Case No: CH/2014/0618

Neutral Citation Number: [2015] EWHC 2744 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Wednesday, 3 June 2015

BEFORE:

STEPHEN JOURDAN QC SITTING AS A DEPUTY HIGH COURT JUDGE

BETWEEN:

EDRAY LIMITED

Claimant/Respondent

- v -

CANNING

Defendant/Appellant

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MR SAMSON SPANIER appeared on behalf of the Claimant

MR STEPHEN BOYD appeared on behalf of the Defendant

Judgment

STEPHEN JOURDAN QC:

1. This is an appeal against the Order of District Judge Ashworth made on 18 November 2014. By that Order, the District Judge set aside a Default Costs Certificate issued by the Southend County Court on 15 October 2014. I will refer to that Default Costs Certificate as "the Certificate". The Certificate was issued on the application of Edray Limited.

2. The background to the Order under appeal can be briefly summarised as follows. Edray petitioned for the bankruptcy of Mr Canning. Mr Canning paid the debt which he owed to Edray three days before the hearing of the petition. At the hearing of the petition, the Court dismissed the petition and ordered Mr Canning to pay Edray's costs of the petition, to be determined by detailed assessment if not agreed. On 13 March 2014, Edray sent to a firm of solicitors, Teacher Stern, Notice of Commencement of the detailed assessment proceedings to assess those costs. No Points of Dispute were served. Seven months later, Edray applied for a default costs certificate which led to the issue of the Certificate.

3. Mr Canning then applied to set aside the Certificate under CPR r.47.12. On 18 November 2014, District Judge Ashworth granted that application, set aside the Certificate, and ordered Edray to pay Mr Canning's costs of the application, to be assessed if not agreed. Her decision followed the determination by her of three issues. First, she held that sending the Notice of Commencement to Teacher Stern did not constitute good service of the Notice of Commencement. There is no appeal against that part of her decision. Second, she held that subsequent communications between Teacher Stern and Edray's solicitors, Lyndales, did not give rise to a waiver or estoppel, preventing Mr Canning from relying on the fact that the Notice of Commencement had not been validly served. There is an appeal against that part of her decision for which she gave permission. Third, she held that she could not remedy the situation by making an order retrospectively validating service. There is no appeal against that part of her decision.

4. The background facts can be summarised as follows. Edray made loans to Mr Canning which he did not repay. In June 2013, Edray served a statutory demand on Mr Canning and he applied to set it aside and that application was given the reference number 285. In November 2013, that application was heard by District Judge Ashworth. She dismissed the application and ordered Mr Canning to pay Edray's costs, to be determined by detailed assessment if not agreed. Some reliance has been placed on observations made by District Judge Ashworth on that occasion and another district judge on another occasion about evidence given by Mr Canning but I do not think I can place any reliance on assessments made by other judges in other proceedings about evidence given by Mr Canning in those proceedings; I have to make my own assessment of his evidence in this case.

5. Even though the statutory demand had not been set aside, Mr Canning did not pay the loans back to Edray and on 5 December 2013, Edray issued a bankruptcy petition seeking a bankruptcy order in respect of Mr Canning. That petition was given the reference number 466 and was listed for hearing on 17 February 2014. On 13 February 2014, Lyndales sent to Mr Canning by email a statement of costs in respect of the bankruptcy petition. After payment of the debt was received, Mr Shaw of

Lyndales pointed out to Mr Canning by email that he had made no mention of the costs which he was liable for and said:

> "Unless I hear from you by return I will be forced to attend Southend County Court on Monday to make representations to the Court."

In circumstances where there had already been a contested application to set aside the statutory demand and where Mr Canning was acting in person, it seems to me to have been reasonable for Mr Shaw to decide to attend himself, rather than instructing a local agent.

6. On 17 February 2014, the matter came before District Judge Oldham at the Southend County Court. Mr Shaw's attendance note records that he had a brief conversation with Mr Canning before going into court and Mr Canning said he was instructing the solicitors to deal with the costs. Mr Shaw asked him whether they could try to avoid having a dispute on the costs of the petition, and Mr Canning said he was instructing solicitors and that Mr Shaw would be hearing from them shortly. The note says that they went into court and the Judge asked Mr Canning if he had had the opportunity of looking at the statement of costs. He said he had recently received it but not yet fully digested it and, on that basis, the Judge ordered the costs of the petition to be assessed by a detailed assessment rather than summarily assessing them.

7. A week later, on 24 February, Teacher Stern sent a letter to Lyndales, headed Anthony Canning v Edray Limited, which was the action heading of the application to set aside the statutory demand, and they said they had been instructed by Mr Canning in relation to the above. They said they had been passed the Notice of Commencement and bill of costs in relation to the statutory demand application and they asked for an extension of time to serve any Points of Dispute in relation to that.

8. So, at that point, Lyndales knew that Teacher Stern had been instructed in relation to the costs of the application to set aside the statutory demand. They had been told by Mr Canning that he was going to instruct solicitors to try and deal with the question of costs in relation to the petition and, perhaps not unnaturally, they assumed that Teacher Stern were dealing with both the costs of the petition and the costs of the application to set aside the statutory demand.

9. On 13 March, Lyndales wrote to Teacher Stern and they said:

> "Please find attached by way of service Notice of Commencement Form N252 accompanied by our Bill of Costs relating to the Order made by Deputy District Judge Oldham on 17 February 2014. We calculate that the time for service for your client's Points of Dispute, if any, expires on 4 April 2014. Please acknowledge receipt."

Now, the District Judge in the present matter held that that did not constitute good service of the Notice of Commencement. The reason she so held was because under the rules, in order for it to have been good service, written notice would have had to have been given identifying Teacher Stern as authorised to accept service. There had

been no such written notice and, therefore, this did not constitute good service. As I have said, that aspect of the District Judge's decision has not been appealed.

10. The bill of costs that was enclosed was for a total of £4,107. That is the most that Edray can recover in respect of the costs; that is what they are claiming. I asked Mr Boyd to say what his client's position was as to what the appropriate sum to be paid to Edray in respect of the costs of the petition and he said £1,500. So, this is, in effect, a dispute about £2,600.

11. On 2 April 2014, Teacher Stern sent a without prejudice letter to Lyndales in relation to the costs of the bankruptcy petition. The fact that it was sent has been put in evidence without objection. The without prejudice letter itself was included in the appeal bundle in a sealed envelope which said "to be opened on at the instruction of the Judge, should the Judge wish to read it." Mr Spanier applied to me for permission to rely on the letter and he said that the heading "without prejudice" did not make it inadmissible because the aspect of it he wished to rely on had nothing to do with the content of the offer but simply had to do with what it indicated about Mr Canning's state of knowledge.

12. Mr Boyd objected to the contents of the letter being put in evidence on two grounds. First, it was without prejudice and, second, it had not been put in evidence before the District Judge so it was fresh evidence sought to be introduced on appeal and, therefore, subject to the usual restrictions.

13. In my judgment, both of those objections are sound. As to the first point, the without prejudice principle should be applied widely and not narrowly and this letter was headed "without prejudice" with the intention that it should not be used to prejudice Mr Canning in relation to the costs of the bankruptcy petition, but that is exactly what Edray are seeking to do by putting it in evidence. A without prejudice communication can sometimes be put in evidence if it is relied on in relation to an issue which has nothing to do with the dispute in relation to which the offer was made. It does not seem to me that that principle goes wide enough to enable the contents of this letter to be looked at.

14. As to the second point, I have been shown a transcript of the hearing before the District Judge. The existence of this letter was referred to, but Edray did not seek to rely on its contents as evidence before her. There seems to me to be no good reason why Edray should be entitled to put the contents of the letter in evidence on this appeal when they were not put in evidence before the District Judge.

15. So, for those reasons, I am not going to have regard to the contents of that letter, but the fact that it was sent and the fact that it was sent in relation to the costs of the bankruptcy petition is a matter which it is accepted I can have regard to. However, it does not really seem to me to add anything to the communications I am about to turn to.

16. On 3 April 2014, Teacher Stern sent an email to Lyndales and they said:

> "We note that the Points of Dispute in relation to the Bill of Costs for the Bankruptcy Petition is due to be served tomorrow. We request a first extension of time until close of business on Friday 11

> April to serve such Points of Dispute. We are working on the basis that we will hopefully be in a position to serve both Points of Dispute by 8 April. Please can we hear from you by 10.30 am tomorrow with your response. You will appreciate that if you do not consent we will need to issue an application tomorrow."

So, having been sent the Notice of Commencement on 13 March, purportedly by way of service, and having been told what the deadline was for serving points of dispute, they were responding in a way which was only consistent with the Notice of Commencement having been validly served on 13 March.

17. The following day, on 4 April, Teacher Stern wrote to Lyndales enclosing an application to extend time for serving the points of dispute until 4.30 pm on 11 April because Mr Canning was not yet in a position to finalise, file and serve his Points of Dispute. That was supported by a short statement, supported by a statement of truth made by a partner in Teacher Stern, Mr Taylor, and he said:

> "On 13 March 2014, the petitioning creditor's solicitors, Lyndales, served the petitioning creditors Notice of Commencement, the bill of costs on the debtor. On 3 April, we wrote on behalf of the debtor to Lyndales to request the first extension of time until 11 April and to inform that unless a request for an extension was agreed, an application would be made to the court that no response has been received from Lyndales. The debtor requires the short extension in which the finalise and serve the Points of Dispute and extending time now is likely to save the time and costs of having to provide further information at a later stage."

Teacher Stern there clearly and unambiguously stated that the letter sent to them on 13 March 2014 constituted service of the Notice of Commencement on Mr Canning.

18. On the same date, Teacher Stern sent the application notice and a draft order and a cheque for the appropriate fee to the court. On 7 April, that was received by the court. On 10 April, the court wrote to Teacher Stern referring to the application and saying:

> "Upon checking the case file, it appears that it may have been in sent in error. The case was concluded on 17 February 2014. Kindly clarify what, if anything, you require us to do with this application."

19. After that, Teacher Stern took no further steps in relation to this matter. It appears from a witness statement I have been shown dated 1 September 2014, made in Case 285, the application to set aside the statutory demand case, that Mr Canning had instructed new solicitors and that he had sought to get papers from Teacher Stern, who were not releasing them. I am invited by Mr Spanier to draw the inference that that was probably because Teacher Stern's costs had not been paid and, therefore, they were exercising their lien on the papers. Mr Boyd did not suggest that was an inference I should not draw. It seems to me a reasonable inference. Whatever the facts are, the fact is that Teacher Stern took no further part of a matter that I am concerned with after 7 April.

20. Thereafter, nothing happened in relation to the costs of the bankruptcy petition but there was a substantial amount of communication and applications in relation to the costs of the application to set aside the statutory demand. Notice of commencement was served on 4 February 2014 on Mr Canning and a Default Costs Certificate was issued on 9 May 2014. In August 2014, Mr Canning made an application to set that aside and it was in that context that he made the witness statement that I have just referred to, dated 1 September 2014. That application to set aside was successful. The District Judge who heard it, granted the application on the grounds, as I understand it, that there had been a technical failure to comply with the rules in the material that had been sent with the Notice of Commencement. Counsel's fee notes had not been attached and, therefore, he set aside the Default Costs Certificate and made an order for costs against Edray. That was on 29 September 2014.

21. Four days after that, on 3 October 2014, an application was made for a Default Costs Certificate in the bankruptcy petition matter, Case 466, and the court issued the Certificate on 15 October. On 17 October, the Certificate was sent both to Wilson Barker, the solicitors who were acting for Mr Canning in relation to Case 285 and also to Mr Canning personally. It does not seem to me surprising that it was sent to Wilson Barker and to Mr Canning personally and not to Teacher Stern, bearing in mind that on 1 September, Mr Canning had made a witness statement in which he had said, in effect, that he had fallen out with Teacher Stern and could not get papers from them. There would not have been much point in those circumstances in sending papers to Teacher Stern.

22. On 24 October, and therefore promptly, Mr Canning applied to set aside the Certificate and there was an exchange of evidence. First of all there was a witness statement from Mr Canning on 24 October in support of the application and he said that he first became aware of the bill of costs in relation to the bankruptcy petition late on the evening of 17 October 2014 when he received a telephone call from Mr Barker. He said he did not understand on what basis it was being said that Notice of Commencement and the bill of costs had been served on him because Lyndales had not explained that. He said he had never seen the bill of costs relied on and no such documents had ever been served on him and he said:

> "I did not ever instruct any firm of solicitors to act for me in relation to the Petition. I am advised that any Bill of Costs should therefore have been served on me directly."

Then he made a second statement on 28 October which was simply to produce certain documents but did not take the matter any further forward.

23. On 14 November 2014, Mr Merrison of Lyndales made a statement and exhibited the documents that he referred to in it. He explained that Teacher Stern had sent the email on 3 April, that I have referred to, and sent the application that I have referred to on 4 April. He also referred to the without prejudice letter of 2 April and at paragraph 16, he said:

> "Pursuant to that correspondence we did not receive any Order of the Court and with hindsight and my knowledge of this matter I suspect that it was at or around this time that the Debtor fell out with [Teacher Stern]. It has since come to my knowledge through

> contact with solicitors now acting for the Debtor that the Debtor's previous solicitors file is unavailable to him for reasons that are not clear to me."

He then made some comments on Mr Canning's credibility based on previous decisions of the court. At paragraphs 25 to 29, he explained the reason for the delay in seeking the Default Costs Certificate in Case 466. In essence, what he said was that what Edray wanted to do was pursue the Default Costs Certificate in Case 285 and that their intention had been to get that and then issue a bankruptcy petition, get a Bankruptcy Order against Mr Canning and then deal with the Official Receiver. It was felt it would be easier to deal with and it was only when the Default Costs Certificate in Case 285 was set aside that they decided to pursue the costs in Case 466. The remainder of his statement is concerned with responding to accusations that he obtained the Default Costs Certificate by stealth, by not communicating with Wilson Barker adequately.

24. What he did not do was say what he thought he would have done had he not received the communications from Teacher Stern which indicated that they were treating the sending of the Notice of Commencement to them as good service. It has been submitted to me by Mr Spanier that it really is obvious that in those circumstances, if he had not been encouraged to believe that good service had taken place, he would have arranged for good service to take place. I will return to that when I deal with the question of estoppel but certainly as a matter of evidence, he does not say that in his statement.

25. Then there is a witness statement from Mr Barker which is dated 14 November 2014 which deals with his communications with Lyndales and with what he says is an unsatisfactory failure on the part of Lyndales to provide him with information. Again, that does not really take the matter any further forward. What there is not is any response to Mr Merrison's statement from Mr Canning saying, "Well, now, I've seen that email from Teacher Stern, now I've seen that letter from Teacher Stern on 4 April, I need to explain why they appeared to be writing on my behalf saying that the Notice of Commencement was validly served on them when, in fact, they had no right to do so." There is nothing of that kind.

26. When a solicitor, such as Teacher Stern, writes in the terms that they did on 3 and 4 April, there is an overwhelming inference that they are authorised to do so by their client. If the client wishes to persuade the Court that is, in fact, not that case, and that the solicitors were acting without authority, then one needs much stronger and clearer evidence than one finds in Mr Canning's first witness statement. Therefore, I am unable to accept what Mr Canning says in his first witness statement. I am satisfied on the evidence that Teacher Stern were authorised to write the letter on 2 April, the email on 3 April, and the letter and the application on 4 April, on behalf of Mr Canning.

27. I turn, then, to the reasons given by the District Judge for rejecting the arguments that there was a waiver or estoppel in relation to the failure to serve the Notice of Commencement in accordance with the CPR. In her Judgment at paragraphs 21 to 23, she said this:

> "The next fundamental question I have to ask is that, if there has not been good service, can this in some way be waived by the issue of waiver or by estoppel, either issue estoppel or prejudice estoppels? Mr Spanier took me through the argument in relation to this. It is very easy to criticise Teacher Stern for their handling of this matter and they are not here today to answer, themselves. I ask myself, why did they not just send the papers back when they received them, say that they did not have instructions to accept service, that they were not on the record. Why did they file an application which said that there had been service of the bill of costs on the debtor but their conduct of the case leaves much to be desired. The question I have to ask myself is can they negate the requirements of CPR 47, that a Costs Certificate has to be served on a debtor. I find that the answer to that question must be no. The rules are clear. Service has to be effected, CPR 6 sets out clearly what is required in relation to service and if good service is not effected and in accordance with that rule, then to my mind, that has to be the end of the matter."

28. So, it is clear, and Mr Boyd did not seek to suggest otherwise, that the basis on which the District Judge rejected the waiver and estoppel arguments was not there was anything wrong with them as arguments, but simply that they did not affect the rules. The rules, the District Judge thought, were clear, service has to be properly and validly effected, and she took the view that communications after the failure to serve were simply irrelevant.

29. It is clear that she was not referred to any authorities on this point and under those circumstances, she cannot be criticised for reaching the decision which she did. But it is also clear, and this is common ground, that there can be circumstances in which communications subsequent to the failure of one party to serve a document in accordance with the rules can lead to a party being prevented from arguing that the document was not validly served. The question is, what are the principles that are applicable and are those principles such that there is a waiver or estoppel in the present case?

30. In terms of authority, I have been supplied with an extract from a text book, The Law of Waiver, Variation and Estoppel by Sean Wilken and Karim Ghaly, and with the decision of the Court of Appeal in Bethell v Deloitte & Touche, [2011] EWCA Civ 1321, the decision of the House of Lords in Kenneth Allison Ltd v AE Limehouse Ltd [1992] 2 AC 105, and also The Stolt Loyalty [1993] 2 Lloyds Law Reports 281 and Mason v Grigg [1909] 2 Kings Bench 341. I was also referred to some passages in Snell's Equity which do not seem to me to take the matter any further than the other material I have been referred to.

31. I will deal first with waiver. Waiver is an expression that is used to refer to a number of different situations. It can be used to refer to an election by a party to a contract not to terminate the contract, as with waiver of the right to forfeit or waiver of the right to terminate a charterparty. It can be used to refer to a situation where a provision in a contract is included solely for the benefit of one party and that party communicates to the other an election not to require compliance with that provision. In those types of

waiver, the focus is on the need for a clear and informed communication by the party waiving of his decision. There is no need for any consequential reliance or alteration of position by the other party. The focus is entirely on the actions and knowledge of the party who is waiving and not on actions of the party who is in receipt of the waiver.

32. It is established that for this sort of waiver, the person waiving must know the facts and must also know of his right to elect. Mr Spanier accepts that that this requirement of knowledge must apply to waiver in the context of waiving a failure to comply with the requirements of the Civil Procedure Rules in relation to service. If somebody does not know they have the right to treat a communication as not constituting good service, they could not be treated as waiving their right to contend that the communication was not good service when they do discover that. That, Mr Spanier accepted.

33. Does the concept of waiver in this sense apply to a failure to comply with the Civil Procedure Rules? There is, certainly in terms of what I have been referred to, a surprising dearth of authority on the point. The Kenneth Limehouse case did not concern waiver, it concerned an agreement to accept service of a writ in a particular way which Lords Bridge, Templeman, Jauncey and Lowry held was effective. Lord Goff approached the matter in a slightly different way. He held there was an estoppel by convention as a result of the agreement to accept service of the writ in a particular way but waiver does not seem to have featured. In the Bethell case, there are tantalising references in the judgment of the Chancellor to waiver but it does not really get discussed in any detail. It is fair to say, and Mr Spanier pointed this out, that there are parts of the Chancellor's judgment which refer to waiver and in paragraph 9, he said in relation to the obligations under the CPR to comply with the rules in relation to service of a Claim Form:

> "Compliance with those provisions may be waived and a defendant may be estopped from relying on a failure to comply but that depends on the actions of the defendant."

34. The trouble is that "waiver" can be used in many different senses and sometimes it is used to refer to estoppel, or something that is very close to estoppel, and which does require actions on the part of the recipient of the communication and not just a clear informed communication. So, I do not think I can get from the Chancellor's judgment in that case a decision that waiver simply based on a communicated informed choice is a relevant concept.

35. If, however, it is a relevant concept then, as I have said, Mr Spanier accepts that knowledge of the right to waive is essential. And, here, there is this difficulty for Mr Spanier, that there is nothing in the evidence to suggest that either Teacher Stern or Mr Canning were aware that there was a choice to treat the sending of the Notice of Commencement to Teacher Stern as good service or bad service. It just seems to have been assumed by Teacher Stern on behalf of Mr Canning that it was good service. It seems to me that the election would have to be made by Mr Canning, unless he authorised Teacher Stern to make it on his behalf. Although I have held that it is right to infer that he authorised them to deal with the matter on his behalf, I think it is not possible to infer that either he or they had knowledge sufficient to make the concept of waiver applicable.

36. Accordingly, it is unnecessary for me to decide whether it is possible to waive the requirements in the CPR relating to the service of documents simply by an informed communication of a decision not to require those requirements to be complied with. That may well be possible, but even if it is, the facts of this case do not support the existence of a waiver.

37. I turn, then, to estoppel and here, the legal position is much more straightforward. As I have said, Lord Goff in the Kenneth Allison case held that an agreement to accept service of a writ in a particular way gave rise to an estoppel, and in the Bethell case, the Court of Appeal recognised estoppel as something that could have the effect of preventing a party to litigation from relying on a failure to comply with the rules as to service, and that seems to me to clearly be right.

38. As for the requirements of estoppel by convention, the principles are summarised in the extract from Wilken that was cited. There has to be a shared assumption which has to be communicated, a crossing of the line. It must be unjust or unconscionable to allow one party to resile from the common assumption, and:

> "The requirement of unconscionability has been summed up as: 'In almost all cases, such unconscionability must be based on the prejudice which would be caused to the claimant if the strict legal position applied. As I see it, the claimant must also establish that the prejudice arises from its reliance upon the convention. In other words, the Court generally must be satisfied that (a) the claimant will suffer real prejudice, and (b) the prejudice arises from its reliance upon the convention. It should be emphasised that, even if the claimant satisfies these criteria, there may still be no estoppel, because there may be other, more powerful, factors pointing the other way.'"

That is a quotation from the judgment of Neuberger J in PW & Co v Milton Gate Investments [2004] Ch. 142 at [222]. The authors also say in the previous paragraph that, because of the requirements of this form of estoppel, it will only arise in limited circumstances. Where there is no shared assumption, there will be no estoppel by convention no matter how unjust the other party's conduct may be.

39. In my judgment, the communications from Teacher Stern referred to above were clear statements that they treated the sending of the Notice of Commencement to them as good service. So, we have a clear communication from Lyndales, on behalf of Edray, that they treat sending the Notice of Commencement as good service on 13 March, and we have on 3 and 4 April communications from Teacher Stern, on behalf of Mr Canning, also communicating that they treat it as good service, the clearest being the witness statement that formed part of the application to the court on 4 April. That seems to me to be a clear communicated common assumption.

40. The key question, as it seems to me, in this case is whether it is unconscionable for Mr Canning to now seek to say that, although his solicitors at the time communicated that the Notice of Commencement had been validly served, in fact it had not been validly served. Is that unconscionable? That requires me to focus on what, if any, prejudice would be suffered by Edray now if Mr Canning was permitted to depart from the

shared assumption. Would there be such prejudice and, if so, would it result from reliance by Edray on the shared assumption of valid service?

41. Mr Spanier has relied on a number of matters as constituting prejudice, but the one that impressed me was this. If Teacher Stern had not created the impression that they had, that valid service had been effected, it is more likely than not that good service would have been effected on Mr Canning. The probable effect of Teacher Stern's communications that the notice of commencencent had been served was that Lyndales would give no further thought to the question of service and would not consider whether service direct on Mr Canning was needed and effect such service. It is true that there is no evidence saying that this is what would have happened, but any such evidence could only really be speculation about what, hypothetically would have happened in different circumstances. That seems to me to be a matter on which I can and should reach a decision based on the inherent probabilities.

42. If that had happened, then subject to two points, Edray would have been in a position to obtain a Default Costs Certificate. The two points are, first, that Points of Dispute might have been served at any time, but we know, in fact, that they were not; so I think that can be discounted. The second is that there is power for the court under CPR rule 47.12(2) to set aside or vary a Default Costs Certificate if it appears to the court there is some good reason why the detailed assessment proceedings should continue.

43. If there had been good service on Mr Canning, after 21 days, Edray would have been in a position to obtain a Default Costs Certificate. The ability to rely on a Default Costs Certificate, subject to Rule 47.12(2), seems to me to be a valuable right and one which it would be prejudicial to deprive Edray of. Further, I am satisfied that the prejudice would be suffered as a result of Edray relying on the shared assumption of good service. But for that, I think it probable that they would have served Mr Canning personally.

44. So, on the face of it, it appears to me that there is sufficient prejudice to make out an estoppel by convention. However, Mr Boyd has a number of points in relation to that which need to be considered. First, he points out that under the rules of court there are obligations on a party to litigation to ensure that if solicitors are appointed, notice is given to the other party and to the court in Practice Form N434 and Mr Boyd helpfully provided me with a blank copy of that. That gives notice that a particular named firm of solicitors has been appointed and Mr Boyd took me through the rules careful and showed me that that is, indeed, what is required. No such notice was given here in relation to Teacher Stern. However, it is a fact that anybody who practices in civil litigation knows that solicitors do not always comply to the letter with all the rules and it is certainly far from unknown for Notices of Change not to be filed and served or to be filed and served later than they should be. So, I do not feel able to attach a great deal of importance to that consideration.

45. Second, Mr Boyd pointed out that there had been a very long delay in making the application for the Certificate. That does not seem to me to bear on the question of unconscionability. Because of the communications from Teacher Stern, Edray had no reason to think about serving Mr Canning personally and if it had served Mr Canning personally, it would, after 21 days, have obtained the right to a Default Costs Certificate, subject to CPR 47.12(2) and that is the prejudice that it suffered, as it seems

to me. The delay does not really bear on that. It is fair to say that Mr Spanier did place considerable emphasis on the delay and on the fact that Edray was being kept out of its money. However, I find it difficult to see that that was prejudice caused by relying on the shared assumption of good service; rather it was prejudice caused by Edray's decision to delay in applying for a Default Costs Certificate.

46. Reference was made to the Stolt Loyalty and the principle that in certain circumstances, if somebody chooses to make a communication, they must ensure that it is not misleading. It was suggested that if Teacher Stern had been aware that a mistake had been made, they had a duty to point it out but there is nothing at all to suggest that Teacher Stern were aware of any mistake so I do not see that that case or that principle has any application here.

47. It is argued by Mr Boyd that Lyndales and their client, Edray, were very much the authors of their own misfortune. They did not enquire if Teacher Stern were authorised to accept service, they relied on the conversation on 17 February, and they subsequently tried to find reasons that they can put to the court to explain their conduct. As to that, somebody who is relying on the other side's conduct as depriving them of the ability to rely on a failure to comply with the rules is very likely to be somebody who did not notice the failure to comply in the first place, otherwise they would have remedied the position and would not need to rely on an estoppel. So, it seems to me that that line of argument would come close to emasculating the doctrine of estoppel in this context and it does not seem to me to be a good reason for refusing to hold an estoppel established.

48. So, for those reasons, in my judgment, the District Judge fell into error in holding that the principles of estoppel were not applicable here. As I have said, I am not making any decision about waiver but I hold that she was in error in holding that the principles of estoppel and specifically estoppel by convention were not applicable in this sort of situation. Understandably, having made that decision, she did not examine the facts in the way that I have, but I have examined the facts and I am satisfied there was a sufficient convention and that, in the circumstances, it would be unconscionable for Mr Canning to seek to rely on the failure of Edray to serve the Notice of Commencement and bill of costs on him personally rather than sending them to Teacher Stern and, therefore, the appeal succeeds.

49. There is then the point which is raised by the Respondent's Notice, which I need to deal with. Rule 47.12(1) says:

> "The court will set aside a Default Costs Certificate if the receiving party was not entitled to it."

Rule 47.12(2) says:

> "In any other case, 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."

What is said in the Respondent's Notice is that reliance was placed on rule 47.12(2) before the District Judge. She did not deal with it. She did not need to deal with it

because she set aside the Certificate under rule 47.12(1) but it is said that her decision can be and should be upheld under rule 47.12(2). In fact, what the Respondent's Notice asked for was for the matter to be remitted to the District Judge but given the amount at stake, I made it clear that I was not at all keen on there being yet another hearing in this matter. It does not seem to me to be appropriate to let any more of the court's resources or any further costs be incurred in relation to a dispute about £2,600 and so I am going to determine that issue myself.

50. Mr Boyd essentially had three points. The first was that the £4,100 claimed in the bill of costs was manifestly excessive. If the court, looking at a bill of costs in respect of which a Default Costs Certificate had been obtained was satisfied that the costs on the face of it looked manifestly excessive, I can see that that could be a good reason for allowing the detailed assessment proceedings to continue. However, this was a petition for a bankruptcy order in respect of failure to pay debts of £20,000 and, on the face of it, it does not seem to me that total costs, including preparing the bill itself, of £4,107, are disproportionate.

51. As to the individual items, it was said that really it was not necessary to have a London firm dealing with this matter and it certainly was not necessary for the partner to come all the way down to Southend and that even if it had been necessary, he had claimed too long for travelling and attending the hearing. In my judgment, those are not valid points for the reasons given by Mr Spanier in his reply. This was a case where an application had been made to set aside the statutory demand which had been fought out in front of the District Judge and the application had been dismissed. It was a case where, as I have said already, a request had been made to Mr Canning to agree that he should pay the costs and he had not agreed. I think in those circumstances, it was appropriate for the fee earner concerned to come down to Southend and deal with the matter, himself, and I am not persuaded it would have been substantially cheaper if he had instructed somebody local and had to explain the matter or somebody else in his firm had to explain all the matters, the history and the background because, of course, at this point, it was not known what position Mr Canning would take at the hearing.

52. I accept entirely it might well be the case that on a detailed assessment, this bill would be reduced somewhat, as that is what normally happens on a detailed assessment, as I understand it. However, I am not persuaded that there is anything sufficiently excessive on the face of it in this bill to justify a detailed assessment continuing in circumstances where a very long period has elapsed since the draft bill was served and no points of dispute were served.

53. The second point that is made by Mr Boyd is that there was a very long delay in applying for the Certificate. That does not seem to me to be a good reason for allowing the detailed assessment to continue. If anything, it points the other way. A very long period means that the debtor had a very long time to put in his points of dispute.

54. The third point that was made was that there had been two contested hearings and a lot of correspondence in relation to the other matter, the costs of the application to set aside the statutory demand. At no point in those was any mention made by Mr Merrison of Lyndales of the dispute in relation to the bill of costs in Claim 466. It is said that that was contrary to the obligation on the overriding objective to deal with the case justly and at proportionate cost. The parties are required to help the court to

further the overriding objective under CPR 1.3 and it is said that really what should have happened is that Mr Merrison should have told Mr Barker that there was a bill of costs that had been sent many months earlier to Teacher Stern and that they had made an application for an extension of time but nothing more had been heard about the matter, and could the matter not be sorted out.

55. I see the force of that but, on the other hand, at any point, it was open to Edray to apply for a Default Costs Certificate. There had been a long delay and it does not seem to me that they were under obligation to raise the matter with the third firm of solicitors that Mr Canning had instructed who were dealing with another matter. That, to my mind, does not constitute a good reason for allowing the detailed assessment proceedings to continue.

56. So, despite Mr Boyd's very clear and very persuasive submissions, I have reached the conclusion that the points taken in the Respondent's Notice should be rejected and, therefore, this appeal should be allowed.

(After submissions)

57. In relation to the costs before the District Judge, Mr Spanier says that Edray should have its costs because the District Judge allowed the application and, on my findings, she was wrong to do so, therefore, Edray should have won but they lost. Against that, it is said by Mr Boyd that there were three points that were argued before the District Judge and Mr Canning won on two of them and that the hearing lasted two hours although, apparently it was listed for one hour, and although Mr Barker on behalf of Mr Canning did put in a skeleton argument, I think, the day before, no skeleton argument at all was put in on behalf of Edray so that Mr Canning had no notice of the points that were going to be taken and certainly no notice of the waiver and estoppel point. And it is the case, if one reads Mr Merrison's witness statement, although the facts are there, it is not put as an estoppel point. The facts are set out but he does not say, as I have already said in my main judgment, that had he not received a communication from Teacher Stern, he would have taken other steps. I have inferred that as a probable fact but it is not set out there.

58. So, it seems to me that what Mr Spanier says happened at the hearing is likely to be correct. The parties went along expecting to argue about the two points which the District Judge decided in Edray's favour. Mr Spanier went along expecting to find that the court file would show that Teacher Stern went on the record on 7 April, but that turned out not to be the case and he had to think on his feet and came up with waiver and estoppel, one of which I have held was a good point, but they were raised at the hearing and Mr Canning was given no advance notice of them.

59. I do not think the point about finding out on the court file that Teacher Stern had not gone on the record on 7 April is a strong one because even if they had gone on the record on 7 April, that would not have helped Edray on service because that was after the purported service, not before.

60. Ultimately, I have to take into account the factors in relation to costs that are set out in Rule 44. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party but the court may make a different order. The court has to have

regard to all the circumstances, including the conduct of the parties and whether a party succeeded on part of its case, even if that party has not been wholly successful.

61. In my judgment, the fair order to make in respect of the costs of the hearing before the District Judge is that Edray should recover half of its costs of that hearing. That fairly reflects the fact that the parties went along, really, to argue about the points on which Mr Canning won but on the consideration of the communications from Teacher Stern the District Judge should have ruled in favour of Edray. Even though no skeleton argument was served and even though no authorities were referred to, the fact is the arguments were put forward and should have been accepted.

62. So, that is my decision in relation to the costs at first instance. As to the costs on appeal, the fact that the waiver and estoppel arguments were put in different ways, and I have accepted one of those ways but not others, does not seem to me to justify any discount from the costs which have been ordered in favour of Edray and, therefore, Edray will have its costs of the appeal.