

# Case management and relief from sanctions— dealing with failure to pay trial fee (NDI Insurance and Reinsurance Brokers Ltd v Iroko Securities Ltd)

24/10/2019

**Dispute Resolution analysis:** This judgment of the Central London County Court considered and determined four separate applications—(a) a strike out application, (b) an application for relief from sanctions in respect of witness statements and expert evidence, (c) an application for an unless order in respect of further information and disclosure, and (d) an application for relief from the automatic strike out sanction due to failure to pay the trial fee. The court generally followed and applied the approach to relief from sanctions set out in CPR 3.9 and adopted and used the three-stage approach used in *Denton v White*. Of particular note is the consideration of the issues resulting from the failure to pay the trial fee. The judgment exposes a risk for unwary solicitors and relief was only given because the failure appeared to have been entirely the court's own fault. Written by Oliver Browne, partner and chair of the London Litigation & Trial Department, at Latham & Watkins.

*NDI Insurance and Reinsurance Brokers Ltd v Iroko Securities Ltd* [\[2019\] Lexis Citation 385](#)

## What are the practical implications of this case?

This is another decision following and applying the three-stage test in *Denton v White* [\[2014\] EWCA Civ 906](#), [\[2015\] 1 All ER 880](#) in which the Court of Appeal held that a judge should examine applications for relief from sanctions in three stages—(a) first identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order which engages [CPR 3.9\(1\)](#), (b); then consider why the default occurred; (c) finally, evaluate all the circumstances of the case, so as to enable the court to deal justly with the application including the factors in subparagraphs (a) and (b) of the rule.

In relation to the failure to pay the trial fee, the failure had arisen, apparently, because of mistakes made by the court—the claimant's solicitors had completed all the necessary formalities for the trial fee to be paid automatically from their fee account. However, the judge had been quick to spot that the trial fee had not been paid (and brought that fact to the parties' attention) and investigate what had happened. Although relief from the automatic strike out sanction was ultimately allowed (and, indeed, the application was not contested), the judge criticised the conduct of the claimant's solicitors in terms of not keeping better track of whether the trial fee had indeed been paid, noting 'In my view, it is for the solicitor to ensure that payment is made on time'. Had the facts been slightly different, and had the court not been wholly at fault, it seems clear that the judge would not have granted the application. Solicitors should put in place procedures to ensure that trial fees are in fact collected/paid on or before the due date, even where those fees are supposed to be collected/paid automatically from fee accounts.

## What was the background?

The claim concerns an alleged contract between the parties pursuant to which the claimant claims to be entitled to a fee for introducing the defendant to a third party to facilitate a transaction by which the third party would obtain funding. The claimant contends that it was agreed that it would be paid 35% of the defendant's arrangement fee, or alternatively a reasonable sum for the introduction. The defendant denies the existence of such a contract, and in any event asserts that the claimant was paid a reasonable fee for the introduction.

A number of procedural issues arose during the period leading up to the anticipated trial of the matter. Witness statements were filed late by the claimant (and a purported application to extend time was not signed with a statement of truth, and was not in the event issued). That led to a strike out application on the basis that because the claimant failed to serve any witness evidence for trial, and

had not applied for relief, it therefore could not prove its case. Neither side provided expert reports by the time directed by the court. Issues also arose over disclosure.

On the hearing to address those various issues on 13 June 2019, the court brought to the parties' attention the fact that the trial fee had not been paid and the claim had been automatically struck out pursuant to [CPR 3.7A1\(7\)](#). The court then made an order providing for any application for relief in relation to the failure to pay the trial fee to be made by 19 June 2019. That application having been made in time, the court then heard all of the issues together on 1 July 2019 (which would have been the first day of the trial). The trial itself was vacated.

### What did the court decide?

The court decided the trial fee application first. Applying *Denton v White*, the court ultimately concluded that 'it does seem to me that the reason why the payment was not made appears to have been because of an administrative error on the part of the court' and granted relief from the automatic strike out sanction.

The court then decided the application for relief from sanctions in respect of witness statements and expert evidence. The court was not persuaded by arguments that delays in service of the relevant evidence had been caused by problems with disclosure—the court followed *Clearway Drainage Systems Ltd v Miles Smith Ltd* [\[2016\] EWCA Civ 1258](#) and commented that 'Issues with disclosure do not amount to a good reason for failing to serve witness statements, and does not permit a party to disregard Court orders'. The court also noted that 'The fact that refusal to grant relief will effectively bring to an end a claimant's claim is not of itself reason to grant relief', following *Gladwin v Bogescu* [\[2017\] EWHC 1287 \(QB\)](#), [\[2017\] All ER \(D\) 104 \(Jun\)](#). Ultimately, the court decided not to grant relief from sanctions in respect of the witness statements or the expert evidence.

In relation to the strike out application, the court decided that the claim should not be struck out, as the court was 'not persuaded that the claim is bound to fail without the evidence' and 'the severe sanction of striking out the claim would not be the right order here'.

Finally, as regards the application for an unless order in respect of further information and disclosure, the court did not make the order sought because most of the documents had in fact been provided and the parties had been able to agree the terms of an order in relation to disclosure.

### Case details

- Court: Central London County Court
- Judge: Judge Monty QC
- Date of judgment: 21 October 2019

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