

Neutral Citation Number: [2022] EWHC 1271 (Ch)

Case No: BL-2019-MAN-000080

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN MANCHESTER**  
**BUSINESS LIST (ChD)**

Manchester Civil Justice Centre  
1 Bridge Street West  
Manchester, M60 9DJ

Date: 14/03/2022

**Before :**

**MR JUSTICE FANCOURT**  
**Vice-Chancellor of the County Palatine of Lancaster**

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**Between :**

**(1) ROY HARRY COLE**  
**(2) BURY VAN HIRE LIMITED**  
**(3) BURY VEHICLE LEASING LIMITED**  
**(4) H&A HOLDINGS LIMITED**

**Claimants**

**- and -**

**(1) ANDREW HOWARTH**  
**(2) MAX HENRY KAY**  
**(3) JOSEPH TYRRELL**

**Defendants**

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**Mr. Jonathan Dale** (through Public Access) for the **1<sup>st</sup> Claimant**  
**The Second to Fourth Claimants not represented**  
**The First Defendant and the Second Defendant in person**  
**The Third Defendant not present or represented**

Hearing date: 14 March 2022  
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**Approved Judgment**  
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**MR. JUSTICE FANCOURT :**

1. This is an application issued by the claimant, Mr. Roy Cole, on 9 March 2022 to reinstate the trial of this action after it was automatically struck out pursuant to CPR rule 3.9 for non-payment of the trial fee which was due on 14<sup>th</sup> February 2022. The fee was paid by Mr Cole on 16 February, two days late, and the trial was due to start today, 14 March.
2. The court accepted the payment of the fee on 16 February 2022, so Mr. Cole would have assumed that things were all right in that regard, until on 3 March, after my reading of the court file, the court then informed him that he needed to apply for relief against sanctions by reason of the late payment of the fee.
3. The background to the application is the following.
4. The claim itself is for the repayment of a debt and interest arising from a loan of £200,000, which was made on 3 July 2015. The only live parties, as things stand, despite the title of the proceedings, are the first claimant, Mr. Cole, and the first defendant, Mr. Andrew Howarth. The other claimants (controlled by Mr Cole) have acknowledged that the first claimant is the correct claimant; summary judgment was entered against Mr Kay in 2020 and the third defendant was never served.
5. The (live) parties have mostly been acting in person, although Mr. Cole has instructed counsel, Mr. Dale, by direct access for the trial hearing. A case management conference took place on 23 March 2021 before Deputy District Judge Hassall, at which time in fact both Mr. Cole and Mr Howarth appear to have been represented.
6. The Deputy District Judge made the usual orders in relation to disclosure and witness statements and then made the following orders material to this application.
7. In paragraph 7, he ordered that the claimant must file an updated schedule of loss by 14 days before the pre-trial review. Paragraph 8 directed that the pre-trial review should take place six weeks before the start of the trial window. Paragraph 10 indicated that the pre-trial review could be conducted by telephone and that the claimants must make the relevant arrangements for that in accordance with Practice Direction 23A.
8. By paragraph 11 of the order, at least three clear days before the pre-trial review the claimants had to file and send to the other parties, preferably in agreed form and by email, any further draft directions required, a chronology and a case summary. Paragraph 13 gave directions in relation to bundles for a trial:
  - a) By 4 p.m. on the 28<sup>th</sup> day before the first day of the trial the parties must notify each other of the documents that they wish included in the trial bundle;
  - b) By 4 p.m. on the 21<sup>st</sup> day before the first day of the trial the parties must agree the contents of the trial bundles;
  - c) The claimants are to lodge hard copy trial bundles with the court and provide hard copies to each party not less than 14 days before the trial.

9. On 1 October 2021, the court sent out notice of the hearing of an application by the claimants for summary judgment. That hearing was scheduled for 26 November 2021. The notice of hearing said:

“Fixing of a PTR and trial date is deferred for further consideration at the hearing of these applications”.
10. The hearing on 26 November 2021 was before District Judge Matharu. The claimants’ application was dismissed but the court unfortunately failed to consider the fixing of the pre-trial review, although it did revise the trial window for the trial. That trial window was from 30 January 2022 to 31 March 2022. On 6 January 2022, the court sent the notice of the trial date which was to be 12.00 on 14 March 2022 with a time estimate of four days. The notice contained the following words:

“Unless the claimant does by 4 p.m. on 14 February 2022 pay to the court the trial fee of £1,175 or file a properly-completed application for help with fees, then the claim will be struck out with effect from 4 p.m. on 14 February 2022 without further order. And unless the court orders otherwise, you will also be liable for the costs which the defendant has incurred”.
11. The notice further indicated that the hearing would be an attended in-court hearing and it stated that the parties should comply with various requirements as to the filing of bundles and skeleton arguments. These directions included a requirement that electronic bundles should be uploaded to CE file and emailed to the judge’s email address as soon as practicable and in any event no later than three clear business days before the hearing.
12. The claimant was notified on Wednesday, 3 March 2022 of the fact that the claim had been struck out. On 5 March he sent an email to the court and to the first defendant stating that the application would be made on 7 March. However, on 7 March, Mr. Cole, who is 82 years old, was in hospital for tests and he says he was unable to prepare the application for relief until 8 March. It was then issued on 9 March 2022, which is why it is being dealt with on the first day of trial.
13. Also on 9 March, the claimant served on the first defendant and filed an electronic bundle. There had been no consultation or no adequate consultation on the contents of that bundle.
14. Mr Howarth complains that it does not contain all the documents on which he would wish to rely, and that it contains certain documents that he says were not disclosed and that he has not seen before, and some inadmissible documents relating to other connected proceedings in proceedings in the Chancery Division in London.
15. Mr Howarth accepted initially, with commendable frankness, that given the nature of the issues to be tried he could probably put together this evening a small bundle of any additional documents that he wished to have put before the court as evidence. He is, as he explained to me, very familiar with this case, having taken time off work in order to focus on it intently.

16. However, with the benefit of an adjournment over lunch, Mr. Howarth then considered that he might be in difficulty in dealing with the matter overnight because of circumstances which have left him having to look after three small children, although he is not their primary carer. Mr. Howarth, it is relevant to observe, is supported in court today by his father, Mr. Anthony Howarth, who is acting as a McKenzie Friend for him, to assist him with the presentation of his case. Given Mr. Anthony Howarth's relationship with Mr. Howarth and his children, it is not the case that Mr. Howarth, the first defendant, is left on his own both to deal with any necessary preparation for a trial and to look after children.
17. The issues for the trial are relatively straightforward, although they have generated a great deal of heat and disagreement and a lot of correspondence in the course of the litigation and the connected litigation in London. They are the following. First, who lent the £200,000, the third claimant or the first claimant? Second, who was the borrower of the money and who is liable to repay it? Third, what were the terms agreed orally on 2 or 3 July 2015 about repayment and interest, and possibly a fourth, although it is not clear whether there is a dispute about this, how much of the loan has since been repaid.
18. There may well be some documents that are relevant to these issues, but the loan agreement is said to have been concluded orally and not in writing or partly in writing, so the principal evidence at the trial will be that of Mr. Cole and Mr. Howarth and two other witnesses intended to be called to give evidence on behalf of Mr. Cole. I am not aware of any other witness intended to be called by Mr. Howarth at this stage, although I am told that if the second defendant, Mr. Kay, arrives at court, he may be minded to seek to set aside the 2020 summary judgment against him.
19. It is clear that the failure to pay the court fee requires the three-stage approach to relief against sanctions set out in the well-known case of *Denton v White*: first, the seriousness and significance of the breach, second, any reason given for the breach and whether it is excusable; and third, whether relief should be granted in all the circumstances of the case.
20. Mr. Dale realistically accepted that non-payment on time is counted as a serious breach and that there was no good reason for it. The application, therefore, turns, as these applications often do in practice, on weighing those considerations against the consequences of granting or refusing relief in all the circumstances of the case, in an attempt to decide whether it is just, having regard to the overriding objective, to grant or refuse relief. In the way of things, that weighing exercise is often a difficult one, but the court ultimately has to come to a conclusion in the exercise of its discretion.
21. Mr. Dale emphasised on behalf of Mr. Cole that payment was made within two days of the default, which he said mitigated the seriousness of the breach to some extent. He also argues that the other failures to comply with the order of 23 March 2021 were explained by the fact that the court failed to fix a pre-trial review, so that there was no deadline for the ordered steps to be taken, and by Mr. Cole's misunderstanding of the effect of the general directions as to electronic bundles given in the notice of trial. Mr. Cole understood that that was the new direction that he needed to comply with. Mr. Cole did comply with that general direction in the notice of trial but not with the order that had been made by the Deputy District Judge.

22. Mr. Dale also points out that there was no proper liaison about the content of trial bundles from either side, and it is clear to me that Mr. Howarth equally should have attempted to communicate no later than 28 days before the trial about the contents of the trial bundle but did not do so. Mr. Dale said that the trial could take place fairly even now, as it depends principally on oral evidence of the witnesses and only a relatively few documents.
23. Mr. Howarth submitted that this was not a case of a single breach by Mr. Cole but that there had been previous breaches, not just in relation to the matters that should have happened before a pre-trial review and the agreement and filing of the trial bundles, but going further back procedurally. He said that Mr. Cole was late in dealing with a listing questionnaire and was late in filing a disclosure statement. I assume in Mr. Howarth's favour, because it has not been possible to investigate in detail, that he is right about the previous breaches, but I do find that the failure to comply with paragraphs 7(a), 8, 10 and 11 of the Deputy District Judge's order is understandable and excusable in the circumstances that I have indicated, namely the court failing to list the pre-trial review and the court sending out apparently conflicting directions about electronic trial bundles.
24. Mr. Howarth also submitted that there was inexcusable delay after 3 March 2022 in making an application for relief, given the obvious urgency of the matter with the trial date at that time only eleven days away. He points out that Mr. Cole waited six days after being given notice of the need to issue his application for relief before doing so.
25. As to that, I find that Mr. Cole did not delay inappropriately and inexcusably, although there was some delay, because the matter was raised with the court on 5<sup>th</sup> March, on notice to Mr. Howarth, and because on 7<sup>th</sup> March when the application would otherwise have been issued, Mr. Cole was in hospital.
26. Mr. Howarth said also that he is prejudiced by not having been given until today a hard copy of the bundle. That has now been remedied, although why Mr. Howarth was not provided with a hard copy bundle in the first place, given that he is a litigant in person, I cannot understand. He was nevertheless provided with an electronic copy of the bundle last week. Mr. Howarth also said that on perusing the hard copy of the bundle he sees that there are some documents in there that should not be in there for one reason or another. That is, however, a matter that I can deal with in the course of the trial, if and when reliance is sought to be placed by Mr. Dale on a document that Mr. Howarth says should not be there.
27. Of Mr. Howarth's two responses to my original question, whether he would be in a position to put together a small bundle of additional documents overnight, I prefer his first answer to his second answer. I accept that it may require some family arrangements to ensure that he has time available to him this afternoon or evening, but I am convinced from my study of what has been filed on the CE file recently that a great deal of the detail and history of this matter is very well-known to Mr. Howarth and he must have well in mind what documents he relies on and can identify any that are missing.
28. On balance, therefore, and it is on balance because the default of Mr. Cole in paying the trial fee was serious and inexcusable, I do consider that the interests of justice in this case are better served by granting relief to enable the trial to take place. If the trial

does not take place on this occasion, a number of the same issues will be being raised in relation to other claims in a different court in any event. It is important to both parties that they are resolved sooner rather than later. The critical question, therefore, is whether a trial can take place at this stage fairly to Mr. Howarth, despite the delays in the preparation for the trial.

29. As I have said, to some extent both sides were at fault for not getting the trial bundles sorted out in good time, but I will ensure in the directions that I give now and in the conduct of the trial as it continues, that Mr. Howarth is not prejudiced by the way that matters have happened shortly before the start of the trial.
30. If and when Mr Howarth needs further time in order to be able to consider his position and how to deal with documents and so on, I will give him a greater degree of latitude than would in any event be given to a litigant in person to deal with any difficulties. I am, however, confident that Mr. Howarth will be able to put together a small bundle of additional documents tonight on which he wishes to rely. I will give him until 9.30 tomorrow morning in order to do so and provide copies to the court and to the claimant.
31. Any work that Mr. Howarth has to do, and any copying costs incurred on the preparation of his supplementary bundle, will be paid for by the claimants. The claimants must also ensure that Mr. Howarth has access to all documentary evidence, whether in the trial bundle that has been produced or otherwise, that is necessary for him to conduct his defence to this case.
32. I am provisionally minded, I say no more than that at this stage, to make the claimant pay the costs of the hearing today, since this is his application for relief against sanctions and the serious default in the first instance was his, but I will hear Mr. Dale and Mr. Howarth further on that before I make a final decision. What that means is that in fairness to Mr. Howarth the trial will not be able to start this afternoon and will start at 10.30 tomorrow morning. As I have indicated, if there is a need for further time I will consider any further application that is made.
33. It does seem to me in any event that the trial of these issues is unlikely to require the four days that have been set aside for them.

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**This judgment has been approved by Fancourt J.**

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