perfectly straightforward application dealing with a delay of nine days.

5. However there is a potentially complicating feature in this case, it is a feature which I hope is rarely to be found elsewhere in the litigation case load of the Courts. The feature is that a solicitor formerly in the employ of the defendant's solicitors lied to the claimant's solicitors concerning the reason why certain documents had not been received by the claimant's solicitors on 20th July 2016. She has since been dismissed as I understand it by reason of her conduct in relation to this matter.

6. On 28th July 2016 the claimant's solicitors wrote a letter stating that the witness statements ordered to be served had not been served, (page 171). It simply states:

> "Further to the order of District Judge Kirkham … we note 1) that no such witness statement has been served."

7. There are other paragraphs in the letter which I do not read. Summarising the position thereafter the now dismissed solicitor represented that she had sent the witness statements by email but could not resend that email because it had been deleted from the main server because of space limitations and could not be retrieved. She wrote this email timed at 9:57am on 29th July (page 186);

> "I cannot resend the original email of 20th July as this was deleted from my account to save memory space in the view of the size (I receive daily alerts from Microsoft informing me that I am over my limit so I regularly delete items in size order). As you will note, we received these statements from Robertson and Co on 19th July. You have confirmed receipt of the video footage which was sent via Data Room on 20th July. We had no reason not to send these statements to you as I trust you agree. I can only imagine there was a size issue given the email was sent at the same time as the Data Room.
>
> Please confirm receipt – the password will follow. I will resend each statement separately in 30 mins should I not hear from you. Regards… [etc]".

8. In fact the truth appears to be that the now dismissed solicitor had delegated the task of sending all of the evidence specified by the order. The footage had been sent but the written evidence had not. The reason for this is explained by Mr Armstrong, a partner in the defendant's solicitors, in his witness statement dated 18th January 2017. He described it in this way in paragraph 15 (page 60):

> "15. Internally an issue was raised by the legal assistant tasked with uploading the surveillance evidence to the Data Room, whereby she acknowledged that she had mis-understood the instruction given to her and only uploaded the surveillance evidence and not both the surveillance evidence and witness statements. As a result of this notification the file was independently reviewed by the professional development lawyer within the team."

9. That represents the entirety of the evidence concerning the circumstances surrounding the reason for the failure to serve all of the relevant evidence on 20th July 2016. It is common ground that the witness statements were received. The witness statements were received electronically by the claimant's solicitors on 29th July 2016; nine days late.

10. This application falls to be determined by reference to our well know three stage test set out in *Denton & Others v T H White Limited* [2014] EWCA Civ 906 1WLR 3926. Stage one is particularised at paragraphs 26 to 28 of the judgment;

> "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 no 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 the 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 obviously example of such a breach is a failure to pay court fees. We therefore prefer simple 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 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."

11. Mr Marvin for the defendant says I should not look beyond the simple fact that there was a delay of nine days in the service of part of the evidence which has had no effect whatsoever on the conduct of the litigation. It is true that the breach has had no discernible effect upon the conduct of the litigation, however I think it relevant to recite what I consider to be the relevant email traffic in this case.

12. I start at page 211, an email from the claimant's solicitors to the defendant's solicitors, 29th July 2016, 16:37;

> "I have now heard from our IT department who has searched our exchange mail server and your email was not received by us. Similarly there is nothing in quarantine on or around 20.07.16. Our system would not have rejected your email due to the size of the attachments as our limit is currently set to 900Mb.
>
> With regards to deleted emails I am advised that these can be recovered even after a user's deleted items folder has been emptied by using the recover deleted items function in outlook. Our deleted emails say on the server for 365 days after a user has deleted them. I imagine that your IT department has a similar policy, perhaps you could confirm."

13. Next, email defendant to claimant 29th July 2016, 16:44;

> "I did ask this question unfortunately because I delete my deleted items at the same time in an effort to clear space it seems there is no way of recovering them. Is it your intention to state that you or your experts or client have been prejudiced by the delay in receiving the statements of surveillance operatives, if so please explain how they have been prejudiced."

14. Then claimant to defendant 1st August 2016, 10:39;

> "Are you saying your firm have no way of proving this email was ever sent?"

15. Defendant to claimant 1st August 2016, 10:45;

> "Yes … are you saying that you have been prejudiced by late receipt, if not I am yet to receive your response to this query. I would rather not incur further time and costs in dealing with this if you have suffered no prejudice."

16. The next relevant item is a letter sent by email I think dated 2nd August 2016. I begin to read from the second paragraph;

> "We have asked you repeatedly for evidence of compliance which you have failed to give. You have now advised us that your firm has no way of showing that you complied with the order by sending the witness statements by email on 20th July 2016.
>
> We consider that such a situation is highly surprising from a risk management perspective. We have again spoken to our IT department who have indicated that your email should be recoverable

> by using the 'recover deleted items' tool in outlook. We accept that how long deleted are kept is dependent upon the retention policy of your IT department. We have asked you to take this matter up with them and confirm their policy for a retention deleted emails."

17. The next relevant piece of correspondence is a letter dated 7th October 2016 from the defendant's solicitors to the claimant's solicitors;

> "We write further to your correspondence of 2nd August 2016.
>
> Our firm's practice for retaining electronic messages is to hold all communications for a period of 10 years. Following liaison with our IT team and with detailed enquiry of our systems we can confirm that service of the witness statements was not effective on 20th July 2016 in contravention of the Court's order of 14th July 2016 and we apologise for the previous misunderstanding.
>
> The failure to submit the witness statements on 20th July was not due to any other reason than human error and service was effected on 29th July 2016 following your alert to these statements being outstanding by email on 28th July 2016.
>
> We apologise that these statements were not served on you on time but we do not believe you have suffered any prejudice as a consequence of this and in the circumstances invite you to consent to the enclosed order companying the attached application for relief from sanctions."

18. As is clear from that last letter the application presently before me was sent that day. It is also clear that although the progress of the litigation has not been adversely affected the claimant's solicitors were put to trouble in following up the lie told by the now dismissed solicitor.

19. Mr Marvin has made it clear from the outset that the actions of the now dismissed solicitor were wholly unacceptable. He roundly criticises them and does not seek to defend them. That approach is entirely correct and entirely in keeping with what I would expect of a highly reputable firm of solicitors such as the defendant's solicitors.

20. The issue for me is whether I can treat the relevant breach in isolation from the circumstances immediately surrounding the explanation for the breach given by the now dismissed solicitor. In one sense I cannot un-know what I now know, but I can ignore it. The question is whether that is the correct approach.

21. The code contained within Denton is directed to the proper conduct of litigation. The now dismissed solicitor clearly lied to the claimant's solicitor. In my judgment I cannot look at the breach in isolation from the excuse made in the immediate aftermath of notification by the claimant's solicitors that there had been no service of part of the evidence. I refer back to the end of paragraph 26 in Denton;

> "But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation although they are serious."

22. And also 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."

23. It might be argued that a breach accompanied by a lie exacerbates a breach that would otherwise be treated as not serious to the level of serious. Alternatively a breach such as this accompanied by a lie concerning the circumstances of the breach escalates the breach to one where, even if not serious viewed in isolation, stages two and three of Denton are engaged in the sense that they assume greater importance.

24. If I had to choose one of those options I would opt for the second of those routes but, however one looks at it, in my judgment the breach is serious such that stages two and three of Denton are engaged and assume greater importance.

25. Stage two requires the Court to engage in what is in itself a two stage process. First what is the reason for the breach? Second, is the reason a good reason? I know little about the reason for the breach, I have recited all I have been told. In the original application this was all that was said;

> "4. The defendant's solicitors email system holds a record of all electronic communications over the past 10 years and, following subsequent review of our electronic records, it has become evident that in error the statements were not served on 20th July 2016 and therefore service not effected until 29th July 2016 and filing was not effected until 5th August 2016 in contravention of the Court's order."

26. The claimant's solicitors asked pertinent questions that were initially rebuffed. It was not until a letter dated 14th November 2016 that a substantive response was received, (page 157). By that letter the defendant's solicitors effectively said that the statements had not been sent by email on 20th July and that there had been no such email of that date. Further information was given concerning the disciplinary process which had led to the dismissal of the person I have been referring to as the now dismissed solicitor.

27. It does not seem that any question was asked which would have elicited the response that a legal assistant had misunderstood delegated instructions but neither was that information volunteered.

28. Turning to the misunderstood instructions I do not know if the instruction was given orally or in writing. More importantly I do not know its terms, thus I cannot make any judgment whether the instruction was vague or ambiguous. I know nothing about the level of competence of the legal assistant to whom the task was delegated so I cannot make a judgment whether the task was one which ought to have been assigned to a higher grade employee or to a person of more experience. In short I find the degree of candour accompanying this particular application to fall short of what I would have expected.

29. I am driven to accept at face value the bald assertion made in paragraph 15 of the witness statement made by Mr Armstrong. It is supported by a statement of truth. In my judgment I cannot go behind it. A simple misunderstanding of instructions may or may not be capable of amounting to a good reason. In this case I do not know what those instructions were and so it is difficult, to say the least, to seek to assess the culpability of the misunderstanding. This is a borderline case but I am just prepared to accept that human error amounts to a good reason in this case.

30. Thus I turn to stage three of the Denton process and look at all the circumstances of the case. Of relevance is that the raw surveillance footage had been delivered in June 2016 before the order of 14th July 2016 and also that the raw surveillance footage was again properly served in time. The delay in completing performance of the order of 14th July was short. The progress of the litigation

has not been compromised. I do however find that the claimant's solicitors were put to trouble in investigating the explanation given by the now dismissed solicitor.

31. However, balancing all the factors including those in CPR Rule 3.9 and having regard to the overriding objective, I determine it is appropriate to grant relief from sanctions and to excuse the lateness of service of the written part of the evidence.

32. However I must make this absolutely clear; there has been a suggestion that the claimant's solicitors were unreasonable in refusing their consent to the granting of relief from sanctions in this case. In some cases such consent should be given or at least no opposition made because it would be absolutely correct to do so. In this case it was equally absolutely correct to decline to give such consent. The conduct exposed in this instance was serious. The information given to the claimant's solicitors, even as late as 7th October, was scant. It was necessary for the Court to proceed to stages two and three of the Denton process and, whilst I have not explicitly dealt with the issue of whether the application in this case was made promptly, it just about satisfied that requirement, if there was a genuine belief on the part of the claimant's solicitors that it would not be appropriate to commence this application before the disciplinary process had been complete, but that again is a borderline finding. In the event the application succeeds.

End of approved judgment

We hereby certify that this judgment has been approved by His Honour Judge Robinson.

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