IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FROM THE CENTRAL
LONDON COUNTY COURT
[2018] EWHC 2815 (Ch)

No. CH-2018-000042

Rolls Building
Fetter Lane, London EC4A 1NL

Friday, 5 October 2018

Before:

MRS JUSTICE FALK

B E T W E E N :

(1) DAVID DEVOY-WILLIAMS
(2) ANJANA DEVOY-WILLIAMS — Appellants/Claimants

- and -

HUGH CARTWRIGHT & AMIN — Respondent/Defendant

MR J. WARDELL QC and MR J. HOLMES (instructed by Bryan Cave Leighton Paisner LLP) appeared on behalf of the Appellants/Claimants.

MS N. SHALDON (instructed by Kennedys Law LLP) appeared on behalf of the Respondent/Defendant.

J U D G M E N T

MRS JUSTICE FALK:

1 This is an application by the claimants and the appellants in this action, Mr and Mrs Devoy-Williams, for permission to appeal, and if permission is granted an appeal by them against an order made by Her Honour Judge Baucher in the Central London County Court on 24 January 2018 following a two-day hearing on 18 and 19 January. Judge Baucher's order granted the application of the defendant in this action and respondent in the appeal, a firm of solicitors I shall refer to as "HCA", to set aside an order made on 21 November 2016 and dismissed the appellants' application for a relief from sanctions dated 21 July 2016. As I shall explain, I am granting permission to appeal and will therefore address the substantive issues raised in the appeal.

2 The underlying claim in this action is a claim in negligence made by the appellants against HCA. That claim was itself connected to an earlier claim brought by HCA against the appellants for outstanding fees. The procedural history is somewhat complicated, but the immediate starting point was an Unless Order granted on the application of the respondent following a hearing on 9 September 2016 and made on 14 September 2016. This order provided, among other things, that the appellants' claim would be struck out and judgment entered in favour of the defendant unless certain documents were provided by a deadline of 4 p.m. on 21 October. Following a review of the documents provided, the respondent concluded that the terms of the Unless Order had not been complied with and applied for judgment to be entered pursuant to CPR rule 3.5(2).

3 On 11 November 2016, Judge Baucher made an order that the claim be struck out. Following representations by and on behalf of the appellants, the court made a further order on 21 November setting aside the 11 November Strike-out Order, with liberty for either party to apply to set that further order aside, which the respondent duly did by an application on 1 December 2016.

4 In the meantime, HCA's insurers had made a Part 36 offer to settle the claim. The appellants received this offer on 10 October 2016 and they sought to accept it on 1 November, eleven days after the deadline for compliance with the Unless Order. HCA's position is that this was of no effect because the claim was already struck out as at 21 October.

5 The 1 December 2016 application was first listed to be heard on 23 June 2017 but was adjourned following the service of a witness statement from Mrs Devoy-Williams shortly before the hearing. Directions were given for the filing of an application for relief from sanctions and for evidence.

The 14 September 2016 order

6 The 14 September order dealt with a number of different matters. For the purposes of this appeal, the key provisions are in paragraph.3. Paragraph 3 required documentation to be provided by 4 p.m. on 21 October 2016. It consisted of three numbered subparagraphs, the first two of which the judge found had been complied with. Paragraph 3.3 required the claimants to provide:

> "the Particulars of Claim against the claimants together with documents evidencing (a) the quantum claimed by the claimants in their counterclaim in the Savills claim

and (b) the settlement in the Savills claim, or, if no such documents are available, a signed witness statement stating why the documents are not available,

failing which, the claim will be struck out and judgment will be entered in favour of the defendant."

7 The reference to the Savills claim is to a separate claim for fees brought by Savills, and a counterclaim by the appellants against Savills. That counterclaim related to a property which was the main subject matter of the negligence claim against HCA. The respondent's concern was that the appellants should not obtain double recovery against both Savills and them. The Savills claim and counterclaim were settled by a Tomlin Order.

The judge's decision

8 Judge Baucher correctly noted the importance of an Unless Order being perfectly clear and precise, such that the party obliged to do something is in no doubt about the steps to be taken. She referred to *Abalian v Innous* [1936] 2 All ER 834, at 838. The judge also concluded that the reference to "available" in the order meant that a witness statement was only required if documents existed but were unavailable to be produced, rather than in a situation where no documents existed at all.

9 Judge Baucher first considered whether there was a breach of either paragraph 3.1 or 3.2 of the 14 September order and concluded that there had not been. She went on to decide that there were material breaches of both paragraph 3.3(a) and 3.3(b). As regards (a), the judge decided that what was required was documents supporting the statement in paragraph 11 of the counterclaim in the Savills action, which had referred to specific amounts of wasted costs under various headings (paragraph [40] of the judgment). The judge concluded at paragraph [41] of the judgment that the figures claimed in paragraph 11 of the counterclaim were specific figures for which some documentation must have been available, since otherwise there could be no possible basis to advance figures in such clear and precise terms. HCA already had the figures and so what they needed was documents to support them. In the judge's view, the breach was material because it went to the heart of the dispute.

10 In relation to paragraph 3.3(b), the central issue was whether the appellants had provided the schedule to the Tomlin Order settling the Savills action. There was a significant factual dispute about this. Mrs Devoy-Williams had visited Kennedys, HCA's solicitors, on the afternoon of 21 October (the deadline for compliance) to deliver a bundle of documents in respect of the Savills claim which had been provided by Savills's own solicitors. She asked the receptionist, a Mrs Roitburd, to photocopy the papers. Mrs Devoy-Williams's evidence was that she was not aware that there were any missing documents and she had not checked them when she was handed back the originals and photocopies and re-delivered the photocopies back to the receptionist.

11 The judge chose to prefer the evidence of Mrs Roitburd and concluded that Mrs Devoy-Williams had deliberately removed the Tomlin schedule, which was missing in two places, both in unsealed and sealed form, from the copy of the documents she left with Kennedys. That was a total of five pages of around thirty pages copied.

12 The judge concluded that the missing schedule was a material document because it showed that Savills's claim for £59,000 had been compromised at £4,000. The judge also went on to conclude at paragraph [56] of the judgment that there would still have been a material

breach even if she had not found that Mrs Devoy-Williams had deliberately removed the schedule, because the responsibility was on the appellants to provide the documents. They had left it to the eleventh hour and it was not challenged that HCA had not received the schedule to the Tomlin Order.

13 In determining whether relief from sanctions should be granted, Judge Baucher applied the three-stage test in *Denton v T H White Limited* [2014] EWCA Civ.906 ("*Denton v White*" or "*Denton*"), finding that the breaches of paragraph 3.3 were serious and significant, that there was no good reason for them (noting a statement in *Mitchell MP v News Group Newspapers Limited* (CA) [2013] EWCA Civ.1537 that well-intentioned incompetence for no good reason should not usually attract relief, and that she had, in any event, found the failure to be intentional) and that in all the circumstances relief should not be granted. Those circumstances included, in the judge's view, a significant and unexplained delay in seeking relief, the fact that there were other breaches of orders in respect of costs (including paragraph 4 of the order dated 14 September which was also in terms of an Unless Order), significant delays in issuing and conducting the negligence claim and, as regards the merits, limited identifiable heads of loss.

14 The judge rejected an argument by counsel for the appellants that HCA's conduct was opportunistic. She also concluded that it would be wrong to take account of the Part 36 offer and purported acceptance, on the basis that the appellants could not in fact have accepted the Part 36 offer since the claim had been struck out. The judge referred to *Joyce v West Bus Coach Services Limited* [2012] EWHC 404 ("*Joyce*"). She went on to say it was not for the judge to grant relief so that a Part 36 offer could be accepted, thereby thwarting the purpose and effect of an Unless Order.

Grounds of appeal

15 Five grounds of appeal were raised. First, the decision was unjust because of serious procedural or other irregularity, and specifically on the basis that:

(a) the judge restricted the ambit of cross-examination of Mrs Roitburd, so her evidence could not properly be tested, and preferred that evidence to that of Mrs Devoy-Williams in a manner that was central to the decision;
(b) the judge refused permission to cross-examine Ms Kent, a witness for the respondent and a solicitor dealing with the case at Kennedys, which was incorrect in the light of allegations of dishonesty and inconsistencies between that evidence and that of Mrs Roitburd;
(c) the judge did not allow the appellants to inspect the bundle of documents that formed the basis of the dispute about compliance with the Unless Order, which meant that the appellants could not develop their arguments;
(d) the judge allowed the respondent to allege that Mrs Devoy-Williams had deliberately left out or removed a vital document when having the file copied, notwithstanding that she had asserted the contrary: this serious allegation should have been put at the earliest opportunity; and
(e) the appellants had to respond to the allegation at the hearing and Mrs Devoy-Williams was only told of its details when she was cross-examined. The judge was wrong to allow the point to be raised so late and the attempt to raise allegations of fraud or dishonesty should have been refused. The claimants were given no opportunity to consult their counsel or prepare a rebuttal.

16 The second ground was that the judge was wrong to find that the *Joyce* case applied to prevent the Part 36 offer being accepted because there had in fact been compliance with the order. The third ground was that the finding that the appellants had deliberately not included the schedule relating to the settlement of the Savills claim in their disclosure was just not permissible on the evidence and was plainly wrong, there being no grounds to find that Mrs Devoy-Williams had deliberately removed the schedule. Fourth, even if there had been a breach of the order, the judge was wrong to find that it was material. Finally, the judge was, in any event, wrong to refuse relief from sanctions, particularly where the sanctions were disproportionate to the breach and the claim had apparently been settled by way of a Part 36 offer in the interim.

Principles to apply

17 In order to grant permission to appeal, the court must be satisfied that the appeal would have a real prospect of success or that there is some other compelling reason for the appeal to be heard (CPR 52.6). Essentially, a real prospect of success means that there must be a realistic, as opposed to fanciful, prospect of winning the appeal.

18 To the extent that there is a challenge to findings of fact, it also needs to be borne in mind that in order to succeed in an appeal, the appeal court will need to be satisfied that a critical finding was either unsupported by the evidence before the judge or that the decision was one that no reasonable judge could have reached (*London Borough of Haringey v Ahmed and Another* [2017] EWCA Civ.1861, at [31]). It does not matter that the appeal court considers that it would have reached a different conclusion. It will be particularly rare for a challenge to a primary finding of fact by a trial judge who has seen witnesses give evidence to succeed on appeal. Where an appeal court is asked to reverse findings of fact which are dependent on the credibility of witnesses, it will only do so if it is satisfied that the judge was plainly wrong (*Assicurazioni Generali Spa v Arab Insurance Group* [2002] EWCA Civ.1642, at [12]).

19 In addition, insofar as the grounds of appeal relates to matters of case management, it is clear that the judge has a generous ambit of discretion. Again, an appeal court must not simply interfere because it might have reached a different conclusion. Applications for permission to appeal in respect of case management decisions must cross a high threshold and an appellate court will not lightly interfere. It is clear that this principle covers decisions to grant or refuse relief from sanctions under CPR.3.9 and decisions about striking out (see, for example, *The Commissioner of Police of The Metropolis v Abdulle and Others* [2015] EWCA Civ.1260).

20 An appellate court may, however, interfere if irrelevant material has been taken into account, relevant material has been ignored (unless it would not have made a difference to the outcome), there was a failure to apply the right principles or the decision was one which no reasonable court could have reached.

Submissions for the appellants

21 Counsel for the appellants, Mr Wardell, submitted that the judge had failed to appreciate the inherent improbability that Mrs Devoy-Williams would have dishonestly removed the one-page schedule to the Tomlin Order with a view to encouraging a higher offer in the light of the fact that the appellants accepted a very low settlement offer a few days later in ignorance of there being any issue about compliance. They could simply have accepted the Part 36

offer. There had been no requirement for them to obtain the Savills documents as they had done from Savills' own solicitors, and they could simply have made a statement confirming that they did not have the documents.

22 The schedule to the Tomlin Order was not a prejudicial document because at worst it showed that very little of the claim against Savills had been recovered. The appellants had also disclosed a much higher settlement in respect of a claim in negligence against another firm, Manches, which was inconsistent with the proposition that they were intent on hiding the extent of any potential double recovery. The judge had also failed to take into account the subsequent conduct of Mrs Devoy-Williams and the inadequacy of the evidence before the court to allow the point to be decided fairly.

23 Mr Wardell also submitted that the allegation of dishonesty was raised for the first time at the hearing, over a year after the application was issued. The judge forced the appellants into an application to adduce oral evidence rather than refusing to allow the point to be raised or ordering an adjournment. The hearing was then seriously compromised by a straitjacket imposed by the judge and Mrs Devoy-Williams was denied access to the bundle exhibit. The finding of dishonesty was central to the judge's decision to refuse relief from sanctions - a decision which was reached holistically - and discretion should be re-exercised, or the matter remitted. Counsel referred to the reiteration in *Three Rivers District Council and Others v Governor and Company of the Bank of England* (No.3) [2003] 2 AC 1 of the well-established principle that fraud or dishonesty must be distinctly alleged and proved both as a matter of pleadings and as a matter of substance, the defendant being entitled to know the case he has to meet.

24 Counsel for the appellants also submitted that the appellants had complied with paragraph 3.3(a) of the order. The order was insufficiently precise, and the judge should not have gone behind the statement included in one of Mrs Devoy-Williams' witness statements that there were no further documents that were relevant, referring to the case of *Jones v Montevideo Gas Company* [1880] 5 QBD 556, at pp.557-9 ("*Montevideo*").

25 Counsel for the appellants also submitted that the judge failed to take account of other factors, including the fact that the disclosure order did not arise out of a failure to provide standard disclosure but was disclosure made at an early stage for the purposes of facilitating a settlement, and the fact that the Part 36 offer was made was a strong indication that compliance with the Unless Order was not material.

26 The judge treated the application for relief as late despite the fact that the appellants had understood that relief from sanctions had been granted. The judge wrongly found that the litigation had been dilatory, and the appellants should not have been treated as litigants in person on the grounds that they had, in the past, qualified as barristers.

Submissions for the respondent

27 For the respondent, Ms Shaldon submitted that the judge's findings of fact were amply supported by the evidence. The judge had read the witness statements of Ms Kent, Mrs Roitburd and Mrs Devoy-Williams and had heard oral evidence from Mrs Roitburd and Mrs Devoy-Williams. She had analysed the evidence in detail and gave reasons why she rejected Mrs Devoy-Williams's evidence on the key issue. She had the benefit of hearing the witnesses and she recorded her impressions of them.

28 In response to the allegations of procedural irregularity, Ms Shaldon submitted that it needed to be borne in mind that the appellants were represented by highly experienced leading counsel. There was no restriction on cross-examination of Mrs Roitburd. Although the question of oral evidence from Ms Kent had been raised in the initial application for permission for oral evidence, it had not been pursued by the appellants' counsel even though Ms Kent was in court and available. It was also incorrect that it was not possible for the appellants to inspect the bundle exhibit, their counsel was permitted to do so, and the exhibits were available to Mrs Devoy-Williams in the witness box.

29 The issue of intentionality was raised during the first day of the hearing and this led to the request by the appellants' counsel for oral evidence. No objection was taken on the basis of lack of notice and there was no objection during cross-examination. The appellants were effectively appealing the course of an action adopted at their counsel's request.

30 Counsel for the respondent submitted that the judge correctly applied the *Joyce* case and correctly held that there had been material breaches of paragraph 3.3 of the order. She further submitted that the application for relief was not justified. The judge had correctly applied the tests in *Denton v White.* The relevant matters were taken into account and the decision was within the generous ambit of the discretion entrusted to a judge in case management matters.

31 It was also incorrect to suggest that the purported acceptance of the Part 36 offer provided an explanation for the late application for relief. The appellants were on notice from early November 2016 of the respondent's position that the claim had been struck out on 21 October and that position was reiterated in the application made on 1 December 2016 to set aside the 21 November order.

Discussion

32 The threshold for permission to appeal is relatively low. Primarily in the light of the allegations of procedural irregularity, and in particular the submission that there was an injustice to Mrs Devoy-Williams in not being given a proper opportunity to address allegations of dishonest behaviour, and in the light of the submission that it was inherently improbable that Mrs Devoy-Williams had acted deliberately in the way alleged, I have concluded that it is appropriate for permission to appeal to be granted. Accordingly, I grant permission and proceed to address the substantive issues in the appeal.

33 Dealing, first, with the question of procedural irregularities, I have read the judgment and the extracts from the transcript to which I was referred. Overall, I do not accept that there were any material procedural irregularities. The matter was being dealt with under CPR 32.6, the general rule being that evidence at hearings other than a trial is to be by way of witness statements, subject to the right of a party to apply for permission to cross-examine under CPR 32.7. In the circumstances, I consider it was well within the judge's discretion to decide which witnesses should be cross-examined and in respect of which matters.

34 It is important to note that the appellants were represented by leading counsel and there was no challenge to the judge's approach at the time. The judge was responding to counsel for the appellants' own application for oral evidence. It was open to the judge to conclude, for example, that Ms Kent's oral evidence was unlikely to add anything significant, and certainly open to the judge not to release one of the exhibits back to Mrs Devoy-Williams for review before she gave evidence. It was also open to the judge to restrict the time

available for submissions in relation to oral evidence. Importantly, I note that this was also not objected to by counsel for the appellants at the time.

35 Mr Wardell submitted strongly that the question whether there was an intentional breach was raised only on the first day of the hearing. I am not persuaded of this. The fact that the schedule to the Tomlin Order was missing was flagged to the appellants on 1 December 2016 in a witness statement made by Ms Kent and lodged with the application made on that date. This was not responded to by Mrs Devoy-Williams until she provided a witness statement some six months later, on 14 June 2017, shortly before the hearing that was subsequently adjourned. This statement provided the first explanation of the fact that Mrs Devoy-Williams had taken a file received from Savills' solicitors to Kennedys and had had it copied there, and first suggested that Kennedys had made an error in the photocopying. This witness statement also produced, for the first time I believe, the full Tomlin Order as an exhibit.

36 This explanation was expanded on in Mrs Devoy-Williams's second witness statement, filed on 21 July 2017. This, in turn, led to a witness statement being obtained from Mrs Roitburd during August 2017 confirming that, as far as she was aware, she had copied all the documents provided and returned both the original documents and the copies to Mrs Devoy-Williams. Ms Kent's third witness statement, dated 18 August 2017, some five months before the hearing in January 2018, responded to this and noted that it was inherently unlikely that Mrs Roitburd had accidentally omitted to include five pages from the bundle.

37 It was also stated in terms in that witness statement (at paragraph 17.1.1) that the defendant did not accept that the breach was unintentional. A similar reference was made in the respondent's skeleton argument for the hearing. Although the appellants may not in fact have appreciated the real significance of this until the first day of the hearing, when their counsel applied for oral evidence to be given in relation to the matter, the point that there was an allegation of intentional behaviour was, I think, sufficiently identified and in plenty of time for the appellants to recognise that there was a serious issue to be addressed.

38 It was Mrs Devoy-Williams's own assertion that she had provided a complete copy of the bundle, and that any error must be that of Kennedys, that led to the receptionist, Mrs Roitburd's, evidence and a clear disagreement about what had happened. In turn, that led to the rather logical inference being drawn that if a complete set had indeed been correctly copied and checked then the most likely explanation was that Mrs Devoy-Williams had chosen not to include the schedule.

39 Again, the appellants were represented by leading counsel and in my view an objection should have been made at the time if it was appropriate to do so in the circumstances. What the appellants' counsel instead chose to do was to seek to address the point through oral evidence within the confines of a two-day hearing, such that the time available would inevitably be truncated. The appellants could have been in no real doubt that the reason why oral evidence was requested was because there was a serious allegation about deliberate behaviour.

40 I should add, although it is not necessary for this decision, that I am also not persuaded that an allegation of intentional non-compliance with an order is necessarily the same as an allegation of fraud or dishonesty, which of course has to be clearly pleaded, particularised and proved. Although it was not cited to me I refer to the recent Court of Appeal decision in the combined cases of *E Buyer and Citibank NA v HMRC* [2017] EWCA Civ 1416 where it was confirmed that an allegation that a person knows that a transaction in which he

participates is connected with fraudulent tax evasion does not by itself amount to or require a pleading of dishonesty.

41 I have been somewhat more concerned that the judge's finding at paragraph [55] of the judgment that the bundle had been doctored at Kennedys' offices rather than elsewhere, was not squarely put either to Mrs Devoy-Williams or raised with Mrs Roitburd. I will revert to this, but overall, I have concluded that the substance of the allegation of intentional non-compliance and tampering with the bundle was put sufficiently clearly so that there was no serious irregularity in the proceedings within CPR 52.21(3).

42 Moving on to the challenged finding of intentional non-compliance, Judge Baucher was, in my view, entitled to conclude that there was an intentional breach of paragraph 3.3(b) of the order. Mr Wardell submitted that the judge should have taken into account the inherent improbability of this being the case, particularly because Mrs Devoy-Williams had gone out of her way to get the bundle from Savills' solicitors, to track Mrs Roitburd down to give oral evidence, and because the judge's finding was that Mrs Devoy-Williams had taken the original bundle to Kennedys and only removed the schedule to the Tomlin Order after copying, which Mr Wardell said was inherently highly unlikely, it being much more likely that removal would occur before going to their offices. In Mr Wardell's submission, the judge's conclusion was also inconsistent with the appellants' acceptance of the Part 36 offer and with the disclosure of the settlement with Manches.

43 The judge had the benefit of hearing oral evidence on this issue. In my view, she was entitled to prefer Mrs Roitburd's evidence that she saw Mrs Devoy-Williams checking both sets of documents once she had completed photocopying the file, and was entitled to conclude that Mrs Devoy-Williams must have appreciated the significance of the schedule to the Tomlin Order.

44 I have looked both at the original bundle exhibit and at the copies produced by Kennedys as having been received by them. Having done so, I consider that the judge was justified in concluding that it was unlikely that the five missing pages were missing as a result of a photocopying error, in circumstances where the pages appeared in two sections of the bundle and were not sequential, there being a page in between the missing pages that did appear in both the original and the copy bundle.

45 I also agree with counsel for HCA that the appellants were not in a position simply to fail to ask Savills' solicitors for the documents. If the documents existed, they would have to provide a witness statement if they were not available, so it was a natural step to seek to obtain them.

46 Whilst it was not the responsibility of the judge to identify and address all conceivable explanations, I have, however, considered carefully the point that her actual conclusion that the schedule was removed following photocopying (rather than at some earlier stage) was not put to the witness. The transcript shows that Mrs Devoy-Williams was clearly asked to respond to an allegation that the missing pages were not in the documents handed over to Kennedys for photocopying and that the pages were withheld because they were damaging documents that Mrs Devoy-Williams did not wish to disclose. Mrs Devoy-Williams denied this and also said that she had not checked the copying. This was contrary to the evidence of Mrs Roitburd and apparently also contrary to an email sent by Mrs Devoy-Williams to the judge in November 2016 which stated that she had taken great pains to get the disclosure right, an email referred to by the judge at paragraph [53] of the judgment.

47 It is clear from the transcript of the hearing that Mrs Devoy-Williams understood that she was essentially being accused of tampering with the bundle and indeed she used that terminology herself during cross-examination, denying that she did so or that she had checked the documents.

48 My conclusion is that the substance of the allegation was very clear and that Mrs Devoy-Williams had a clear opportunity to respond to it. I do not consider it material that the judge concluded that the missing documents were removed after photocopying rather than beforehand, and that that level of detail was not directly put to Mrs Devoy-Williams.

49 I also do not agree with the submission that acceptance of the Part 36 offer was inconsistent with an intentional breach. If the appellants had wanted to accept that offer when it was first made, they could have done so at that stage rather than going to the trouble of taking steps towards complying with the Unless Order by the deadline of 21 October (the Part 36 offer having been made some days earlier on 10 October).

50 It was quite clear from the evidence that disclosure was being made because the appellants thought that that might assist in obtaining an increased settlement offer. The schedule to the Tomlin Order was potentially unhelpful to the appellants in that respect because it quantified the recovery they had made from Savills. I also do not agree with the suggestion that the appellants' behaviour must have been unintentional given that they had previously disclosed the Manches settlement in a much more substantial sum. That had only been done rather reluctantly in response to earlier specific orders for disclosure.

51 The judge also made it clear that she would have reached the conclusion that there was a material breach even if she had not found there to be intentional non-compliance through deliberate removal of the schedule to the Tomlin Order. As the judge said, it was the appellants' responsibility to comply with the order, not that of Kennedys. The appellants had left compliance until the last minute and clearly did not check that all material documents were included. A fairly cursory check of a small bundle would have determined that the schedule to the Tomlin Order was missing.

52 I do not agree with counsel for the appellants' suggestion that handing a complete bundle to Mrs Roitburd for photocopying amounted to compliance with the order when that was quite clearly done on the basis that Mrs Devoy-Williams intended to leave the copies but not the original bundle with Kennedys. Mrs Devoy-Williams's second witness statement specifically stated that she had asked the receptionist to copy the original bundle, rather than handing over the original bundle as such. In my view, that does not amount to delivery of the original bundle.

53 I also do not agree that with such a small bundle any unintentional non-compliance was not material. The schedule to the Tomlin Order was material and the content of what was provided to Kennedys should have been checked.

54 Turning to the question of whether there had or had not been compliance with paragraph 3.3(a) of the order, the appellants relied on the fact that the respondent had not been able to identify a single document that was omitted from disclosure under that paragraph. But that is not surprising, since no documents were disclosed. The judge's finding that there must have been more documents given the specific figures provided in the counterclaim cannot be said to be insupportable, and it was a matter on which the judge could properly draw an inference for the reasons given at paragraph [41] of the judgment. Specific figures were included in

paragraph 11 of the Savills counterclaim and, in my view, it was open to the judge to conclude that it would not have been possible to advance those figures in such clear and precise terms without some supporting documentation existing.

55 I do not agree that paragraph 3.3(a) was insufficiently precise. I think it is clear on its terms that what it was getting at was documents underlying the figures originally included in the counterclaim. I do not think it can reasonably be interpreted as somehow relating simply to any documents produced in settlement discussions with Savills, which is the way that Mrs Devoy-Williams appears to have interpreted it, at least in her witness statement of 14 June 2017 which was made well after the date of the Unless Order.

56 What was required by paragraph 3.3(a) was documents evidencing the quantum of the counterclaim, not documents forming the basis of the settlement discussions. It was paragraph 3.3(b) that covered the settlement and paragraph 3.3(a) covered the counterclaim. I do think that is clear from the wording. It was also incorrect to suggest that the Savills counterclaim was simply unquantified so that paragraph 3.3(a) could not apply on that basis. Paragraph 11 of the counterclaim included specific amounts.

57 I also do not accept the argument based on the *Montevideo* case. That case related to the rules then in force governing the practice on discovery of documents which provided for an affidavit of documents, not a witness statement. Brett LJ held that the affidavit should generally be accepted as conclusive. That principle has been applied subsequently but specifically in relation to affidavits of documents. I was referred in that context to *West London Pipeline & Storage Limited v Total UK Limited and Others* [2008] EWHC 1729, at [81] and [86], but that is not relevant where what is relied on is a witness statement, and one made a number of months after the Unless Order.

58 I also note that the rule referred to in the *Montevideo* case is qualified if it appears from the documents produced that some documents were withheld. That is analogous to the position here given the content of paragraph 11 of the Savills counterclaim. Furthermore, the statement relied on in Mrs Devoy-Williams's witness statement was that no documents were produced by the appellants to quantify the Savills claim before it was settled. As already touched on, I read that statement as referring to documents either generated by the appellants or at least produced to Savills for the purposes of the settlement discussions. In my view, it does not specifically address the requirements of paragraph 3.3(a) of the order which is getting at whatever documents the appellants had that supported the figures in the counterclaim.

59 The other section of that witness statement relied on was a statement that to the best of Mrs Devoy-Williams's knowledge and belief, all documents required were provided. The judge was entitled to conclude that, for whatever reason, not all documents were provided in fact. She was also entitled to conclude that the documents in question were important and went to the heart of the dispute, given the concern that the appellants were pursuing the same heads of loss in these proceedings (paragraphs [42] and [43] of the judgment).

60 Turning to whether non-compliance was material, it is clear that the sanction embodied in an Unless Order only takes effect without the need for a further order if the party to whom it is addressed fails to comply with it in a material respect (see *Marcan Shipping (London) v Kefalas and Another* [2007] 1 WLR 1864 at [34] ("*Marcan*")). In my view, the conclusion that there was a material failure was one that the judge was entitled to draw.

61 I disagree with the submission that the fact that a Part 36 offer was made after the Unless Order was made is an indication that compliance was not material. Disclosure would have remained material if the claim had not settled, and the fact that the order for disclosure may have been motivated by the aim of facilitating settlement does not affect the question of whether there had been a material failure to comply.

62 It is also not appropriate to judge materiality by reference to the size of the Savills claim of around £60,000 as compared to around £2 million for the claim in these proceedings. That £2 million figure was entirely speculative, particularly in the context of the claim which the appellants were in fact willing to settle at £10,000.

63 As a matter of principle, I have significant doubts about whether the question of materiality can be judged in financial terms at all in the way that this suggests. To my mind, the materiality question more naturally refers to the extent of non-compliance with the order and in particular with whether documents at which the order for disclosure was clearly aimed, and which were required here to determine the double recovery issue, were in fact not disclosed. The purpose of the order is clearly relevant.

64 However, if it is relevant to consider the financial aspects then I consider that there is significant force in the submission by Ms Shaldon that the figures in the schedule to the Tomlin Order were material in the context of the appellants apparently wishing to persuade the respondent to increase their Part 36 offer by just £30,000, and against the background that the origin of the negligence claim was as a response to a relatively modest claim for unpaid fees, a claim which had itself been settled, but where, as I understand it, the settlement amount was still outstanding from the appellants to HCA.

65 Turning to the question of relief from sanctions, I do not agree with counsel for the appellants' submission that the judge was not entitled to have regard to the fact that relief from sanctions was applied for late. The appellants were aware by early November 2016 that the respondent's position was that there had been breaches of the Unless Order. The Court of Appeal made it clear at paragraph [35] of the *Marcan* decision that the party in default must apply for relief from sanctions if it wishes to escape the consequences. The point was clearly picked up by the appellants' own solicitors as well, as shown by a letter they wrote on 2 December 2016 which referred to the requirement to apply for relief from sanctions.

66 Although the 21 November order was in place setting aside the 11 November order, so strictly the status quo at the relevant time was that the striking out had been set aside, it is quite clear that the question of whether there had been a material breach of the Unless Order and the question of relief from sanctions would need to be dealt with by the court together. In the light of that, a prompt application for relief was needed.

67 The submission by counsel for the appellants that a prompt application was not needed, in my view, also sits very uneasily with the point that the sanction under an Unless Order takes effect without the need for a further order, so in this case as at 21 October 2016. That of course is well-established by the *Marcan* case.

68 Counsel for the appellants suggested that I should take account of the submission that neither part of paragraph 3.3 of the order should properly have been made the subject of an Unless Order in the first place. This was on the basis that there had been no prior order in respect of the documents and the purpose of the order was to facilitate a potential settlement. My primary response to this is that the appropriate course would have been to challenge the

Unless Order when made by appealing it. This point was made very clearly in *Marcan* at paragraph [34].

69 I do accept that, if it was clear that the order should not have been made, that might be one of the circumstances to be considered as part of the review of all the circumstances at stage three of the *Denton* test, but it is far from clear to me that this is not an order that should have been made. Whilst it is certainly right that an Unless Order should not be made simply for good housekeeping purposes, and it is usual for there to have been a breach of a prior order before an Unless Order is made, the judge clearly took account of the history of the proceedings, with which she was extremely familiar, and specifically the appellants' conduct in them. The order was made in the light of previous delays and problems in disclosure, and in the light of a clearly identified concern about the risk of double recovery.

70 Although Mr Wardell for the appellants submitted that they had bent over backwards to be cooperative, and to provide documents and information requested, it is clear that the judge did not share that view. Based on the submissions by Ms Shaldon which took me to aspects of the history of the proceedings in some detail, this was a view that I consider that the judge was entitled to reach. Based on my review, making an Unless Order was within the generous ambit of Judge Baucher's case management discretion.

71 Counsel for the appellants submitted that Kennedys' action in seeking a strike-out was highly opportunistic. They should have simply alerted the appellants to the missing schedule to the Tomlin Order and allowed them to supply it rather than applying to the court for a strike-out without notice to the appellants. I disagree. Kennedys made a request under CPR 3.5(2) and not an *ex parte* application. They notified the appellants before the Strike-out Order was made and provided a detailed witness statement with their further application on 1 December 2016. The request for judgment was made against the background of continued delays in providing documents requested, including earlier failures to comply with orders for disclosure.

72 In my view, Judge Baucher was entitled to conclude that the three-stage test in *Denton* did not lead to the conclusion that relief should be given. The breaches of the orders were serious, and it was wrong to test this, as counsel for the appellants sought to do, simply in the context of the Part 36 settlement offer and purported acceptance. It was also wrong to conclude that because the Unless Order required early disclosure with a view to seeking to narrow the issues and hopefully to allow settlement to occur, that that somehow made the failure to comply less serious than a failure to make standard disclosure.

73 I agree with the judge that the Part 36 offer could not be some form of trump card. As the judge said at paragraph [74], the claim was struck out and it was not for the judge to grant relief so that the Part 36 offer could be accepted, thereby thwarting the purpose and effect of an Unless Order that had been breached. There is an element of circularity here, or at least pulling yourself up by your own bootstraps. In my view, this is quite a separate point to the judge's obiter remarks at paragraph [77] onwards about whether relief from sanctions takes effect as at the date of the order. I accept that the correctness of those statements might well be susceptible to challenge if they had been a necessary part of the decision, but they were not.

74 I also do not agree that the appellants should have been treated as being in the category of unsophisticated litigants in person. They clearly were not unsophisticated and indeed, although they were acting as litigants in person through much of the process, they in fact benefited from professional advice at a number of stages.

75 In conclusion, having granted permission to appeal, I have decided that the appeal fails and must be dismissed. In my view, there was no serious procedural or other irregularity and the decision was not wrong. Insofar as the appeal relates to factual matters, the judge was entitled to reach the conclusions that she did. Insofar as they related to matters of case management, the decision fell within the ambit of her case management discretion.

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Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

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