Neutral Citation Number: [2020] EWHC 2500 (Ch)

Case No: 9BS0139C

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
CHANCERY APPEALS (ChD)
On appeal from the County Court at Truro (DJ Stone)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 23 September 2020

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

WOLF ROCK (CORNWALL) LIMITED	**Appellant**
- and –	
RAILA LANGHELLE	**Respondent**

- -
- -

Charlotte Davies (instructed by **DKLM LLP**) for the **Appellant**
Arnold Ayoo (instructed by **TLT LLP**) for the **Respondent**

Hearing dates: 9 September 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 10:30 am.

HHJ Paul Matthews :

Introduction

1. This is my judgment on an appeal brought by Wolf Rock (Cornwall) Ltd from the order of District Judge Stone made in the County Court at Truro on 6 December 2019, that the appellant company be wound up under section 122(1)(f) of the Insolvency Act 1986 (company unable to pay its debts). The respondent, Raila Langhelle, is the (substituted) petitioning creditor. The appellant's notice and grounds of appeal were filed on 23 December 2019. On 17 February 2020 I gave permission to appeal generally. At the hearing before me on 9 September 2020, the appellant was represented by Charlotte Davies of counsel and the respondent by Arnold Ayoo of counsel. I am grateful to both of them for their cogent, measured and concise submissions. The appeal was conducted remotely, using the MS Teams videoconferencing platform.

Background

2. The petition on which the order is based was presented on 21 March 2019 at Truro, by Nash & Co, solicitors. On 7 May 2019, the respondent made a witness statement setting out the basis upon which she claimed to be a creditor of the appellant, in support of an application to be substituted as petitioner in place of Nash & Co, who had indicated a desire to withdraw the petition. Her claims were in essence threefold. First of all, she claimed that she had been employed by the appellant but had not received a salary, which now amounted (at the rate of £40,000 per annum) to some £135,000. Secondly she claimed that she had incurred expenses on behalf of the company in the sum of about £12,500. Thirdly, she claimed that she had made loans to the company of nearly £16,000. On 8 May 2019 District Judge Stone ordered the substitution of the present respondent as petitioner, and adjourned the substantive hearing of the petition to 25 June 2019. On 18 June 2019 Carl Jansen, a director of the appellant, made a witness statement responding to the amended petition and the witness statement of the respondent, and denying her claims.

3. When the matter came back to court on 25 June 2019, the petition did not proceed on that date, but District Judge Stone gave directions as to the service of evidence, made an order that the respondent permit the appellant to have access to certain online accounts held with Quickbooks, and adjourned the further hearing of the petition to 21 August 2019. It is necessary to set out the major part of this order verbatim:

> "1. There is permission for the Respondent to rely upon the statement from Carl Edward Jansen dated 18 June 2019;
>
> 2. There is permission for the Petitioner to rely upon her further statement in reply dated 24 June 2019
>
> […]

> 5. There is permission for the Respondent to rely upon a further statement in response to the Petitioners position allowing access having been restored to Quickbooks. Such statement to be filed and served by 4 PM on the 24 July 2019
>
> 6. There is permission for the Petitioner to rely on a further statement in reply (if so advised) to be filed and served by 4 PM on 31 July 2019
>
> 7. Any application by Mr Andreas Read to adduce evidence into these proceedings shall be made no later than 4 PM 2 July 2019 and (if such application is made) shall be heard as a preliminary issue at the adjourned hearing…"

4. The appellant then made an application for an order that a penal notice be attached to the order of the 25 June 2019. Witness statements were made by both the respondent and Carl Jansen in relation to this application. The application was heard and dismissed on 23 July 2019, by District Judge Stone. He also gave further directions regarding evidence, given that the timetable laid down by the order of 25 June 2019 had been interrupted by that application. He directed in particular that:

> "3. Time for the respondent [the current appellant] to make disclosure is extended to 4 PM 9 August 2019
>
> 4. Time for the respondent [the current appellant] to file and serve statement evidence is extended to 4 PM on 16 August 2019."

5. Mr Jansen made two further witness statements on 15 August 2019, dealing with a number of aspects of the respondent's claims against the appellant. One of them also referred, somewhat summarily, to a cross-claim against the respondent in respect of goods costing £1,527.47, apparently ordered at the expense of the appellant, but said to have been delivered to the respondent's home address. Mr Jansen said that this showed the respondent was misappropriating assets of the appellant company. The respondent made a witness statement in response to those statements on the following day, 16 August 2019. In relation to the cross-claim for goods delivered to her home address, the respondent said she had never seen the invoice before and was unaware of what it related to. (I note in passing that the delivery note was apparently signed by someone receiving the goods called SW McTavish.) On 21 August 2019 the petition came before District Judge Middleton (District Judge Stone not being available). He considered, first, that oral evidence should be permitted at the hearing of the petition, and, second, that accordingly the existing time estimate of two hours was insufficient. The district judge therefore adjourned the hearing of the petition to 6 December 2019, with a revised time estimate of one day.

6. On 21 November 2019 two further witness statements were made on behalf of the appellant. One was by another director of the appellant, Peter Woods, and provided an analysis of the respondent's claims against the appellant. The other was by a bookkeeper employee of the appellant, Debbie Sheldon-Smith, which dealt with a very short point relating to an expense claim by the respondent. Mr Jansen himself made a further witness statement the next day, 22 November 2019, in which he set out details of a much more significant cross-claim by the appellant against the respondent than the one mentioned in his second witness statement of 15 August 2019. This alleged payments out of company funds to the respondent's partner Andreas Read and his company of sums amounting to £1,759,701.18. Although there was a contract

between Mr Read or his company and the appellant for building works to be done, the contract price was said to be only £1,199,623.47, meaning that there was an apparent overpayment of £559,778.42. This cross-claim, if proved, would overtop the respondent's claims against the appellant by some way. These further three witness statements were served on the respondent and filed at court on 22 November 2019.

The decision below

Preliminary point

7. The substantive hearing of the petition before the district judge on 6 December 2019 lasted the whole day. A preliminary point was raised as to the status of the three latest witness statements filed on 22 November 2019, that is, exactly two weeks before. Ms Davies for the appellant sought permission to rely on those witness statements. Mr Ayoo for the respondent opposed it. The district judge refused to permit reliance on the witness statements for reasons which he then gave in his extempore judgment. These were essentially that the position was similar to an application for relief from sanctions under CPR rule 3.9, and that the appropriate the *Denton/Mitchell* principles were not satisfied. I will return to this later. The hearing of the petition then proceeded, and the judge heard live evidence from both Mr Jansen and the respondent. Having seen them both give evidence, and for reasons which the judge gave in his judgment (again extempore), he said that

> "to a large extent if there is a conflict between the evidence of Ms Langhelle and Mr Jansen, … I will prefer Mrs Langhelle's evidence."

Substantive decision

8. The district judge subsequently went through the evidence carefully and in some detail, and stated his conclusions. In relation to the loans which the respondent claimed to have made to the appellant, the judge found that this claim was not disputed on substantial grounds, and that there was

> "simply no substance to the concerns now raised by Mr Jansen".

In relation to the expenses claimed by the respondent, the judge held first that there was no dispute that £1360.50 was owed, as confirmed by Mr Jansen's first witness statement. The concern raised here was that Mr Jansen asserted that the appellant was entitled to set off against that the sum of £6100, that he said was paid to the respondent for the settlement of an invoice but which she did not use for this purpose. The judge held that this account was controverted by the documentation before him, and concluded that it was

> "not of sufficient substance to be a valid offset in the context of these proceedings".

Thirdly there was the question of salary claimed by the respondent. The fundamental question was whether there was a contract of employment or not, and if so on what terms. The judge concluded on the evidence before him that

> "there was a contract of employment, albeit not a written one, and that [the respondent] was expecting and entitled to be paid".

He also found that the respondent was expecting to be paid at least £40,000 per annum, so amounting to £136,667 over the period of employment. He concluded that, even if two disputes raised by Mr Jansen over salary were resolved in the appellant's favour,

> "the amount owed in respect of salary is likely to be a minimum of £100,000".

This is of course well over the £750 threshold for a winding-up petition. Accordingly, the judge found that none of these claims was disputed on substantial grounds.

9. The judge also briefly considered the cross-claims put forward by the appellant. The most important of these was dealt with only in the witness statement of Mr Jansen of 22 November 2019, which had been excluded from consideration at the hearing. But (as I have already said) there was a much smaller one briefly set out in Mr Jansen's second witness statement of 15 August 2019. The judge held that

> "at its height it is an inference that [Mr Jansen] has very serious concerns as to [the respondent]'s conduct… At its height it is something of a smokescreen of suspicion, nothing more than that…"

In any event, even if proved it would not reduce the respondent's claims below £750. The judge then went on to deal with the petition more generally, and concluded by making the winding up order complained of.

Grounds of appeal

10. The grounds of appeal attached to the appellant's notice are five in number. In summary form, they are as follows:

First, the judge wrongly refused to admit the three further witness statements of 21 and 22 November 2019. They were served in accordance with rule 7.16 of the Insolvency (England and Wales) Rules 2016, and not in breach of any relevant order of the court. There was therefore no need for an application for relief from sanctions. Even if there had been, the judge did not correctly apply the *Denton/Mitchell* principles on relief from sanctions.

Second, the judge was wrong to find that there was not a genuine and substantial dispute over the petition debt in the form of a cross-claim arising from payments made from the appellant's bank account to the respondent's partner, which had been authorised by the respondent.

Third, the judge was wrong to find that the petitioner was an employee of the appellant, in the light of the respondent's concession that there never was any concluded contract of employment, and in the light of the lack of company tax or accounting records kept by the appellant.

Fourth, the judge was wrong to have made a winding up order for an unliquidated sum. The judge found that the petition debt was not due, but made no finding as to what sum was due. In particular he could not determine the yearly salary to which the

respondent was entitled and made no finding as to when her employment had commenced.

Fifth, the judge was wrong to find that there was no substantial dispute over the petition debt.

Issues on appeal

11. As I see the matter, the following issues arise, or may arise, for determination on this appeal:

1. Was relief from sanctions required before admitting the further evidence filed in November?

2. If such relief was required, did the lower court apply the *Denton/Mitchell* principles correctly?

3. If such relief was not required, what is the effect of not admitting the further evidence?

4. Could a winding up order be made in respect of the claims made by the respondent?

5. If so, were any of the respondent's claims disputed on substantial grounds?

6. If not, was there a cross-claim for a larger sum such that the petition debt was disputed on substantial grounds?

12. I remind myself of certain relevant rules concerning appeals. By virtue of CPR rule 52.21(1), an appeal is limited to a review of the decision of the court below, unless the court considers that in the circumstances of a particular appeal it would be in the interests of justice to rehear the case: *Audergon v La Baguette Ltd* [2002] EWCA Civ 10, [83]. There being no need for a rehearing in this case, this appeal is a review. A second point is that rule 52.21(3) provides that the appeal court will allow the appeal where the decision was (a) wrong, or (b) unjust, because of serious procedural or other irregularity in the proceedings below. Here wrong means wrong in law, wrong in fact, or wrong in the exercise of discretion. But the test is different for each of these. The court must distinguish between a finding of primary fact on oral evidence where credibility is in issue, the evaluation of facts by a judge, and the exercise of discretion by the judge. Thirdly, the court below must give reasons for its decisions: *Bassano v Battista* [2007] EWCA Civ 370. But these must be read on the assumption that the judge knew how to perform the judicial functions and the matters which had to be taken into account: *Piglowska v Piglowska* [1999] 1 WLR 1360, 1372.

First issue: was relief from sanctions required?

13. As to the first of the issues that I identified above, neither counsel was able to locate any authorities on the construction of rule 7.16 of the 2016 Rules. The rule reads as follows:

> "(1) If the company intends to oppose the petition, it must not later than five business days before the date fixed for the hearing—

> (a) file with the court a witness statement in opposition; and
>
> (b) deliver a copy of the witness statement to the petitioner or the petitioner's solicitor.
>
> (2) The witness statement must contain—
>
> (a) identification details for the proceedings;
>
> (b) a statement that the company intends to oppose the making of a winding-up order; and
>
> (c) a statement of the grounds on which the company opposes the making of the order."

14. Rule 7.16 is in Chapter 3 of Part 7 of the Rules. Part 7 deals with winding-up by the court, and within that Chapter 3 deals with petitions for a winding-up order. It covers the procedure from presentation of the petition to the making of the order by the court. This includes a requirement to serve a copy of the petition on the company, and sometimes others (rule 7.9), a requirement to give notice of the petition by advertisement (rule 7.10), a requirement for a certificate of compliance with the rules relating to service and giving notice (rule 7.12), power to give permission to the petitioner to withdraw the petition (rule 7.13), a requirement that a creditor or contributory who intends to appear on the hearing of the petition give notice of intention to appear to the petitioner (rule 7.14), a requirement that the petitioner prepare for the court a list of the creditors and contributories who have given notice under that rule (rule 7.15), power for the court to substitute another creditor or contributory for the petitioner (rule 7.17), a requirement for the petitioner to give notice of any order adjourning the hearing of the petition to various persons (rule 7.19), and various provisions relating to the order for winding up if made by the court (rules 7.20-7.22).

Arguments

15. The appellant argued that rule 7.16 governed the ability generally of the appellants to adduce further evidence, and that, by serving the further evidence more than five business days before the hearing, that rule had been complied with. Accordingly, there was no need for any application for relief from sanctions, and the district judge's decision to exclude the November evidence from consideration (on the grounds that such relief was necessary) was wrong in law. The appellant accepted that rule 7.16 could be overridden by express order of the court, or even an order which by necessary implication overrode that rule, but submitted that there was nothing of that sort here. To the extent (if at all) that orders of the court before 21 August 2019 had amounted to such (implied) overriding of rule 7.16, the appellant submitted that the order of District Judge Middleton on that date had put a different framework in place, and displaced any earlier directions.

16. The respondent argued for a different view. She submitted that rule 7.16 applied only to cases coming before the court for the first time. At that stage, the court would need to know whether the petition was opposed by the company. If it was not, then the order could be made there and then. But if it was opposed the court would give

directions for further hearing, depending on what was opposed and on what grounds. In a case such as the present, where the petition *was* opposed from the beginning, and a witness statement *had* been filed under rule 7.16 (on 18 June 2019), and then the court had given detailed directions for further evidence in the case (by its order of 25 June 2019), the effect of rule 7.16 was in effect spent, and it was open to the court thereafter to case manage the petition and decide that no further evidence should be admitted except by permission of the court. In effect, the court intended to, and did by its orders of 25 June and 23 July 2020, control the evidence, and impliedly prohibit the admission of further evidence except pursuant to those orders, or any subsequent order of the court. The effect of this was that, when the appellant filed further evidence in opposition to the petition in November 2019, it did so without the permission of the court, and in breach of the order of 25 June 2020 as amended by the order of 23 July 2020.

Authorities

17. No specific sanction is prescribed for breach of the orders. However, in recent years case law has built up the concept of *the implied sanction*, to which the *Denton/Mitchell* principles are equally applicable: see the decisions of the Court of Appeal in *Sayers v Clarke Walker* [2002] 1 WLR 3095, CA, *Robert v Momentum Services Ltd* [2003] EWCA Civ 299, *Baho v Meerza* [2014] EWCA Civ 669 and *Altomart Ltd v Salford Estates (No 2) Ltd* [2015] 1 WLR 1825. In the last of these cases, the respondent to an existing appeal sought to file a respondent's notice out of time. Moore-Bick LJ (with whom Ryder LJ and David Richards J agreed) first of all pointed out the limited scope of the relief from sanctions provisions of the CPR (rules 3.8 and 3.9):

> "10. In my view it is clear from the language of rule 3.8 that it is concerned with a sanction imposed by the very rule, practice direction or order of which the applicant is in breach, hence the use of the words 'imposed by the rule, practice direction or court order.' In such cases the consequences of default are spelled out; a classic example is an 'unless' order. Rule 3.9 does not repeat the words 'by the rule, practice direction or court order', but Rule 3.8 provides the context in which rule 3.9 has to be read and in my view it is also directed to sanctions in the sense of consequences imposed by the rule, practice direction or order of which the applicant is in breach. Most rules, practice directions and orders, however, do not provide specific sanctions for their breach, leaving it to the court to decide what, if any, consequences should follow. In my view rule 3.9 does not, therefore, apply to such cases and an application for an extension of time is not one that falls within the scope of rule 3.9, either expressly or by analogy. Such applications are governed by rule 3.2(1)(a)."

18. Secondly, Moore-Bick LJ went on to point out that in the seminal relief from sanctions case of *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795, CA, [12],

> "the sanction from which relief was sought had not been prescribed as a consequence of default by any rule practice direction or previous order of the court. It was a sanction imposed by the court in the exercise of its discretion for a failure to comply with a rule that itself prescribed no sanction for default.

> To that extent it might be thought that the case did not fall within the natural ambit of rules 3.8 and 3.9. […] Nonetheless, the application proceeded under rule 3.9 and laid down principles which are intended to govern applications under that rule. The question remains, however, whether they were intended to govern applications, such as the present, for extensions of time where no sanction is prescribed for the default.

19. Moore-Bick LJ continued:

> "13. The consequences of failing to file a respondent's notice within the prescribed time are not spelled out in the rules, so on the face of it there is no sanction within the meaning of that expression in rules 3.8 and 3.9 from which the respondent needs relief. However, in a number of cases dating back more than a decade the courts have recognised the existence of implied sanctions capable of engaging the approach contained in rule 3.9 and therefore now the *Mitchell* principles. … "

20. Moore-Bick LJ referred in particular to the decision of the Court of Appeal in *Sayers v Clarke Walker* [2002] 1 WLR 3095, in which the court considered the approach to be adopted to applications for permission to appeal out of time. He quoted the statement of Brooke LJ (with whom Kay LJ and Sir Christopher Staughton agreed) in that case (at [21]) that

> "In my judgment, it is equally appropriate to have regard to the check-list in CPR 3.9 when a court is considering an application for an extension of time for appealing in a case of any complexity. The reason for this is that the applicant has not complied with CPR 52.4(2), and if the court is unwilling to grant him relief from his failure to comply through the extension of time he is seeking, the consequence will be that the order of the lower court will stand and he cannot appeal it. Even though this may not be a sanction expressly 'imposed' by the rule, the consequence will be exactly the same as if it had been, and it would be far better for courts to follow the check-list contained in CPR 3.9 on this occasion, too, than for judges to make their own check-lists for cases where sanctions are implied and not expressly imposed."

21. So Brooke LJ was not saying that the intention of the rule-maker was that there should be a sanction implied in such a case. Instead he was saying that *for good policy reasons* the law should treat an application for extension of time *as if it were* an application for relief from sanctions. Moore-Bick LJ returned to this point when he said:

> "16. The reason given by Brooke LJ in *Sayers v Clarke Walker* for treating an application for permission to appeal out of time as analogous to an application for relief from sanctions was that without such an extension the appeal could not proceed. Mr. Knox submitted that an application for permission to file a respondent's notice out of time is different because the proceedings will continue in any event. That is certainly true, but in my view that is not a significant ground of distinction. The purpose of the respondent's notice is to enable Altomart to rely at the hearing of the appeal on grounds for upholding the judgment that were not before the court below. If an extension of time is not granted it will be unable to do so. To that extent that area of dispute will

> not come before the court. In my view for a respondent to be prevented from pursuing the merits of a case it wishes to pursue on the appeal is no more or less of an implied sanction than it is for an appellant to be prevented from pursuing its case on appeal. In my view, therefore, the *Mitchell* principles apply with equal force to an application for an extension of time in which to file a respondent's notice."

22. Accordingly, as a result of this line of authorities, I understand the position to be that, although there are cases where the rule or order does not expressly state a sanction and the court by a process of interpretation nevertheless construes the rule or order as impliedly containing one, there are *also* cases where there is *no* intention to create a sanction but the law for policy reasons treats the case as one *analogous* to an application for relief from sanctions, and applies the *Denton/Mitchell* principles.

23. As against that, the appellant referred me to the decision of Chief Master Marsh in *Djurberg v Richmond London Borough Council* [2019] EWHC 3342 (Ch). In that case the first defendant had intimated an intention to apply to strike out the claim. The Chief Master directed that

> "If the [First] Defendant wishes to apply to strike out the claim such application must be issued and served with any further evidence relied on by 4pm on 31 May 2019. It shall be listed for hearing on 3 September 2019 at the same time as the Claimant's application."

It will immediately be noted that this is a different case from the present. It is not about a timetable for evidence for an existing application. It is about whether an application to the court should be made at all. At the hearing on 3 September 2019, it became clear that the first defendant *had* filed a witness statement in support of the application, a draft order and a skeleton argument on 31 May 2019, but *not* an application notice. Moreover, none of the three documents filed had actually been served on the claimant. The hearing was adjourned, and the order specified that if the first defendant intended to apply for relief from sanctions *that* application had to be issued and served by 4pm on 17 September 2019. That application was apparently so issued and served, and was the subject of the present judgment.

24. The Chief Master noted that the order of 7 May 2019 did not contain an express sanction for non-compliance. He discussed the concept of the implied sanction, and referred to a number of cases, including *Sayers v Clarke Walker* [2002] 1 WLR 3095, CA, and *Altomart Ltd v Salford Estates (No 2) Ltd* [2015] 1 WLR 1825 to which I have also referred. He also quoted from another, more recent decision of Martin Spencer J, in *Mark v Universal Coatings & Services Ltd* [2019] 1 WLR 2376. That was a case of a claimant's failure to serve a medical report or schedule of loss within the time periods specified in the relevant practice direction. The judge said:

> "54. In his submissions, Mr Limb referred to the wording of paragraph 4 of the Practice Direction and the use of the word 'must' indicating that it is a mandatory provision. Whilst this is true, I would observe that this is a characteristic of the drafting of the CPR and the word 'must' is used liberally. However, to imply the need to apply for relief from sanctions in all cases where a rule or practice direction contains such wording would, as Mr Walker

> submitted, result in the courts being inundated with applications quite unnecessarily."

The judge decided that no sanction was implied by the provisions of the practice direction specifying the time for service of the documents.

25. Having referred to that, the Chief Master said this:

> "32. I respectfully agree with that analysis. In my judgment, it would be wrong for the court to search out reasons for imposing sanctions that do not obviously arise out of the terms of the CPR or an order made by the court. As to orders made the court, it is always open to the court to impose a sanction and it should be clear on the face of the order so that the parties know of the consequences of a failure to comply with it.
>
> 33. [Counsel for the first defendant] submitted that there are three categories of case so far as sanctions are concerned.
>
> > (1) Cases where (a) there is an express sanction that is imposed as a consequence of failure to comply with a rule (such as the deadline for filing a costs budget (CPR 3.14) or serving a witness statement (CPR 32.10) or the effects of CPR 8.4(1) and 8.6(1)) or (b) orders that impose a time limit with an unless order.
> >
> > (2) Cases where a sanction must be implied. This occurs where although the rule or order does not impose a sanction, the effect of the rule or order is to require a party to have to apply to the court for permission or take some other step to avoid a negative consequence. Examples are having to apply for permission to appeal out of time or to be permitted to participate in hearings where no respondent's notice has been served.
> >
> > (3) Cases where an order is expressed in mandatory terms such as "shall" or "must" but no consequences are directed in the rule or order for a failure to comply.
>
> 34. It seems to be that this is a helpful categorisation subject to two observations:
>
> > (1) With reference to the second category, loosely 'implied sanctions', in some cases it will be obvious that the court intended there to be a sanction for a failure to comply with the order and it is also obvious that what that unexpressed sanction should be. This is matter of the court construing the earlier order. But as I have observed already, since it is open to the court to impose an express sanction in an order, it will be rare of the court to be able to reach the threshold for implication. After all, if it is so obvious that the court intended there to be a sanction, why was it not expressed. But I distinguish here a failure to draw up the order to as to reflect the intention of the court as it was expressed at the hearing, from seeking to construe the order to establish the court's unexpressed intention.

> (2) As with any categorisation, the boundaries between the categories may be indistinct.
>
> 35. I am satisfied that the order made on 7 May 2019 did not contain a sanction. I would add that even if my analysis of the CPR is wrong, I would have been willing to grant relief. The failure to serve the application and evidence by the deadline was serious because the idea behind the order was to put the claimant in a position in which he knew whether or not the application was to be made and if so on what terms. However, the explanation for the breach that is provided in the first defendant's evidence goes a long way to explain the breach and when all the circumstances of the case are considered, the fact that the claimant wishes to resurrect this is very weak case after a lengthy period of inaction militates strongly in favour in granting relief. The court is required to consider the merits of the amended claim when dealing with the application for permission to amend the particulars of claim. It follows that even when the considerations set out in CPR 3.9(1)(a) and (b) are taken into account, it would be right for the court to deal with the first defendant's application."

The Chief Master then went on to deal with the first defendant's application, and struck out the claim.

Discussion

26. I too respectfully agree with the view of Martin Spencer J that it would be wrong "to imply the need to apply for relief from sanctions in all cases where a rule or practice direction contains" the word 'must'. It is a question of construction and, as is well known, in questions of construction context is everything. Subject to one important caveat, I also agree with the Chief Master's view that counsel's tripartite categorisation of sanctions cases was "a helpful categorisation". The caveat is that, for the reasons already given I consider that counsel's second category of cases where there is an implied sanction, in fact is divided into two: (1) those where the intention of the rule-maker or judge is to impose a sanction which has not been expressed, and (2) those where the rule-maker or judge had no intention to impose a sanction, but for policy reasons the case is treated as one of relief from sanctions.

27. All that said, I respectfully doubt whether some of the further comments which the Chief Master made are completely compatible with the approach taken, and the comments made, in the decisions of the Court of Appeal in *Altomart*, to which I referred earlier. I am thinking in particular of his comment in paragraph 34(1) that

> "since it is open to the court to impose an express sanction in an order, it will be rare of the court to be able to reach the threshold for implication. After all, if it is so obvious that the court intended there to be a sanction, why was it not expressed."

28. That may be true of the case of implied intention *in fact* to impose a sanction (though in this case I need not and therefore do not so decide), but it is in my judgment irrelevant in the case where for policy reasons the case is treated as one of relief from sanctions. The question in the present case is whether, when the court has set a timetable for the filing and service of evidence leading to a hearing, and a party fails

to abide by it, an application for relief from sanctions under CPR rule 3.9 is necessary. The respondent's argument here is not that the court *intended* a sanction, but that the setting of a timetable for evidence for a hearing requires that breaches of the timetable *be treated analogously* to cases where sanctions are expressly imposed.

29. In my judgment, there is force in the submission by the respondent that rule 7.16 is really concerned with preparation for the first hearing of the petition. First of all, the rules in that chapter from rule 7.10 to rule 7.19 deal with what must be done to bring the existence of the petition to the notice of the company and to others who may be affected, with a view to their attending the hearing of the petition or even being substituted for the petitioner, as well as with ascertaining the position of the company (rule 7.16 itself). It is obvious that, in deciding how to deal with the future conduct of the petition, the court needs to know the respective positions of the petitioner, other creditors and contributories, and the company itself. In addition, the terms of rule 7.16 itself are concerned with informing the court of the company's opposition to the petition and the grounds of that opposition. Those are the very matters which must be contained in "the witness statement" (and I note the use of both the singular form and the definite article) that the rule requires to be made, filed and served. In the present case, that function was performed, and the provisions of rule 7.16 satisfied, by the witness statement of Mr Jansen of 18 June 2019.

30. Once that rule is indeed satisfied, it is hard to see that the rule should have any role to play thereafter. A witness statement filed and served under rule 7.16 must give the statutory particulars required in rule 7.16(2). A subsequent witness statement which did not contain those statutory particulars, but which otherwise contained evidence relevant to the issues arising in the petition, would not be admissible in the proceedings by virtue of rule 7.16. And it would make no legislative sense to say that a subsequent witness statement which was otherwise inadmissible for non-compliance with rule 7.16 should become admissible merely because it (again) contains those statutory particulars in addition to whatever other relevant evidence it may contain.

31. A further point is that Chapter 3 of Part 7 does not contain anything like a code of procedure for the preparation and conduct of hearings of petitions to wind up companies. Indeed, rule 7.16 is the only provision in that chapter dealing with witness statements at all. That chapter says nothing about evidence by anyone else (although the statements of fact contained in the petition itself will be verified by a statement of truth: see rule 7.6). On the other hand, rule 12.1(1) of the 2016 Rules, which was referred to at the hearing, provides that

> "The provisions of the CPR (including any related Practice Directions) apply for the purposes of proceedings under parts 1 to 11 of the Act with any necessary modifications, except so far as disapplied by or inconsistent with these Rules"

32. So it is clear that, since Chapter 3 does not deal with the preparation and provision of evidence for the hearing of winding up petitions, the relevant provisions of the CPR apply instead, except so far as inconsistent with the Rules. Those provisions include CPR rule 32.1, which so far as material provides:

> "(1) The court may control the evidence by giving directions as to –
>
> (a) the issues on which it requires evidence;

(b) the nature of the evidence which it requires to decide those issues; and

(c) the way in which the evidence is to be placed before the court.

(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible."

33. In my judgment, in giving directions as to evidence in the orders of 25 June 2019 and 23 July 2019, the district judge was exercising this power, and requiring that, in order for evidence to be admissible for the purposes of the hearing of the petition, it had to be filed and served in accordance with a prescribed timetable. By the order of 25 June 2019, the appellant had to file and serve any further witness statement by 24 July 2019. Because of the intervening application to attach a penal notice to the disclosure order, the district judge on 23 July 2019 decided to extend that time to 16 August 2019. Further evidence was indeed filed and served on behalf of the appellant on 15 August 2019. That was in accordance with the timetable. But the further evidence filed and served on behalf of the appellant in November 2019 was not in accordance with the timetable.

Did the order of 21 August 2019 change matters?

34. The appellant submits however that the timetable was in effect set aside by the order of District Judge Middleton on 21 August 2019, by "putting a different framework in place". This framework included provision for oral evidence and cross-examination, and a significant extension in the hearing time allocated to the matter. I do not accept this submission. On 21 August 2019 the district judge took stock of the position as it then was, with the evidence that had been filed on both sides, and the issues raised by that evidence. The judge was concerned that the issues raised by the evidence filed and served could not be resolved without cross-examination, and that accordingly a longer time would be necessary. The district judge was not, in my judgment, "putting a different framework in place". Instead the judge was simply accommodating the further material that had been put forward in accordance with the court's directions, and managing the case accordingly. In my judgment the timetable envisaged by the earlier orders was maintained. Indeed, it was *because* the timetable was maintained that the order of 21 August 2019 needed to be made.

35. It is impossible to believe that the court in its case management orders of 25 June 2019 and 23 July 2019 that evidence should be filed and served by certain dates was implying that it was content that evidence that was not filed and served in accordance with those directions should nevertheless be admitted at the hearing without further ado. On the contrary, that would set at naught the whole point of the case management orders. The obvious inference is that such evidence would not be admitted at the hearing of the petition *without the permission of the court*. At the same time, no specific sanction was laid down, except in the philosophical sense that, if permission were not obtained the evidence could not be admitted. This is directly comparable to the example of an application to file an appellant's respondent's notice out of time: no appellant's notice, no appeal; no respondent's notice, no possible extra support for the decision under appeal. Accordingly, whilst I would not categorise the putting forward a further evidence in November as a *breach* of the earlier orders (because the appellant in the present case was under no *obligation* to file any evidence at all), the authorities to which I earlier referred make clear that, for policy reasons,

the test for giving permission for evidence not filed and served in accordance with the court timetable was to be the same test is that for relief from sanctions under CPR rule 3.9. In my judgment, therefore, the district judge was not wrong in law to consider the question from the perspective of relief from sanctions in accordance with the *Denton/Mitchell* principles.

The second issue: application of the *Denton/Mitchell* principles

36. The second issue then is whether the district judge applied the *Denton/Mitchell* principles correctly. The appellant argued that he did not. The grounds of appeal on this point (paragraph 5 of ground I) are divided into five subparagraphs, each of which begins with words to the effect that the judge failed to give any or any sufficient weight to various points. These are characteristic of a challenge to the weighing up process in the mind of the judge. At the hearing, the appellant submitted in particular that, in relation to the second of the criteria (the reason for the breach), the judge did not place sufficient weight on the conduct of the respondent, who, it was said, obstructed the appellant's access to the accounting documents which were needed in order to deal with the respondent's claims and the appellant's cross-claims. Instead, the appellant said, the judge dwelt on credibility points. The second criticism made by the appellant relates to the third of the *Denton/Mitchell* principles, taking account of all the circumstances. The appellant says that the judge's primary concern was the loss of the court time that would be represented by granting an adjournment, which would follow from the decision to admit the fresh evidence. The appellant says that prejudice to the appellant should have been considered more important.

37. In response, the respondent referred me to the decision of the Court of Appeal in *Metropolitan Police Commissioner v Abdulle* [2015] EWCA Civ 1260. That was a case which concerned the decision of a first instance judge not to strike out a claim on the basis of a failure to comply with rules and court orders. The defendant appealed against this decision to the Court of Appeal.

38. Lewison LJ (with whom Moore-Bick and Kitchen LJJ agreed) said this:

> "24. Let me say at once that if I had been the first instance judge I would have accepted [the defendant]'s submissions. I would have given more weight to the lamentable history of delay in progressing this case, the apparent incompetence of the claimants' solicitors, and the loss of the trial date. But that is not the question for an appeal court.
>
> 25. Mr Thomas's submissions did not include a submission that the judge overlooked any relevant factor, or that he took into account irrelevant factors. Nor did he suggest that the judge misdirected himself in law. Rather, his submissions were directed to the weight that the judge attributed to the various factors that he did take into account in exercising his discretion. That is not a promising start to an attack on an exercise of discretion. What it amounts to is a submission that the judge's decision was perverse.
>
> 26. In *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795 at [52] this court said:

> 'We start by reiterating a point that has been made before, namely that this court will not lightly interfere with a case management decision. In *Mannion v Ginty* [2012] EWCA Civ 1667 at [18] Lewison LJ said: "it has been said more than once in this court, it is vital for the Court of Appeal to uphold robust fair case management decisions made by first instance judges".'

27. The first instance judge's decision in that case was to refuse relief against sanctions and her refusal was upheld by this court. But the same approach applies equally to decisions by first instance judges to grant relief against sanctions. In *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506, [2014] 3 Costs LR 588 Davis LJ said at [63]:

> '… the enjoinder that the Court of Appeal will not lightly interfere with a case management decision and will support robust and fair case management decisions should not be taken as applying, when CPR 3.9 is in point, only to decisions where relief from sanction has been refused. It does not. It likewise applies to robust and fair case management decisions where relief from sanction has been granted.'

28. In my judgment the same approach applies to decisions by first instance judges to strike out, or to decline to strike out, claims under CPR 3.4(2)(c). In a case in which, as the judge himself said, the balance was a 'fine' one, an appeal court should respect the balance struck by the first instance judge. As I have said I would have found that the balance tipped the other way; but that is precisely because in cases where the balance is a fine one reasonable people can disagree. It is impossible to characterise the judge's decision as perverse."

39. In my judgment, the same is true in this case. At the hearing the appellant sought to argue that the judge did not take into account the highly complicated nature of the accounting information which had been obtained from the online database. I do not agree. The judge did look at the fresh evidence tendered, and cannot have failed to notice its nature. The appellant also criticised the fact that the judge did not mention rule 7.16. But rule 7.16 had been referred to during the argument, and the judge cannot have failed to have it in mind. In my judgment, on the material before me, the judge did not fail to consider matters that ought to have been considered, and neither did he consider anything which was irrelevant. The weight to be put on the matters that he did consider was one that was for him, and not for me. Standing back and looking at what he says, I cannot possibly characterise his decision on the application of the *Denton/Mitchell* principles as perverse. As Lewison LJ said in *Abdulle*, what I myself might have done in those circumstances is irrelevant. Accordingly, I hold that the judge's application of the *Denton/Mitchell* principles cannot be challenged.

The third issue: effect of not admitting further evidence

40. The third issue that I identified does not therefore arise.

The fourth issue: winding-up petition based on respondent's claims

41. The fourth issue is whether a winding up order could be made in respect of the claims made by the respondent. As I have already said, her claims fall under three heads.

These are (1) a claim in respect of salary as an employee of the appellant, (2) a claim to the reimbursement of expenses incurred by her on behalf of the appellant, and (3) a claim in respect of loans to the appellant: see at [2] above.

The test

42. The question whether a person who makes a claim against a company may present a petition for its winding up is governed by section 124(1) of the Insolvency Act 1986. So far as material, this provides as follows:

> "Subject to the provisions of this section, an application to the court for the winding up of a company shall be by petition presented either by the company, or the directors, or by any creditor or creditors (including any contingent or prospective creditor or creditors), … or by all or any of those parties, together or separately."

43. Here the critical words are "creditor", "contingent" and "prospective". A "creditor" is a person to whom a debt in money is owed by the debtor. A person who has an obligation to pay damages or like compensation for breach of some legal duty is not without more a "creditor", because such a person does not owe a "debt". This is not the same distinction as between a liquidated sum and an unliquidated sum. An unliquidated sum is one which is still to be ascertained by the court, as for example in the assessment of general damages. A liquidated sum is one which the parties have already agreed (or where they have agreed a formula for ascertaining it), as for example in a liquidated damages clause in a contract. These are both examples, not of a claim in *debt*, but of a claim in *damages*. However, in some contexts at least, a person who is not owed a debt may still be a *contingent* or *prospective* creditor within section 124, because on a certain contingency, or within a certain prospect, the *obligation to pay damages* may be converted into a money judgment, which will represent a judgment *debt*.

Changes in the law

44. On this subject the law has changed over the years, because Parliament has legislated in different terms from time to time. Originally, under the Joint Stock Companies Act 1862, section 82, a petition to wind up the company might

> "be presented by the company, and by any one or more creditor or creditors, contributory or contributories of the company, or by all or any of the above parties together or separately".

45. In *Re Pen-y-Van Colliery Company Limited* (1877) 6 Ch D 477, a decision on that legislation, a petition was presented for the winding up of the company (already in voluntary liquidation) under the supervision of the court. The petitioner had recently commenced an action for damages against the company and its liquidator on the basis of fraudulent misrepresentation, and based its petition on this claim. Sir George Jessel MR dismissed the petition on two bases. Firstly he dismissed it on the facts, in saying (at 483) that it was

> "plain that there is no claim at all on the statements against anybody before me".

But, secondly, he also dismissed it on the law, in saying (at 484) that

> "I do not think a claim for unliquidated damages, that is, a claim for damages for fraudulent representation, makes a man a creditor entitling him to petition under the Act either for a winding up by the court or a winding up under supervision. He must change the claim for damages into a judgment, and thus make himself creditor, before he can petition the Court."

46. As I have already set out, the modern statute is in expanded terms, and is not confined to "creditors" properly so called. It now extends to "any contingent or prospective creditor or creditors". By the time of *Re a Company* [1973] 1 WLR 1566, the relevant legislation was the Companies Act 1948, section 224, which already contained the modern phraseology, including references to contingent and prospective creditors. In that case, Megarry J doubted whether the decision in *Re Pen-y-Van Colliery Company Limited* could justify the statement in *Buckley on the Companies Acts*, 13th edition (1957) at page 464 that "a claim for unliquidated damages … will not support a petition". In fact his decision to dismiss the petition depended on other factual aspects of the case, amounting to an abuse of the process of the court. However, in *Re Dollar Land Holdings plc* [1993] BCC 823, an individual claimed liquidated damages against a company for breach of an obligation to release his personal guarantee that had been given for the company's purposes in the circumstances that had happened. He then presented a winding up petition based on that claim. An application to strike out the petition on the basis that the petitioner was not a "creditor" (as extended by the statutory wording) of the company failed.

47. Sir Donald Nicholls VC held that:

> "I am concerned, primarily, with whether Mr Weiss has standing as a creditor. Under section 124 of the Insolvency Act 1986 a petition may be presented by a creditor, including a contingent or prospective creditor. Mr Tager accepted, in my view rightly in view of the authorities, that a person with an undisputable claim for unliquidated damages for more than a nominal amount qualifies as a prospective creditor for the purposes of section 124. In my view, Mr Weiss is, and is at present, a creditor within the meaning of that section. He is a competent petitioner.
>
> […]
>
> I can see no answer to the argument based on Mr Weiss's claim to damages for breach of the obligation to procure the release of the guarantee. Mr Weiss is a creditor, at least contingently or prospectively. Further he is, at least prospectively, a creditor in a substantial sum even if the claim is not one for liquidated damages in the sum of £422,000. I express no view on whether the damages would inevitably be in that amount."

48. In my judgment, it is clear from these cases that the status of "creditor" for the purposes of being able to present a petition to wind up the company under the 1986 Act is not restricted to those who claim to have a "debt" in the strict sense, much less to those who actually *do* have such a "debt". A person who has a claim in damages, even unliquidated, is at least a contingent and perhaps a prospective creditor for the purposes of presenting a winding up petition. The company may then be able to

dispute the claim on substantial grounds, and thus have the claim struck out. But that is a separate matter.

The respondent's claims

49. In the present case, however, it seems to me that the position of the petitioner is stronger than this. The nature of a claim for repayment of a loan is one in debt, not damages. Similarly, the nature of the claim for repayment of expenses incurred by an agent on behalf of the principal is also one in debt, whether by virtue of implied contract, or under the law of unjust enrichment. It is not a claim in damages. Lastly, there is the question of the nature of the claim by an employee for salary. In the usual case there is an agreement between the parties that the employee will work for the employer at an agreed salary. Any claim for the salary, on the basis that the employee has worked, or at any rate being available for work, is a claim in debt, not damages.

50. In the present case, the judge below found as a fact, after hearing the relevant witnesses, that there *had* been an agreement between the company (the appellant) and the respondent to employ her, but did not find that there was any agreement as to the salary. So the claim made by the respondent would have been a claim for a *quantum meruit*. But that too is not a claim in damages, rather in debt. So in any event in my judgment it is clear that the nature of the claims made by the respondent entitled her to present this petition, even without taking into account the expanded meaning of "creditor" in the current legislation.

Uncertain amount

51. The appellant also makes a separate point here. It is that the precise amount of the claims being made by the respondent might not be capable of being stated at the time of the presentation of the petition. In particular, it was not clear when the respondent's employment with the appellant was said to have started, and neither was it clear what was, on her case, the date up to which she was entitled to be paid. This does not matter either. Provided that the claim is for a minimum amount exceeding the statutory threshold of £750, it does not matter that the precise amount may not be capable of being ascertained at the time of presenting the petition. This is shown by the decision of Norris J in *Angel Group v British Gas* [2012] EWHC 2702. That was a case where application was made to restrain the presentation of a winding-up petition on the grounds that the debt was disputed on substantial grounds. One aspect of the application was an argument that British Gas ("BG") was unable to specify the exact amount which it claimed in respect of the supply of gas at any given moment, because of the way that the billing process was conducted. Norris J held that this did not matter.

52. He said:

> "28. The fourth argument advanced by Counsel for Angel was that unless I can specify an exact sum which is due from Angel to BG then I must grant an injunction to restrain further proceeding on the petition: and that I can only reach that exact sum by undertaking a line by line examination of each of the invoices rendered on the Corporate Account and the SME Account for the entire duration of the relationship between Angel and BG. Only in this way would the exact sum and its precise constitution be established, and only in

this way could Angel know how much it had to pay and what liabilities were thereby discharged.

29. I do not accept this submission. On this application the question is whether or not there is an indisputable debt owed by Angel to BG sufficient to support a winding up petition. There may be uncertainty about the precise sum: but the court at this stage is not concerned to determine what could be proved in a winding up. It is concerned to see that the petitioner is indisputably a creditor in a sum exceeding the statutory minimum and so entitled to present a winding-up petition. It will be for the parties to agree or make their own respective judgements about what cannot be disputed and what can properly be disputed (and the court will be alert to identify every case where the winding up process is being used to exert pressure to pay a debt that is bona fide disputed on substantial grounds rather than to litigate it). In *Re A Company No.2340* (2001) Mr Justice Blackburne held:-

> 'At the end of the day the question is whether or not there is a debt owed by [the Debtor] to [the Creditor] over and above £750, sufficient therefore in amount to support a winding up petition, which is not bona fide disputed on substantial grounds. In my judgment, there clearly is. Even making allowance for the various points which [Counsel] has raised, on any view further substantial sums are owing. In my judgment therefore, it cannot be said that if [the Creditor] were now to present a petition to wind up [the Debtor] it would be an abuse of process. True it is that there is a dispute as to the precise amount of the sum to which [the Creditor] is entitled but, on the evidence I have seen, I am satisfied that there is no genuine dispute… as to the existence of an indebtedness on the part of [the Debtor] to [the Creditor] amply sufficient in amount to support a winding up petition. I propose therefore to dismiss this application'.

My approach is the same."

I add only that so was the approach of the district judge in the present case. In my judgment he was right to adopt this approach.

The fifth issue: defences to the respondent's claims

53. The final two questions relate to whether the respondent's claims were disputed on substantial grounds. There are two quite separate aspects here. One is the question of possible defences to the specific claims (the fifth issue). The other is the question of crossclaims against the respondent (the sixth issue). The appellant's skeleton argument makes clear that the real and substantial dispute submission arises "primarily by way of a cross-claim, through analysis of the company's accounts and documentation". I will return to that shortly.

54. As to the first aspect (the fifth issue) however, the skeleton argument is silent. In its grounds of appeal, the appellant challenged the judge's findings of fact on the question whether the respondent was an employee of the appellant and on sums transferred from the appellant company to a third party. This was supported in oral submissions, where the appellant advanced a number of criticisms of the findings

made by the district judge. The problem is that the district judge exceptionally heard oral evidence from the respondent and Mr Jansen on behalf of the appellant, and was able therefore to decide whether he preferred the evidence of one to another. I have not had that advantage. In this connection, the respondents cited to me the recent decision of the Court of Appeal in *Prescott v Potamianos* [2019] EWCA Civ 932, where factual findings by a judge in an unfair prejudice petition were challenged on appeal.

55. In that case, the court (McCombe, Leggatt and Rose LJJ) said:

> "71. It seems to us that the argument in this case is directed to the judge's 'evaluative' decision as to whether Dr Potamianos's conduct justified his exclusion from the management of the Company and so whether there had been 'unfair prejudice' in the conduct of the company's affairs on the basis of the primary facts as he found them to be. While there were disputes below as to the primary facts, his findings on those disputes are not now challenged. We are concerned to assess the judge's 'evaluation' of those primary facts leading to his decision that there had been 'unfair prejudice' in this case.
>
> 72. The question of the room for appellate challenge of such an 'evaluative' decision is an area of our procedural law which has attracted much attention from appellate courts in recent years, possibly fuelled by the ever-increasing complexity and detail of some litigation. In such litigation it is very difficult for appellate courts to put themselves in the same position as trial judges in making those decisions, based (as they are) on voluminous documentary and/or oral evidence, which can only be summarised even in an extensive judgment at first instance. In our judgment this is just such a case."

56. After considering three other authorities, the Court of Appeal continued:

> "76. So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion'.
>
> 77. All this said, when assessing an evaluative decision of the facts found by a trial judge, there can be no doubt that one must also bear in mind the well-known passage in the speech of Lord Hoffmann in *Biogen Inc v Medeva plc* [1997] RPC 1, 45 where he said:
>
> > '…The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an

> important part in the judge's overall evaluation. It would in my view be wrong to treat Benmax as authorising or requiring an appellate court to undertake a de novo evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation.'

78. Again, the position is so well summarised by Lewison LJ in his well-known judgment in *Fage UK Ltd. & anor v Chobani UK Ltd & anor* [2014] EWCA Civ 5, at paragraph 114, as follows:

> '114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them…'."

57. I am of course bound by the decision of the Court of Appeal in that case. In my judgment, I should be very slow to interfere with the factual or evaluative findings of the district judge in the court below. In this case the district judge had evidence before him on which he was entitled to come to the conclusion that he did. In considering his expressed reasons, I also bear in mind that this was an extempore judgment. There is no basis upon which it can properly be said that the decision of the judge was perverse. Realistically, and in substance, this court is being asked to say that the judge who saw and heard the evidence of the witnesses themselves should have reached a different conclusion, and that this court should therefore substitute its view of the evidence for the view taken by the judge. Yet there is no suggestion that he took into account evidence that he should not have done, or that he failed to take into account anything that he should have done. In my judgment, there is no basis here for the appellate court to interfere with the decision of the court below on this issue.

The sixth issue: crossclaims

58. That leaves the sixth issue, namely, the question of the cross-claim. The cross-claim sought to be raised by the evidence that was actually before the district judge was at most worth £1527.47, whereas the district judge found that the respondent's claim, even taking into account difficulties with the ascertainment of the exact amount claimed, was still over £100,000. It is only if the much larger cross-claim sought to be raised by the evidence filed in November 2019 is taken into account that the question of a cross-claim wiping out the claim of the respondent comes into play. But that can only happen if the appellant succeeds on the first two issues. However, as I have already held, the appellant has failed on those two issues, and therefore the point does not arise. That further evidence should not have been before the court, and the district judge did not therefore fall into error in failing to take it into account.

Conclusion

59. In my judgment, in the circumstances, this appeal fails, and must be dismissed.