



coyle white devine
clear thinking - plain speaking

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Date: 10 December 2013

Second letter

Dear Sirs

Our client: The National Guild of Removers & Storers Ltd

In readiness for the hearing tomorrow, please find enclosed, by way of service:

1. Claimant's Skeleton Argument;
2. Statement of Costs (in relation to the application);
3. Statement of Costs (in relation to the substantive claim).

Yours faithfully

Coyle White Devine

COYLE WHITE DEVINE

Enc

IN THE AYLESBURY COUNTY COURT

CLAIM NO: 3YM68412

BETWEEN

THE NATIONAL GUILD OF REMOVERS & STORERS LIMITED

CLAIMANT

- AND -

MCRORYS REMOVALS LIMITED

DEFENDANT

CLAIMANT'S SKELETON ARGUMENT

Introduction

1. This litigation arose because the Defendant failed to pay the Claimant's invoice.
2. The Claimant's invoice was delivered on 15 July 2013.
3. Proceedings were issued on 1 August 2013.
4. The claim form, particulars of claim and response pack were served on the Defendant on 7 August 2013.
5. The Defendant failed to file a defence and accordingly, judgment in default was entered on 18 September 2013.

The Defendant's Application

6. It is not clear from the application notice, what the basis of the application is. It appears that the Defendant's application is to set aside judgment on the basis that the Defendant sought to file a defence, within the required time, but it was not accepted by the court; either as the attachment could not be opened or it was in the wrong format.

The Claimant's Position

7. The Claimant's position is that the application is ill-founded.

8. Rule 13.3 deals with cases where the court may set aside or vary judgment entered under Part 12. It is submitted that this is a matter which falls within CPR 13.3, as opposed to CPR 13.2.

Rule 13.3 states as follows:

(1) In any other case, the court may set aside or vary a judgment entered under Part 12 if

(a) the defendant has a real prospect of successfully defending the claim; or

(b) it appears to the court that there is some other good reason why

(i) the judgment should be set aside or varied; or

(ii) the defendant should be allowed to defend the claim.

(2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.

9. It will be noted that a defendant applying to set aside the judgment must come within r.13.3(1)(a) or (b). It is not enough to show an "arguable" defence; the defendant must show that he has "a real prospect of successfully defending the claim". It is essentially the same test as applied to summary judgment applications under Pt 24.

10. Furthermore, in *ED&F Man Liquid Products Ltd v. Patel* [2003] EWCA Civ 472; [2003] All E.R. (D)75; [2003] C.P.Rep. 51, Potter L.J. explained the distinction between the tests:

"..the only significant difference between the provisions of CPR 24.2 and 13.3(1), is that under the former the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success whereas, under the latter, the burden rests upon the defendant to satisfy the court that there is good reason why a judgment regularly obtained should be set aside. That being so, although generally the burden of proof is in practice of only marginal importance in relation to the assessment of evidence, it seems almost inevitable that, in particular cases, a defendant applying under CPR 13.3(1) may encounter a court less receptive to applying the test in his favour than if he were a defendant advancing a timely round of resistance to summary judgment under CPR 24.2".

11. As it detailed in the witness statement of David Sheahan dated 3 December 2013, there is no defence attached to the application. If there is no defence before the court, it is

impossible for the court to conclude that Defendant has shown that it has "a real prospect of successfully defending the claim". Similarly, the application notice fails to provide any details of the basis on which the claim would be defended at all, let alone "successfully defended".

Defence

12. Without prejudice to the above, by email dated 5 December 2013 at 21:40hrs, the Defendant provided a copy of its purported defence.
13. Whilst the defence makes numerous ill-founded allegations in relation to the claimant, as well as referring to without prejudice communications, it would appear that the crux of the "defence" appears to be that the defendant contends that any monies due to the claimant under the terms of the agreement, over and above the admitted sum of £3834, is a penalty. The defendant is wrong.
14. The first thing to note that the sums invoiced to the defendant are nothing more than the contract price. Alternatively, the sums invoiced represent liquidated damages.
15. The starting point in this case must be the rule in *L'Estrange v Graucob*, namely that where the agreement of the parties has been reduced to signed writing, the signing party will ordinarily be bound by the terms of the written agreement irrespective of whether he has read them and irrespective of whether he knows the extent of their legal effect. To this end, not only has the defendant signed the agreement on 21 April 2011, it also accepts that it was provided with a copy of the 2011 Membership Rules, which would govern its membership after the expiry of the Free Trial Period.
16. Further still, if this is a matter which the defendant is able to pursue, the onus is on the party challenging the contractual clause to establish that it is a penalty, not on the party seeking to enforce it. Further still, as there is a predisposition to uphold liquidated damages clauses, particularly in commercial contracts, the initial evidential burden is on the party challenging the clause to adduce some clear evidence to enable the Court to find that the clause is a penalty. There is no such evidence before the court.
17. Notwithstanding the above, the rule against penalties is an exception to the general rule that the Court will enforce the terms of lawfully made contracts. The Court generally will not rewrite contracts or strike out clauses, which are unduly harsh.
18. The classic statement of the rule is in the House of Lords' decision in *Dunlop Pneumatic Tyre Company v New Garage and Motor Company Ltd* [1915] AC 79 at pp 86 to 88:

"1. Though the parties to contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages..."

2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine pre-estimate of damage ...

3. The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged as at the time of the making of the contract, not at the time of the breach ...

4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

(a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison to the greatest loss that could conceivably be proved to have followed from the breach...

(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid...

(c) There is a presumption (but no more) that it is a penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage"....

On the other hand:

(d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damages was the true bargain between the parties ..."

19. A more contemporary statement of law is contained in the judgment of Colman J in *Lordsdale Finance plc v Bank of Zambia* [1996] QB 752 at p 762G the loss at the time the contract was made.

"... whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach. That the contractual function is deterrent rather than compensatory can be deduced by comparing the amount that would be payable on breach with the loss that might be sustained if breach occurred."

This statement has been approved by the Court of Appeal in *Murray v Leisureplay plc* [2005] IRLR 946.

20. Similarly, there is a predisposition to uphold contractual terms which fix the level of damages for breach. This predisposition is even stronger in commercial contracts. Where a liquidated damages clause has been made between parties of comparable bargaining power, negotiating at arms' length, the Court will be reluctant to strike down such a term.

21. Commercial certainty of knowing the financial consequences of breach is desirable, particularly where loss will be hard to calculate. Liquidated damages clauses tend to avoid:
- disputes
 - lengthy arguments
 - over complicated calculations
 - the risk of under compensating the innocent party.
22. As is stated above, the sum invoiced to the defendant was simply the contract price. Alternatively, when referenced to the contract price, the licence fees charged for the use of the claimant's name and logos etc., the liquidated damages are clearly compensatory and a genuine pre-estimate of the damage suffered by the claimant; either by reference to the licence fees or the sums which the claimant could have charged to an alternative mover.
23. As to the loss and damage suffered by the claimant, it should be noted that the licence fees due under the claimant's Rules have been upheld and awarded as damages in a number of matters, including *National Guild of Removers & Storers Ltd v Silveria (t/a C S Movers)* [2010] EWPC 15 (12 Nov 2010), Birss J (as he then was) held that the Defendant was to pay £200 per week, which amounted to a total amount of £11,594.23 for 1 year infringement.
24. For completeness, it is pertinent to address the defendant's ill-founded position that it cannot be bound by the 2011 Rules as they were never signed. In *RTS v Müller* [2010] UKSC 14, the Supreme Court's decision contains a helpful summary of the law:
- "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations."*
25. The court will appreciate that notwithstanding that the FTO Rules were signed by the defendant, it admits that it was provided with a copy of the 2011 Rules.
26. Both the FTO Rules and the 2011 Rules contained an indemnity. Unlike a guarantee, an indemnity need not be in writing or signed by the indemnifier in order to be effective. Further still, being a primary obligation, an indemnity will be valid even if the underlying transaction is set aside; unlike a guarantee, which is dependent on the underlying transaction. Furthermore, any variation to the underlying transaction will discharge a

guarantor's (but not an indemnifier's) liability, unless the guarantor consents to the variation, or the variation is insubstantial or incapable of adversely affecting the guarantor.

Conclusion

27. The major consideration on an application to set aside is whether the defendant has shown a real prospect of successfully defending the claim or some other compelling reason why judgment should be set aside or he should be allowed to defend the claim. The defendant is seeking to deprive the claimant of a regular judgment which the claimant has validly obtained in accordance with Pt 12: this is not something which the court should do lightly
28. In all the circumstances, it is submitted that the Defendant has no real prospect of successfully defending the claim and there is no other "good" reason why the default judgment should be set aside. The application should therefore be dismissed, with costs awarded to the Claimant in any event.

Costs

29. As to costs, the court's attention is drawn to CPR 44.5 which provides as follows:

Amount of costs where costs are payable under a contract

44.5

(1) Subject to paragraphs (2) to (4), where the court assesses (whether by summary or detailed assessment) costs which are payable by the paying party to the receiving party under the terms of a contract, the costs payable under those terms are, unless the contract expressly provides otherwise, to be presumed to be costs which –

(a) have been reasonably incurred; and

(b) are reasonable in amount,

and the court will assess them accordingly.

(2) The presumptions in paragraph (1) are rebuttable. Practice Direction 44 – General rules about costs sets out circumstances where the court may order otherwise.

(3) Paragraph (1) does not apply where the contract is between a solicitor and client.

30. For completeness, the relevant part of the Practice Directions states:

Amount of costs where costs are payable pursuant to a contract: rule 44.5

Application of rule 44.5

7.1

Rule 44.5 only applies if the court is assessing costs payable under a contract.

It does not –

(a) require the court to make an assessment of such costs; or

(b) require a mortgagee to apply for an order for those costs where there is a contractual right to recover out of the mortgage funds.

31. Accordingly, it is submitted that the defendant is required to pay the claimant's costs of the application and/or the claim, in any event pursuant to the contractual indemnity.

COYLE WHITE DEVINE

10 DECEMBER 2013

Statement of Costs (summary assessment)

In the AYLESBURY COUNTY	
Court	
Case Reference	3YM68412

Judge/Master

Case Title National Guild of Removers & Storers Ltd v McCrorys Removals Limited

[Party]'s Statement of Costs for the hearing on (date) 11/12/2013 interim application

Description of fee earners*

(a) (name) (grade) (hourly rate claimed)	DAVID N SHEAHAN (Grade A) - £250
(b) (name) (grade) (hourly rate claimed)	
(c) (name) (grade) (hourly rate claimed)	
(d) (name) (grade) (hourly rate claimed)	

Attendances on (party) client

Personal attendances

(a) (number)		hours at £		£	0.00
(b) (number)		hours at £		£	0.00
(c) (number)		hours at £		£	0.00
(d) (number)		hours at £		£	0.00

Letters out/emails

(a) (number)	1	36	hours at £	250.00	£	400.00
(b) (number)			hours at £		£	0.00
(c) (number)			hours at £		£	0.00
(d) (number)			hours at £		£	0.00

Telephone

(a) (number)		24	hours at £	250.00	£	100.00
(b) (number)			hours at £		£	0.00
(c) (number)			hours at £		£	0.00
(d) (number)			hours at £		£	0.00

Attendances on opponents (including negotiations):

Personal attendances

(a) (number)		hours at £		£	0.00
(b) (number)		hours at £		£	0.00
(c) (number)		hours at £		£	0.00
(d) (number)		hours at £		£	0.00

Letters out/emails

(a) (number)	1	36	hours at £	250.00	£	400.00
(b) (number)			hours at £		£	0.00
(c) (number)			hours at £		£	0.00
(d) (number)			hours at £		£	0.00

Telephone

(a) (number)			hours at £		£	0.00
(b) (number)			hours at £		£	0.00
(c) (number)			hours at £		£	0.00
(d) (number)			hours at £		£	0.00

Attendance on others:

Personal attendances

(a) (number)			hours at £		£	0.00
(b) (number)			hours at £		£	0.00
(c) (number)			hours at £		£	0.00
(d) (number)			hours at £		£	0.00

Letters out/emails

(a) (number)		6	hours at £	250.00	£	25.00
(b) (number)			hours at £		£	0.00
(c) (number)			hours at £		£	0.00
(d) (number)			hours at £		£	0.00

Telephone

(a) (number)		12	hours at £	250.00	£	50.00
(b) (number)			hours at £		£	0.00
(c) (number)			hours at £		£	0.00
(d) (number)			hours at £		£	0.00

Site inspections etc.

(a) (number)		hours at £		£	0.00
(b) (number)		hours at £		£	0.00
(c) (number)		hours at £		£	0.00
(d) (number)		hours at £		£	0.00

Work done on documents, as set out in schedule:

3,155.00

Attendance at hearing:

(a) (number)	30	hours at £	250.00	£	125.00
(b) (number)		hours at £		£	0.00
(c) (number)		hours at £		£	0.00
(d) (number)		hours at £		£	0.00
(e) Fixed costs				£	

(a) (number)	1 30	hours travel and waiting time £	250.00	£	375.00
(b) (number)		hours travel and waiting time £		£	0.00
(c) (number)		hours travel and waiting time £		£	0.00
(d) (number)		hours travel and waiting time £		£	0.00

Sub Total £ 4,630.00

* 4 grades of fee earner are suggested:

- (A) Solicitors with over eight years post qualification experience including at least eight years litigation experience.
- (B) Solicitors and legal executives with over four years post qualification experience including at least four years litigation experience.
- (C) Other solicitors and legal executives and fee earners of equivalent experience.
- (D) Trainee solicitors, para legals and other fee earners.

"Legal Executive" means a Fellow of the Institute of Legal Executives. Those who are not Fellows of the Institute are not entitled to call themselves legal executives and in principle are therefore not entitled to the same hourly rate as a legal executive.

Brought forward £ 4,630.00

Counsel's fees (name) (year of call)

Fee for [advice/conference/documents] £

Fee for hearing £

Other expenses

Court fees £

Others (give brief description) TRAVEL £ 10.00

Total £ 4,640.00

Amount of VAT claimed on solicitors and counsel's fees £
on other expenses £

Grand Total £ 4,640.00

The costs stated above do not exceed the costs which the (party) is liable to pay in respect of the work which this statement covers. Counsel's fees and other expenses have been incurred in the amounts stated above and will be paid to the persons stated.

(party) Claimant



09/12/2013

Signed

Dated

DAVID SHEAHAN

Name of Partner signing

COYLE WHITE DEVINE

Name of firm of solicitors

Schedule of work done on documents

Item	Description of work <i>(one line only)</i>	(A) hours	(B) hours	(C) hours	(D) hours	Total £
1	Reviewing and analysing website	0.36				150.00
2	Drafting witness statement	3.12				800.00
3	Amending witness statement and collating exhibit	2.36				650.00
4	Research relating to contractual costs indemnity	1.12				300.00
5	Reviewing Defence	0.36				150.00
6	Researching penalty clauses/costs	0.48				200.00
7	Preapring skeleton argyument	3.24				850.00
8	Preparing costs schedule				0.30	55.00
9						
10						
11						
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29						
30						
Total		11.04	0	0	0.3	3,155.00

Statement of Costs (summary assessment)

In the AYLESBURY COUNTY	
Court	
Case Reference	3YM68412

Judge/Master

Case Title National Guild of Removers & Storers Ltd v McCrorys Removals Limited

[Party]'s Statement of Costs for the hearing on (date) 11/12/2013 costs of the claim (to 2.10.13)

Description of fee earners*

(a) (name) (grade) (hourly rate claimed)	DAVID N SHEAHAN (Grade A) - £250
(b) (name) (grade) (hourly rate claimed)	CHRIS LETHEREN (Grade C) - £150
(c) (name) (grade) (hourly rate claimed)	
(d) (name) (grade) (hourly rate claimed)	

Attendances on (party) client

Personal attendances

(a) (number)		hours at £		£	0.00
(b) (number)		hours at £		£	0.00
(c) (number)		hours at £		£	0.00
(d) (number)		hours at £		£	0.00

Letters out/emails

(a) (number)	4 24	hours at £	250.00	£	1,100.00
(b) (number)		hours at £		£	0.00
(c) (number)		hours at £		£	0.00
(d) (number)		hours at £		£	0.00

Telephone

(a) (number)	2 36	hours at £	250.00	£	650.00
(b) (number)		hours at £		£	0.00
(c) (number)		hours at £		£	0.00
(d) (number)		hours at £		£	0.00

Attendances on opponents (including negotiations):

Personal attendances

(a) (number)		hours at £		£	0.00
(b) (number)		hours at £		£	0.00
(c) (number)		hours at £		£	0.00
(d) (number)		hours at £		£	0.00

Letters out/emails

(a) (number)	5 24	hours at £	250.00	£	1,350.00
(b) (number)		hours at £		£	0.00
(c) (number)		hours at £		£	0.00
(d) (number)		hours at £		£	0.00

Telephone

(a) (number)		hours at £		£	0.00
(b) (number)		hours at £		£	0.00
(c) (number)		hours at £		£	0.00
(d) (number)		hours at £		£	0.00

Attendance on others:

Personal attendances

(a) (number)		hours at £		£	0.00
(b) (number)		hours at £		£	0.00
(c) (number)		hours at £		£	0.00
(d) (number)		hours at £		£	0.00

Letters out/emails

(a) (number)	36	hours at £	250.00	£	150.00
(b) (number)		hours at £		£	0.00
(c) (number)		hours at £		£	0.00
(d) (number)		hours at £		£	0.00

Telephone

(a) (number)		hours at £		£	0.00
(b) (number)		hours at £		£	0.00
(c) (number)		hours at £		£	0.00
(d) (number)		hours at £		£	0.00

Site inspections etc.

(a) (number)		hours at £		£	0.00
(b) (number)		hours at £		£	0.00
(c) (number)		hours at £		£	0.00
(d) (number)		hours at £		£	0.00

Work done on documents, as set out in schedule:

1,505.00

Attendance at hearing:

(a) (number)		hours at £		£	0.00
(b) (number)		hours at £		£	0.00
(c) (number)		hours at £		£	0.00
(d) (number)		hours at £		£	0.00
(e) Fixed costs				£	

(a) (number)		hours travel and waiting time	£		£	0.00
(b) (number)		hours travel and waiting time	£		£	0.00
(c) (number)		hours travel and waiting time	£		£	0.00
(d) (number)		hours travel and waiting time	£		£	0.00

Sub Total £ 4,755.00

* 4 grades of fee earner are suggested:

- (A) Solicitors with over eight years post qualification experience including at least eight years litigation experience.
- (B) Solicitors and legal executives with over four years post qualification experience including at least four years litigation experience.
- (C) Other solicitors and legal executives and fee earners of equivalent experience.
- (D) Trainee solicitors, para legals and other fee earners.

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Brought forward £ 4,755.00

Counsel's fees (name) (year of call)

Fee for [advice/conference/documents]

£

Fee for hearing

£

Other expenses

Court fees

£

345.00

Others (give brief description)

£

Total

£

5,100.00

Amount of VAT claimed

on solicitors and counsel's fees

£


on other expenses

£

Grand Total £ 5,100.00

The costs stated above do not exceed the costs which the (party) is liable to pay in respect of the work which this statement covers. Counsel's fees and other expenses have been incurred in the amounts stated above and will be paid to the persons stated.

(party)
Claimant



Signed

09/12/2013

Dated

DAVID SHEAHAN

Name of Partner signing

COYLE WHITE DEVINE

Name of firm of solicitors

Schedule of work done on documents

Item	Description of work <i>(one line only)</i>	(A) hours	(B) hours	(C) hours	(D) hours	Total £
1	Drafting and finalising Particulars of Claim	32				800.00
2	Considering trademark infringement	12				300.00
3	Considering documents	3				75.00
4	Drafting Claim Form	2				50.00
5	Reviewing/collating exhibits for Particulars of Claim	9				225.00
6	Completing Certificate of Service	1				25.00
7	Preparing Request for Judgment		2			30.00
8						
9						
10						
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26						
27						
28						
29						
30						
Total		59	2	0	0	1,505.00