Case No: SC-2021-APP-000007

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London WC2A 2LL

Date: 11/03/2021

Before :

COSTS JUDGE ROWLEY

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Between :

(1) National Bank of Kazakhstan	**Claimants**
(2) The Republic of Kazakhstan	
- and -	
(1) The Bank of New York Mellon SA/NV, London Branch	
(2) Anatolie Stati	
(3) Gabriel Stati	
(4) Ascom Group SA	
(5) Terra Raf Trans Trading Limited	**Defendants**

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Roger Mallalieu QC (instructed by **Stewarts Law LLP**) for the **Claimants**
Jamie Carpenter QC (instructed by **King and Spalding International LLP**) for **the 2nd to 5th Defendants**

Hearing date: **15 February 2021**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is my decision in respect of the application brought by the 2nd to 5th defendants (known as the "Stati parties") against the Default Costs Certificate obtained by the claimants on 6 January 2021 in the sum of US$3,730,290.

Background

2. The claim for costs arises from orders made by Teare J dated 4 December 2018 and 4 May 2020 in proceedings brought in the High Court following a referral from the Belgian courts. The proceedings in Belgium involved the Stati parties seeking to enforce a Swedish arbitration award against the second claimant for a sum in excess of US$500 million.

3. The Stati parties sought to challenge the jurisdiction of the High Court but were unsuccessful in so doing and this led to the order made on 4 December 2018. The Stati parties were also unsuccessful in the High Court proceedings themselves and were required to pay the claimants' costs save for those incurred by the first claimant in pursuing claims against the first defendant only. The Stati parties were required to pay the sum of £1,500,000 on account of these costs by 1 June 2020. They were also obliged to pay, via what is conventionally known as a "Bullock" order, a portion of the costs of the first defendant that the claimants were required to pay. These provisions were set out in the order dated 4 May 2020.

4. Both parties sought to appeal this second order of Teare J but were unsuccessful in their attempts. The claimants entered into correspondence during this period about the question of costs but did not have a formal bill of costs drawn until the Court of Appeal had handed down its decision.

5. The Notice of Commencement of the detailed assessment proceedings, together with supporting documents, were served upon the Stati parties' solicitors, King and Spalding International LLP ("KSI") on 15 December 2020 and the electronic bill was provided by email on the same day. The solicitor with conduct at KSI, Mr Egishe Dzhazoyan, in a witness statement (dated 15 January 2021 and his sixth overall) made to support the application states that he was not in a position "to get familiar with" the served documents until 17 December 2020.

6. It does not appear that Mr Dzhazoyan took any further steps in respect of dealing with the documents he had received until he was served with a Default Costs Certificate on 6 January 2021. Nevertheless he wrote to the claimants' solicitors, Stewarts Law LLP ("Stewarts"), the following day in robust terms about the certificate that had been obtained and sought agreement to it being set aside without the need for an application. That proposal fell on stony ground when Ms Gillett, the solicitor with conduct at Stewarts, indicated in a letter dated 11 January 2021 that any application would be opposed. Given that response, Mr Dzhazoyan set about producing the application notice and his sixth witness statement in support which were filed with the court on 15 January 2021.

7. In respect of producing draft points of dispute, Mr Dzhazoyan's seventh witness statement (dated 10 February 2021) says the following:

> "21. My firm does not have an in-house costs specialist team. This is why it took our team several days to seek and obtain client instructions and agree terms with the costs lawyers. As a result, on 19 January 2021 our firm retained the services of costs lawyer, Mr Nick Overton, of Overtons Costs Consultants **("OCCL")**, to assist with these proceedings including to prepare the Points of Dispute.
>
> 22. Also on 19 January 2021, my firm electronically shared with Mr Overton an initial set of documents to accompany our preliminary instructions. The next day, we arranged for a hardcopy bundle of the initial set of documents to be sent to a colleague of Mr Overton assisting on the matter, Mr Mark Vickery, which he confirmed were received on the same day.
>
> 23. It took my firm a further two weeks or so to arrange for transfer of a copy of the entire electronic dataset/file in the required .pst format (as requested by OCCL), which was shared with OCCL on 4 February 2021. The reason behind this slight delay was to do with the need to seek and obtain certain internal approvals from my firm's Director of Records and Information Governance concerning collating and sharing this type of data in light of my firm's data privacy protection policies and procedures."

8. Mr Dzhazoyan continued in the same statement to say that work had commenced on the points of dispute and that points of dispute could be prepared for service by 3 March 2021 as sought in the application notice. However, this would be a more superficial document than if the time for providing the points of dispute was extended to 17 March 2021.

The CPR

9. According to CPR 47.9, the claimants were entitled to file a request for a default costs certificate in the absence of being served with any points of dispute by the end of 21 days after the date of service of the notice of commencement. That period ran out on 5 January 2021 and consequently a request for a default costs certificate was made in accordance with CPR 47.11.

10. It is not disputed that the claimants were entitled to obtain a default costs certificate. As such, the relevant rule regarding applications to set aside such a certificate is CPR 47.12(2):

> (2) …the court may set aside or vary a default costs certificate if it appears to the court that there is some good reason why the detailed assessment proceedings should continue.

11. Paragraph 11 of the Practice Direction to Part 47 ("PD47") provides further information in respect of applications to set aside default costs certificates. In particular, paragraph 11.2 says:

> (1) An application for an order under rule 47.12(2) to set aside or vary a default costs certificate must be supported by evidence.
>
> (2) In deciding whether to set aside or vary a certificate under rule 47.12(2) the matters to which the court must have regard include whether the party seeking the order made the application promptly.
>
> (3) As a general rule a default costs certificate will be set aside under rule 47.12 only if the applicant shows a good reason for the court to do so and if the applicant files with the application a copy of the bill, a copy of the default costs certificate and a draft of the points of dispute the applicant proposes to serve if the application is granted.

12. If a default costs certificate is set aside, paragraph 11.3 of PD47 draws attention to the entitlement of the costs judge to exercise the power of the court to make an order under rule 44.2(8) to order a party to pay an amount on account of costs before they are assessed even though the costs judge did not make the original order for costs.

Does *Denton* apply?

13. The test in CPR 47.12 clearly requires the applicant to demonstrate a good reason for the detailed assessment proceedings to continue rather than to be curtailed by the summary effect of a default costs certificate. The all-pervading influence of the overriding objective and the need for a defaulting party to seek relief from the sanction of an adverse judgment has led to the question of whether the Court of Appeal's guidance in Denton v TH White Ltd [2014] EWCA Civ 906 adds to the test in CPR 47.12. There has not been, to my knowledge, an authoritative decision on this point but it appears to be generally accepted that, at the very least, the three stage Denton test provides some structure in coming to a conclusion as to whether a good reason has been demonstrated.

14. In this case, as with many, there is in fact very little difference between simply considering whether there has been a good reason and considering whether it would be just in all the circumstances to allow the detailed assessment proceedings to continue i.e. applying the third stage "all the circumstances" test from Denton. I say this because:

    i) There is no doubt in my mind that the failure to comply with the time limit for serving points of dispute is a serious breach of the rules and it clearly has a significant consequence on the paying party who is, absent relief, prevented from taking any further steps to challenge the receiving party's bill (Denton stage 1).

    ii) There is no good explanation for the breach. There was simply an oversight which cannot be a good reason (Denton stage 2).

15. It was said by Jamie Carpenter QC, counsel for the Stati parties, that the oversight was not a deliberate act of refusing to deal with the proceedings that had been received but was simply accidental. Roger Mallalieu QC, counsel for the claimants' challenged that description, but it seems to me that it is of limited, if any, relevance. It is obviously not

a good reason for a professional person to overlook something required by the rules to be completed in a specific period of time. Consequently, all hangs on the third stage of the Denton test namely, whether it is just in all the circumstances to exercise the court's discretion in the applicants' favour?

Submissions

16. According to paragraph 25 of his skeleton argument, Mr Carpenter cited three factors in particular which pointed towards the granting of relief.

17. The first was the size of the bill. It is for more than US$3 million and, in Mr Carpenter's submission, it may be expected to be reduced by US$1.2 million or more in the usual manner of a detailed assessment. In support of that submission, Mr Carpenter relied upon paragraph 26 of Mr Dzhazoyan's seventh witness statement. Initially it appeared that the costs draftsman, Mr Vickery, considered there to be a considerable number of items in the bill which were outside the scope of the order, but Mr Carpenter informed me that further work has suggested that initial impression was not borne out and as such he relied only upon the following part of paragraph 26:

> "In addition, I am told by Mr Vickery that the overall costs appear to be excessive given that this was a case which turned on issues of law and was not document heavy. Thus, the Claimants only disclosed 110 documents between them (running to a mere 343 pages in total) and the Stati Parties – by agreement – did not disclose any documents at all."

18. In response to this, Mr Mallalieu submitted that if it was enough for a defaulting paying party to say that the bill was too high and they wanted to challenge quantum in order to set aside a certificate, then this would be done more or less as of right.

19. Mr Carpenter's second factor concerned the draft points of dispute. Paragraph 11.2(3) of PD 47 says that it is the general rule that a draft of the points of dispute upon which the paying party would wish to rely needs to accompany the application to set aside the default costs certificate. In Mr Carpenter's submission, the absence of points of dispute was explained by the size of the bill and the time reasonably required to draft points of dispute. It was a reasonable course of action for the Stati parties to have made the application without any such draft. As I recorded in paragraph 8 above, the Stati parties seek a period until 17 March 2021 in which to produce full points of dispute.

20. This led into Mr Carpenter's third factor which was that there would be no delay caused by setting aside the certificate when compared with the course of events which would have occurred in any event. By this Mr Carpenter meant that there would inevitably have been agreed extensions of time for service of the points of dispute given the size of the bill in issue. The time now requested until 17 March 2021 was entirely within the range of reasonable requests to produce meaningful points of dispute which would have been made anyway.

21. As such, allowing the default costs certificate to stand would result in a pure windfall for the claimants. There was no attempt by the claimants to identify any real prejudice they would suffer if the certificate was set aside. In Mr Carpenter's submission that was because there was no prejudice.

22. Mr Mallalieu's response to the second and third factors was to suggest that there had been no good reason given as to why the paying parties had not appended points of dispute to their application. He accepted that the bill was "not insignificant" and that, as such, a modest additional amount of time might be needed for the points of dispute. Based upon the original request in the application for a period up to 3 March 2021 for producing the points of dispute, and the indication in Mr Dzhazoyan's seventh witness statement that Mr Vickery had received the necessary papers on 4 February 2021, Mr Mallalieu contended that a month was a reasonable period in which to have produced the points of dispute. (That would be a week or so longer than the usual 21 day period.) Building upon that calculation, Mr Mallalieu contended that if Mr Dzhazoyan had acted promptly in instructing costs lawyers at the same time as making the application, there would have been points of dispute available to be considered by the court at the hearing of this application.

23. Mr Mallalieu therefore challenged the lack of available points of dispute at the hearing even if it was reasonable for them not to have been produced at the time of issuing the application. This submission was in addition to his contention that Mr Dzhazoyan had done nothing with the papers when he had first received them in December. Mr Mallalieu contended that Mr Dzhazoyan had simply continued to proceed without any celerity other than writing to the claimants' solicitors asking them to agree to set aside the certificate. It had taken Mr Dzhazoyan two weeks to instruct Overtons and, given Mr Dzhazoyan's statement that KSI had no in-house costs expertise, it must have been obvious from the original receipt of the papers that instruction of external costs lawyers would be required.

24. In his reply, Mr Carpenter responded to Mr Mallalieu's point about the timescale in which points of dispute could have been produced. In respect of producing them in the month before the application was issued, he relied upon his earlier submissions that the pre certificate default period could not be counted and that left a matter of eight days which was not realistic for the points of dispute to be produced.

25. In respect of the period between the application being made and the hearing of the application, Mr Carpenter took a different point. He said that there was no separate obligation on an applicant who had reasonably issued an application without draft points of dispute then having to produce them so that they could be put before the court when the application was heard. He described Mr Mallalieu's argument as introducing a further threshold requirement.

26. In addition to the three specific points raised by Mr Carpenter, he submitted that the application had been made promptly as required by paragraph 11.2(2). Mr Dzhazoyan had sensibly asked the claimants' solicitors to agree to setting aside the certificate by consent and once that had not been agreed he had made the application to the court. As an overarching submission, Mr Carpenter drew attention to the description by Mr Dzhazoyan of there being a perfect storm at the time the notice of commencement was received by him. In addition to the impending Christmas break, London was about to enter increased restrictions owing to the pandemic and within days this led to the closing of KSI's offices in London. At the point when the solicitors' annual leave ended at the beginning of the New Year, the Stati parties were on holiday until 11 January as a result of the Eastern Orthodox Christmas falling on 7 January each year.

27. Mr Mallalieu did not challenge the speed of the bringing of the application itself in any robust way, albeit that he did not accept that Mr Dzhazoyan had acted "all that promptly." He did query the extent of the difficulties described by Mr Dzhazoyan given the size and resources of a firm such as KSI.

Discussion and decision

28. The onus of the application is on the defaulting paying party to demonstrate a good reason why the detailed assessment proceedings should continue. Amongst other things, the overriding objective requires the court to enforce compliance with rules and practice directions as well as to allocate an appropriate share of the court's resources to any particular case. Given those objectives, it cannot be the case that applications to set aside default judgments will be granted as little more than a rubberstamping exercise. Engagement with the court process is required to demonstrate that further court resources should be available in the future, if required, for a full detailed assessment hearing. A bill of this size would require probably two or three weeks of court time to assess.

29. The delay in dealing with the notice of commencement by Mr Dzhazoyan between 15 December and 6 January is not a matter for me to take into account in my deliberations since that is the cause of the default costs certificate in the first place. Having been alerted to the existence of the certificate, promptness is then required, as with all applications for relief from sanctions, and as is specifically mentioned in the practice direction directly relevant to this application. I accept that Mr Dzhazoyan acted promptly in writing to Ms Gillett in the hope of setting aside the certificate by consent. I also accept that, having received a rejection of that request, Mr Dzhazoyan's application was filed with the court promptly, given the detailed witness statement produced to support the application. Some of that detail has proved, upon reflection, to be unnecessary but that ought not to attract any serious criticism.

30. Regrettably, the same promptness cannot be glimpsed in Mr Dzhazoyan's efforts to produce draft points of dispute. I agree with Mr Mallalieu's comment that in the absence of any in-house expertise, it ought to have been apparent that external assistance would be required. Strictly speaking, that ought to have been apparent in the middle of December when Mr Dzhazoyan was becoming familiar with the documents. But, for the purposes of this decision, I take that realisation to be expected on 6 January 2021 following receipt of the default costs certificate. I have set out earlier in this judgment the relevant paragraphs of Mr Dzhazoyan's witness statement concerning the instruction of Overtons. It does not make good reading.

31. In the ordinary course of detailed assessment proceedings, a paying party has 21 days in which to prepare points of dispute. That period of time (taken as starting on 6 January 2021) would have elapsed before the costs lawyers had received the full papers at the speed with which the paying parties acted in this case. Having received a default costs certificate, I would have expected the speed of instruction of costs lawyers to have increased rather than decreased.

32. Moreover, I would have expected any litigation firm to have links with external costs lawyers so that instructions could be sent immediately. In these days of costs budgets and Costs and Case Management Hearings, the interplay between cost lawyers and instructing solicitors goes far beyond the traditional instruction of a cost draftsman to

prepare a bill (or points of dispute) at the end of a case when the substantive proceedings have concluded. It may be that the "several days" required to instruct Overtons was a result of the clients taking time to provide instructions to KSI but, whatever is the case, a period of nearly a fortnight just to instruct a costs lawyer in these circumstances does not suggest any urgency.

33. Matters, if anything, deteriorate in the events recorded at paragraphs 23 and 24 of Mr Dzhazoyan's statement. Taking a (further) fortnight to produce a data file in what is a common format for emails in Outlook is surprising. Describing it as a "slight delay" is euphemistic and the reason given for the delay of there being an internal governance issue is both surprising and unconvincing. In circumstances where some criticism of KSI might be levied – since that is always a possibility where a default judgement has been entered – it might be thought that priority would be given to any necessary internal approvals being obtained. But in any event, as I have indicated above, the use of external costs lawyers to produce costs budgets et cetera is commonplace and the idea that "this type of data" was somehow particularly sensitive in terms of the firm's policies and procedures so that it could not be shared with external costs lawyers is not an impressive explanation at all.

34. The absence of points of dispute have inevitably hampered the arguments which Mr Carpenter could deploy. He pointed out that the requirement for draft points of dispute to be attached to the application notice was only a general rule and not a requirement. Furthermore, it was only a general rule referred to in the practice direction and not in the rule itself. As I have recorded above, he also submitted that if it was reasonable for an applicant to issue an application without appending draft points of dispute, there was no requirement for draft points to be produced in time for the hearing.

35. Mr Carpenter is obviously correct regarding his description of the need for draft points of dispute as being only a general rule, but I do not accept that compliance with paragraph 11 is somehow time limited in the way that he submitted.

36. Where there are large bills of costs, it will often be the case that points of dispute cannot be produced quickly enough to be exhibited to an application notice that is issued promptly. If Mr Carpenter's submission is correct, it would mean that the court would regularly expect to see draft points of dispute in smaller cases and not the larger ones. That does not seem attractive to me and I do not see that paragraph 11.2 should be construed in that way. The wording of the paragraph to my mind is very largely aimed at the court hearing the application. That is particularly so in respect of 11.2(2) and also in 11.2(3) for the need to consider the good reason being put forward. That consideration is expected to take place with the benefit of the evidence, the bill and the draft points of dispute to hand. In the normal way, the evidence and documents will be appended to the application notice, but where that cannot happen, it should be provided in time for the hearing.

37. Whilst it is true that a general rule may not apply in a particular case, the assumption is that it will do so absent a case specific reason. In the light of the views I have expressed when looking at the speed of instructing Overtons, I do not consider any case specific reasons to have been made out.

38. In my view, the need for points of dispute, in some shape or form, is fundamental to the prospects of setting aside the default costs certificate in most cases. Unlike setting aside

a default judgment, the paying party in detailed assessment proceedings has already been found to be liable to the receiving party by virtue of the order for costs on which the bill is based. The detailed assessment proceedings are essentially a matter of quantifying that liability. Some of the challenges to the bill of costs may be fundamental to whether any costs are payable, but mostly the challenges will be about the extent of the costs claimed. In the absence of points of dispute setting out either fundamental or quantum challenges, the court has no precise information about what a detailed assessment hearing, if the proceedings were allowed to continue, would involve.

39. As was demonstrated here, the lack of any points of dispute left only the general submission that upon a detailed assessment bills of costs are usually reduced and the most general of comments from the costs draftsman that the costs claimed appeared to be excessive given the nature of the case and the limited documents disclosed. Mr Mallalieu was entirely right to be dismissive of the first point since there would be no benefit in the default costs certificate procedure if the certificate could always be set aside by a party simply saying that they expected to reduce the costs on assessment.

40. As far as the second point is concerned, if meaningful points of dispute could not be drafted in time, there could undoubtedly have been a witness statement from Mr Vickery, or even some other document produced by him, to give an indication of the nature of the points he was expecting to take. Mr Dzhazoyan's seventh statement was produced on 10 February 2021, six days after receipt of Ms Gillett's witness statement and the full file of papers having been received by Overtons. They had had some papers since 19 January and the comments given to Mr Dzhazoyan and recited at paragraph 17 above on a significant bill of costs shed no light on any matters of substance to be raised at a detailed assessment. This is not meant to be a criticism of Overtons specifically as I am in no position to ascertain whose decision it was simply to put forward the broadest of comments in Mr Dzhazoyan's witness statement. The result however was that Mr Carpenter was left with no ammunition when Mr Mallalieu made the inevitable point that there was nothing of any substance before me as to why detailed assessment proceedings should continue.

41. As I have said, the absence of any points of dispute, or even some outline of the points to be taken, leaves me with no indication of what purpose the detailed assessment hearing will serve save for the trite point that at any detailed assessment some costs are likely to be reduced. That point cannot be an answer to a failure to serve points of dispute originally as otherwise these applications would indeed be a rubberstamping exercise. The court's duty to enforce compliance with rules and practice directions requires a defaulting party to act promptly when seeking relief from sanctions and to provide material on which the court's discretion may be based. In my judgment, the Stati parties have failed to act with sufficient promptness so as to be able to set out any putative case in the detail expected at the hearing of such applications and, upon analysis, such actions as have been taken do not weigh sufficiently in the balance to grant relief in the circumstances. Consequently, I dismiss the Stati parties' application to set aside the default costs certificate.

Postscript

42. The submissions I have recorded are the entirety of the ones set out by the Stati parties to justify the setting aside of the default costs certificate. They did not require the half day involved in the hearing of this case, nor require the eloquence of leading Counsel.

True, the bill of costs is for a significant sum but there is only so much that can be said on these applications.

43. The reason why leading Counsel were instructed, and the submissions took as long as they did, relate to the background concerning the original proceedings and various orders for costs and "damages" which are said to be in favour of both sides and which may or may not be capable of being set off.

44. Given the decision I have reached there is no need for me to make any decision on these submissions. Mr Carpenter said that he was not asking me to make an order as such but by the very fact of not making an order for there to be a condition (to make an interim payment) upon setting aside the default costs certificate I would be "holding the ring" between the various entitlements of the parties.

45. Mr Mallalieu challenged the various contentions made by Mr Carpenter and said that if I were to deal with any of the other orders for costs et cetera, it should be limited to the order made by Teare J for a payment on account of the costs contained in the bill in these proceedings for £1,500,000 which was to be paid by 1 June 2020 but remains unpaid.

46. I have not set out the rival contentions in any detail because, unless this decision is appealed, then there is no need for that to occur. The background events were not relied upon by Mr Carpenter in support of his clients' application to set aside the certificate. They were relied upon by Mr Mallalieu and his instructing solicitor in seeking to oppose the application or, as a fall back position, to require a condition to be imposed upon any setting aside order.

47. Should there be a successful appeal of this decision, then the appellate court will have to deal with the appropriateness of a condition being imposed. I do not think that court would benefit from me setting out the arguments. But in case it was relevant for me to indicate my decision in the alternative, I would say that I would have imposed a condition of the sort contended for him by Mr Mallalieu concerning payment of the sum previously ordered by Teare J.