# Legal Briefing

## *Beware: the TCC takes a hard line to relief from sanctions in adjudication enforcement proceedings*

## *City Basements Ltd v Nordic Construction UK Ltd*

**[2014] , TCC, Ramsey J, Unreported**

*Background Facts*

City Basements Limited ("CBL") commenced adjudication proceedings to recover sums from Nordic Construction UK Limited ("Nordic") pursuant to an interim payment application under a JCT Standard Building Sub-Contract, with Sub-Contractor's Design (2011 Edn). In the absence of Nordic giving a Payment Notice/Pay Less Notice, on 24 February 2014 the Adjudicator found that CBL was entitled to the payment of (amongst other things) the sums claimed in its payment application and ordered Nordic to pay those sums plus interest and his fees by no later than 3 March 2014. Nordic failed to comply with the Adjudicator's decision.

On 12 March 2014, CBL commenced adjudication enforcement proceedings against Nordic. By an Order dated 13 March 2014, the Court gave standard directions which required Nordic to (amongst other things) file and serve its *"further evidence"* by 4 p.m. on 31 March 2014, and CBL to file and serve its evidence in response by 4 p.m. on 4 April 2014. CBL's application for summary judgment was listed for Monday 14 April 2014, with the hearing bundles being due on 7 April 2014 and the skeleton arguments being due for exchange on 8 April 2014.

On 31 March 2014, Nordic submitted a Defence verified by a statement of truth from the Construction Manager of Nordic. However, Nordic failed to submit a witness statement to support its Defence, or any supporting documentation. On 2 April 2014, CBL's Solicitors wrote to Nordic, highlighting that Nordic had failed to serve any evidence, as required by the Court's Order. Accordingly, CBL reserved its position as to whether or not Nordic had permission to file and serve a Defence and highlighted that the time for Nordic to file evidence had now passed and that CBL did not intend to include any of the additional documents referred to in the Defence within the hearing bundle.

*Nordic's Application for relief from Sanctions*

On the evening of 3 April 2014 (the day before CBL's responsive evidence was due), Nordic applied for: (1) relief from sanctions *"following a misinterpretation of the Order of Mr Justice Ramsey dated 13 March 2014"*; (2) leave for Nordic to rely on the Witness Statement of its Construction Manager; and (3) permission to vary the Court's directions. In support of its Application, the Witness Statement of Nordic's Solicitor stated that he *"did not file a witness statement on behalf of the Defendant [Nordic] through a misinterpretation of the Order"*.

In the absence of a direction from the Court to the contrary, on 4 April 2014 CBL filed and served its responsive evidence in accordance with the Court's Order dated 13 March 2014. CBL's evidence and Reply was prepared and filed on the basis that Nordic had not been given the permission requested in its Application for relief from sanctions. On the same day, CBL's Solicitors wrote to the Court opposing Nordic's Application. Applying the guidance in *Mitchell v News Group Newspaper Limited* [2014] 1 WLR 795 (CA), CBL argued that Nordic's failure was not trivial and that there was no good reason or explanation for the default. As to whether or not the default was trivial, CBL argued (amongst other things) that:

- The timetable for summary judgment proceedings is necessarily short and it is particularly important that the parties adhere to the Court's timetable so as not to prejudice the hearing date.

- The importance of adjudication enforcement proceedings being conducted efficiently and at proportionate cost (in accordance with CPR, r. 3.9(1)(a)) is even more acute because the purpose of adjudication is to provide a *"speedy mechanism for settling disputes in construction contracts on a provisional interim basis"*: *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93.

- If Nordic's Application were allowed, there was a real risk that the hearing date would be prejudiced.

Nordic's paper Application went before Mr Justice Ramsey on 8 April 2014, when he ordered: (1) Nordic was permitted to rely on its Defence as its evidence; and (2) insofar as Nordic sought to pursue its Application, such Application would be heard at the substantive hearing on 14 April 2014.

At the hearing, Nordic effectively withdrew its Application but maintained that a few documents that it wished to rely upon should be placed before the Judge.

*The Judgment*

Before turning to the substantive application for summary judgment, Mr Justice Ramsey said there was no serious challenge to Nordic's request for a limited number of documents to be put before the Court and so Nordic's Application for relief from sanctions had come to a natural end.

However, he went on to give helpful guidance. He said that had Nordic pursued its Application, it would have been refused. The reasoning was as follows:

- Nordic's failure to file evidence in response could not be seen as trivial.

  This was a case where there was a short timetable on an application to enforce an adjudication decision. Those proceedings are subject to curtailed directions leading to a hearing within about a month of the proceedings being commenced. The essence of these applications means that there has to be compliance with the Court's timetable. In this case, in accordance with the Court's Order of 13 March 2014, once the evidence in defence had been filed on 31 March 2014, CBL's responsive evidence had to be filed by 4 April 2014. CBL could not comply with this timetable if Nordic's Application was not made until the day before, on 3 April 2014. CBL had to respond to Nordic's Application on 4 April 2014 and the hearing bundle was due to be filed on 8 April 2014, with skeleton arguments being exchanged on 10 April 2014. In the context of those directions, Nordic's failure to serve evidence in response cannot be *"trivial"*. Further, the witness statement in respect of which relief from sanctions was sought ran to some 100 pages and CBL would have been required to respond to that statement.

- There was no good reason for Nordic's default.

  After referring to the witness statement of Nordic's Solicitor, the Judge found that Nordic's Defence was properly before the Court as evidence. However, he did not accept that there was anything reasonably open to misinterpretation of the standard directions given by the Court.

The Judge said that had the Application been pursued by Nordic there would have been *"no question of granting relief"*. He then went on to say that everything pointed towards keeping costs proportionate and complying with orders of the Court. Therefore, had the matter come before the Judge seeking relief, it would have been refused.

After giving judgment on the substantive matters and giving judgment in favour of CBL, the Judge then came to consider the question of costs.

The Judge awarded CBL its costs of dealing with Nordic's Application for relief from sanctions on an indemnity basis. In reaching his decision, he took into account that the Application had been made based on a *"misinterpretation"* of an order yet there was no possibility of

a reasonable misinterpretation of the Court's Order which gave standard directions. It had been time-consuming and expensive for CBL to deal with Nordic's Application and at a time when CBL was preparing for the substantive hearing. Accordingly, CBL was awarded its costs on an indemnity basis.

*Comment*

Although Nordic's Application for relief from sanctions was effectively withdrawn at the hearing, Mr Justice Ramsey was quite clear that had it been pursued, the Application would have been rejected. The Judge emphasised that compliance with the procedural timetable was even more important in adjudication enforcement proceedings where the procedural timetable was necessarily curtailed.

The judgment, together with the award of costs on an indemnity basis, sends out a clear message that the Technology and Construction Court intends to take a robust approach to parties who fail to comply with court orders/directions and that in considering whether or not relief should be granted, the TCC will apply the *Mitchell* jurisprudence.

For parties defending applications for relief from sanctions, there is also another important lesson to learn from the facts of this case. In the absence of a court order varying directions of a previous court order, stick to the current directions that have been issued by the court. In the event that a party fails to comply with the court's directions in order to try and accommodate a procedural mishap of the other side, that party may also need to apply for relief from sanctions.

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and
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