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Case No: B2/2020/2137
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IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
His Honour Judge Luba QC
B30YP001 / B29YP644

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 November 2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
LORD JUSTICE BAKER

- -

Between :

DEORANEE BOODIA	**Claimant/ Appellant**
- and -	
VOLODYMRY YATSYNA	**Defendant/ Respondent**

- -
- -

Navjot Atwal (instructed by **W Davies & Son Ltd t/a W Davies Solicitors**) for the **Appellant**
Stephen Goodfellow (instructed by **Ventura Law Ltd**) for the **Respondent**

Hearing date : 26 October 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Wednesday 17 November 2021.

Lord Justice Lewison:

Introduction

1. Mrs Boodia brought two claims against Mr Yatsyna who had carried out building work for her at two buildings, known as the Gables and the Barn. In the case of the Gables, the works were completed in June 2015; and in the case of the Barn in mid-May 2010. Both claims were issued on 11 November 2015. DJ Jarzabkowski, sitting in the county court at Brentford, tried the claim relating to the Barn on 7 January 2019; and gave judgment for Mrs Boodia for damages of £10,920 plus interest.

2. Mr Yatsyna appealed on a number of grounds. The only one that succeeded was his allegation that the District Judge did not have jurisdiction to try the claim because it had already been struck out for failure to pay a trial fee; and no application for relief against sanctions was before the court. The same applied to the claim relating to the Gables. HHJ Luba QC accepted that argument "with a heavy heart". This is Mrs Boodia's appeal against that decision.

Procedural history

3. To put the point in context it is necessary to rehearse some of the procedural history of the claim. On 18 January 2018 DDJ Hay gave directions. He allocated the Barn claim to the fast track; made orders about disclosure and evidence of fact and expert evidence. The trial window was to be listed as a fixture on the first open date, namely 21 June 2018 in the county court at Brentford. After the substantive directions, the order continued:

> "Unless the claimant does by **4.00pm on the 24 May 2018** pay to the court the trial fee of **£545.00** or file a properly completed application (i.e. one which provides all the required documentation in the manner requested) for help with fees, then the claim will be **struck out with effect from 24 May 2018 without further order and, unless the court orders otherwise, you will also be liable for the costs which the defendant has incurred**.
>
> **If your claim has been struck out, it will no longer exist, The hearing will be vacated, unless a counterclaim survives the claim being struck out**.
>
> If, following strike out of the claim the claimant or defendant wishes to start fresh proceedings a new claim must be filed together with the appropriate fee or application for help with fees."

4. The order ended:

> "**Please note, unless you apply for help with fees, there will be no further correspondence from the court office**

> **regarding payment of the fee or warnings as to the consequences of non payment**."

5. He made similar directions in relation to the Gables claim (although the date for payment of the trial fee was slightly different). Mrs Boodia did not pay either trial fee by the due date. In the event the trial date was adjourned on 18 June because no judge was available to hear it. On 3 September 2018 the court sent out a document relisting the two cases. which started "TAKE NOTICE." In each case it said that the trial would take place on 7 and 8 January 2019. The document sent by the court does not reveal who made it. It included the statement that "you must prepare for the hearing on the basis that it will proceed", and the statement that five days before the hearing "you must contact the court" and state whether the case still required listing. In the case of the Barn (but not the Gables) there was an amended version which purported to have been amended under the slip rule on 25 September 2018. The amended part said:

> "Unless the claimant does by 4.00pm on the 7 December 2018 pay to the court the trial fee of £545.00 or file a properly completed application (i.e. one which provides all the required documentation in the manner requested) for help with fees, then the claim will be struck out with effect from 24 May 2018 without further order and, unless the court orders otherwise, you will also be liable for the costs which the defendant has incurred."

6. The cases came to DJ Jarzabkowski on 23 November 2018 when she gave further directions.

7. Mrs Boodia paid the trial fee in each case on 5 December 2018, within the time set by the document of 25 September 2018. On 21 December 2018 Mr Yatsyna took the point that the trial fee ought to have been paid by 23 May 2018; and asked the court for clarification about when the fees had been paid. His e-mail was referred to a district judge who directed that any queries about the fee should be raised at the hearing scheduled for 7 and 8 January. On 3 January 2019 (the Thursday before the trial fixed for the following Monday) counsel acting for Mr Yatsyna wrote to the court saying that the claim had been automatically struck out on 24 May 2018. He also pointed out that Mrs Boodia had made no application for relief against sanctions, with the consequence that the claim remained struck out. On the following day, the court replied:

> "The Judge has looked at the Court file in relation to the points you have raised.
>
> On the June hearing being vacated and re-listed for January, the Court by order dated 3 September 2018 extended the time for payment of the hearing fee to 7 December 2018."

8. The judge in question was DJ Jarzabkowski. In the course of the trial on the following Monday she made a number of procedural rulings adverse to Mr Yatsyna. She refused an adjournment (on the ground of counsel's ill-health), excluded certain witness statements (which were not in Mr Yatsyna's own words) and refused to accept his wife as an interpreter. The point about the trial fee arose again briefly in the course of discussion between the district judge and the advocates. She said:

> "In any event, I looked at this. I spent a lot of time on Friday looking at the point, when I could have been reading in. I am satisfied that retrospectively, the time for payment was extended."

9. It was then pointed out to her that no application had been made for relief against sanctions; but she replied that it was done "of the Court's own motion".

10. That was reflected in her order of 8 March 2019 (although not drawn up until 23 November 2020) which provided at paragraph 3:

> "The court determines that the hearing fee for the trial has been paid in time, time having been extended, and the claim is not struck out."

11. HHJ Luba QC gave judgment to the contrary on 19 November 2020. A few days later, on 25 November 2020, Mrs Boodia did make an application for relief against sanctions. That application is pending in the county court at Brentford.

Court fees

12. Section 92 (1) of the Courts Act 2003 gives the Lord Chancellor power to prescribe fees with the consent of the Treasury. Before doing so, he must consult with a number of members of the senior judiciary. In prescribing fees, the Lord Chancellor must have regard to the principle that access to the courts must not be denied. Fees payable under section 92 are recoverable as a civil debt: section 92 (8). Something of the history of court fees was explained by Dyson LJ in *R (London Borough of Hillingdon) v Lord Chancellor* [2008] EWHC 2683 (Admin), [2209] LGR 554. He said at [8]:

> "Fees have been charged by civil courts since the modern court system was established in the 19th century. Shortly after the First World War, the policy became established that fees should cover the cost of the court system, but excluding judicial salaries and pensions and the cost of court buildings. From 1983/84, accommodation costs were included in the expenses to be met from fee income. In 1992, the policy was announced that all costs, including judicial salaries, should be borne by court fees."

13. Full recovery no longer seems to be the policy. In its response of 21 August 2021 to a consultation about raising court fees, the Ministry of Justice stated that the policy was that those who use courts or tribunals (outside the criminal jurisdiction) should pay towards the cost of the service they use. The Ministry estimated that court fees covered less than half of the costs of running the courts and tribunals system. The additional cost is subsidised by the taxpayer. But even if full recovery is not achieved, the purpose of the fee is to recoup at least some of the cost to the public purse of providing a court and tribunal system to support the rule of law.

14. In civil cases, fees are prescribed by the Civil Proceedings Fees Order 2008. The amount of the prescribed fees is regularly updated. At the time of the proceedings with which we are concerned, there were a number of fees that were potentially payable. Those fees, and the circumstances in which they are payable are set out in Schedule 1

to the Order. There is also provision for remission of fees in certain cases, but we are not concerned with those.

15. A fee is payable on starting proceedings as laid down by paragraph 1 of the Schedule. The amount of the fee depends on the size of the claim. In practice if the fee is not paid, the court will not issue the claim. Further fees may be payable during the progress of a claim. For example, paragraph 2.4 (a) provides for the payment of a fee on an application on notice where no other fee is specified; and paragraph 2.5 (a) specifies a different fee for an application made by consent or without notice. A witness summons incurs a fee under paragraph 2.6.

16. We are immediately concerned with the trial fee which is specified by paragraph 2.1 of the Schedule. In the case of a claim assigned to the fast track, the fee is £545. The Schedule also deals with when the fee is payable:

> "Where notice of trial date or trial period is given by the court 36 days or more before the trial date or the Monday of the first week of the notified trial period, fee 2.1 is payable at least 28 days prior to the trial date or the Monday of the first week of the notified trial period.
>
> Where notice of trial date or trial period is given by the court less than 36 days before the trial date or the Monday of the first week of the notified trial period, fee 2.1 is payable within 7 days after the date on which such notice is given.
>
> Where the court gives notice of both a trial date and a trial period, the fee is payable by reference to the Monday of the first week of the notified trial period.
>
> Written notice is given on the date on which the notice is sent out from the court. Oral notice is given on the date on which the notice is communicated by the court. Where notice is both in written form and given orally, the notice is given on the date that the written notice is sent out from the court."

17. In very broad terms, then, fees are payable on a "pay as you go" basis.

18. The requirement to pay fees is also reflected in the CPR. The relevant rule for present purposes is CPR Part 3.7A1. It provides, so far as material:

> "(1) In this rule and in rule 3.7AA—
>
> (a) "Fees Order 2008" means the Civil Proceedings Fees Order 2008;
>
> (b) "fee notice" means a notice of—
>
> (i) the amount of a trial fee;
>
> (ii) the trial fee payment date; and

(iii) the consequences of non-payment of the trial fee;

(c) "trial date" means the date of the trial in relation to which the trial fee is payable, and if the trial in relation to which the trial fee is payable is scheduled to commence during the course of a specified period, "trial date" means the date of the Monday of the first week of that specified period;

(d) "trial fee" means fee 2.1 set out in the Table in Schedule 1 to the Fees Order 2008 and payable for the trial of a case on the multi-track, fast track or small claims track;

(e) "trial fee payment date" means the date by which the trial fee must be paid, calculated in accordance with the Fees Order 2008;

(f) ….

(2) This rule applies in relation to trial fees where that fee is to be paid by the claimant and the court notifies the parties in writing of the trial date.

(3) When the court notifies the parties in writing of the trial date, the court must also send a fee notice to the claimant.

(4) The fee notice may be contained in the same document as the notice of trial date, or may be a separate document.

(5) …

(6) …

(7) If—

(a) the claimant has had notice in accordance with this rule to pay the trial fee;

(b) the claimant has not applied to have the trial fee remitted in whole or part; and

(c) the trial fee has not been paid on or before the trial fee payment date,

the claim will automatically be struck out without further order of the court, and unless the court orders otherwise, the claimant will be liable for the costs which the defendant has incurred.

(8) …

(9) If—

(a) a claimant applies to have the claim reinstated; and

> (b) the court grants relief,
>
> the relief must be conditional on the claimant either paying the trial fee or filing evidence of full or part remission of that fee …"

19. This is supplemented by Practice Direction 3B. Paragraph 1 provides that:

> "if a claim … is struck out under rule 3.7A1 … the court will send notice that it has been struck out to both the claimant and the defendant."

20. One evident purpose of that paragraph is to alert the party whose claim has been struck out to the fact of the striking out, so that they may apply for relief against sanctions. Another purpose is to alert the opposing party, so that they can down tools unless and until the claim is reinstated.

21. It is also necessary to refer to some of the court's case management powers. The court has a general duty to further the overriding objective by actively managing cases: CPR Part 1.4. That includes fixing timetables: CPR Part 1.4 (2)(g). CPR Part 3.1 gives the court wide powers of management "except where these rules provide otherwise". CPR Part 3.1 (2) (a) gives the court power to extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired).

22. CPR Part 3.1 (7) gives the court power to vary or revoke an order. CPR Part 3.3 (1) provides that:

> "Except where a rule or other enactment provides otherwise, a court may exercise its powers on an application or of its own motion."

23. Part 3.8 (1) provides:

> "(1) Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.
>
> (Rule 3.9 sets out the circumstances which the court will consider on an application to grant relief from a sanction)."

24. CPR Part 3.9 provides:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need—
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and

> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence."

25. CPR Part 3.10 provides:

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction—
>
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
>
> (b) the court may make an order to remedy the error."

26. As mentioned, DDJ Hay allocated the claims to the fast track. CPR Part 28.5 provides for the filing of a listing questionnaire unless it considers that the claim can proceed to trial without one. CPR Part 28.6 provides that as soon as practical after the date specified for filing a completed pre-trial check-list "the court will" fix the date for trial; give any directions for trial which it considers appropriate and "specify any further steps that need to be taken before trial."

HHJ Luba QC's judgment

27. HHJ Luba QC recorded the submission that was made to him by Mr Goodfellow for Mr Yatsyna. CPR part 3.7A1 was simple and straightforward. If the trial fee notice is not complied with, then without more the claim is ended. That is not to say that life cannot be breathed back into it later by a successful application for relief from sanctions; but no such application had been made. In essence, that is the argument that the judge accepted. He said:

> "[27] It is with a heavy heart that I find it impossible to escape from the logic of Mr Goodfellow's submissions that in this case nothing was done which can unpick the effect of rule 3.7A1. That is because the rule is expressed in absolute terms. It imposes a sanction; indeed an automatic sanction. True it is that it is a sanction that can be unpicked. But to my mind it is capable only of being "unpicked" by judicial order. I am not satisfied that there has ever ben a judicial order addressing this matter. It might be said that Judge Jarzabkowski herself, by the orders made at trial, of her own motion treated the events which had happened as in some way retrospectively extending time for compliance with the original order. But for my part I do not consider that that was available to her.
>
> [28] In the circumstances of this case, therefore, I find that the judge's order was wrong, and that she ought to have held that in both cases the claims stood struck out and that, without a successful application for relief against sanctions she could not proceed to deal with them…. I am satisfied that, had argument been directed to her on the point, and had she been taken to it

> fully, her only possible response would have been to invite an appropriate application, which in the event was not made."

Was the trial fee notice valid?

28. The first point that Mr Atwal takes on Mrs Boodia's behalf is that the trial fee notice was not effective to bring the sanction into operation. The sanction only operates if the claimant had notice "in accordance with this rule": CPR Part 3.7A1 (7) (a). It must follow that if the claimant has not had notice "in accordance with this rule" the sanction is not triggered. When the court notifies the parties of a trial date, it must send a "fee notice": CPR Part 3.7A1 (3). A "fee notice" is defined by CPR Part 3.1A1 (1) (b). It must give notice of the trial date and "the trial fee payment date". The "trial fee payment date" is the date by which the trial fee "must be paid, calculated in accordance with the Fees Order 2008".

29. The Fees Order provides that where notice of a trial date or trial period is given by the court 36 days or more before the trial date or the Monday of the first week of the notified trial period, the trial fee is payable at least 28 days prior to the trial date or the Monday of the first week of the notified trial period. It goes on to say that where the court gives both a trial date and a trial period, the fee is payable by reference to the Monday of the first week of the notified trial period.

30. So the question is: what is the date which is 28 days prior to the trial date or the Monday of the first week of the notified trial period? In the present case, the order of 2 January 2018 referred to both a trial window and a fixture. 21 June 2018 was a Thursday. As a matter of ordinary English, it seems to me that 20 June was one day prior to the trial date. Taking 20 June 2018 as day 1, and counting back to day 28 takes one to 24 May 2018, the last date specified in the order for payment of the trial fee. If one takes 21 June 2018 as the beginning of the trial period, then Monday of that week was 18 June 2018. Counting back 28 days from 18 June 2018 takes one to 21 May 2018. On the face of it, therefore, the order specified the correct final date for payment of the trial fee (and indeed a slightly later date if the order is taken as fixing a trial period beginning on 18 June 2018). It is not suggested that the fact that the order specified 4.00 p.m. on 21 May as the last time for payment (rather than, say, midnight) makes any difference to the outcome.

31. The Fees Order does not use the expression "clear days". Mr Atwal, however, submitted that a line of authorities supported the view that where an act is to be done "at least" a given number of days before a given event, then the period should be reckoned in clear days. That would exclude both the first and last day of the period, conformably with CPR Part 2.8 (3). CPR Part 2.8 deals with the calculation of time. It provides:

> "(1) This rule shows how to calculate any period of time for doing any act which is specified—
>
> (a) by these Rules;
>
> (b) by a practice direction; or
>
> (c) by a judgment or order of the court.

> (2) A period of time expressed as a number of days shall be computed as clear days.
>
> (3) In this rule "clear days" means that in computing the number of days—
>
> (a) the day on which the period begins; and
>
> (b) if the end of the period is defined by reference to an event, the day on which that event occurs,
>
> are not included."

32. If that interpretation were to be adopted, then the trial fee notice was not given "in accordance with this rule".

33. The first of the cases on which he relied was *Young v Higgon* (1840) 6 M & W 49. Mr Young had been convicted of an offence by Mr Higgon (a magistrate). Mr Young refused to pay for his conveyance to gaol. The magistrate issued a warrant to the constable requiring him to seize Mr Young's goods to pay the charges, which the constable duly executed. On 26 March 1838 Mr Young gave notice that he intended to sue Mr Higgon for trespass; and on 26 April 1838 he issued his writ. The relevant statute provided that "no writ shall be sued out against, nor any copy of any process at the suit of a subject shall be served on, any Justice of the peace for anything done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, at least one calendar month before the suing out or serving the same." The Court of Exchequer held that the action was premature. Parke B referred to *Lester v Garland* (1808) 15 Ves Jr 248 (which is usually considered to be the leading case on the topic) and said:

> "I do not say that that case is precisely in point with the present: but looking at the elaborate judgment of the Master of the Rolls, in which all the authorities are collected and commented upon, I should feel little difficulty in saying that the day in this case ought to be reckoned exclusively, on the authority of that case alone. But many others have since been decided, in which the principle of that case has been followed, viz. that when time from a particular period is allowed to a party to do any act, the first day is to be reckoned exclusively."

34. Although the phrase "at least" appeared in the statute, it does not appear to me to have played any part in the court's reasoning. The case turned on whether the period of one month included or excluded the date when the notice was given. In our case, there is no start date for the period: there is only an end date.

35. In *R v The Justices of Shropshire* (1838) 8 Ad & El 173 notice of appeal to quarter sessions was served on 19 December. The ensuing quarter sessions began on 2 January 1837. Statute required notice of the grounds of appeal "fourteen days at least" before the first day of the sessions at which the appeal was intended to be heard. The Court of King's Bench held that the appeal could not be heard because short notice had been

given. The four judges gave very short reasons for their decision which I should quote in full:

> "*Lord Denman CJ* We may regret the decision we have to pronounce in the particular instance; but it is much best not to shake a rule settled by former decisions. The writ, therefore, must not go.
>
> *Littledale J* We must abide by what has been already decided, though it appears to me that a day is a day, whether "at least" be added or left out.
>
> *Patteson J* In a matter wholly indifferent, it is best to abide by former decisions: that is the ground of my judgment.
>
> *Coleridge J* I think, for the same reason, that the rule must be discharged: but, on principle, I should be of a different opinion."

36. The case thus turned on previous authority, with which Coleridge J was clearly uncomfortable. In addition, Littledale J said that the inclusion of the phrase "at least" made no difference. It is not clear, to me at least, what Patteson J meant by "a matter wholly indifferent".

37. *Re Railway Sleepers Supply Co* (1885) 29 Ch D 204 concerned the validity of a special resolution passed by a company. Section 51 of the Companies Act 1862 provided:

> "A resolution passed by a company. … shall be deemed to be special whenever a resolution has been passed. … at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed. … at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month, from the date of the meeting at which such resolution was first passed."

38. The EGM was held on 25 February 1885. A special resolution was passed for the reduction of the capital of the company; and at another EGM held on 11 March 1885, that resolution was confirmed. Chitty J held that the second meeting was one day premature. He, too, referred to *Lester v Garland* and held that when the time began "from" a certain event, the day of the event itself was to be excluded. As he put it:

> "An interval of not less than fourteen days is equivalent to saying that fourteen days must intervene or elapse between the two dates."

39. Again, this turned on whether the start date "from" which the period ran was to be included or excluded in the reckoning. One test that he proposed was to consider the consequences if the period were reduced to one day. He illustrated the point thus:

> "Now supposing the statute had said at an interval of not less than one day; if the first meeting were held say on the 1st of January, the second meeting could not properly be held on the

> 2nd of January, for one day must intervene, therefore the 3rd of January would be the earliest day, and adding thirteen more days to make up the fourteen the second meeting could not be held before the 16th."

40. Again, this turns on different language. If one applies the "one day" test to the wording in our case, there is no difficulty in understanding that one day "prior to" 21 June was 20 June, as Mr Atwal accepted.

41. In *Associated Dominions Assurance Society Pty Ltd v Balmford* [1950] HCA 30, [1950] ALR 672 Australian legislation provided for the appointment of a person to investigate the affairs of an insurance company. The procedure was to serve notice on the company requiring it to show cause "within such period, not less than fourteen days from the date of the notice, as is specified in the notice" why an appointment should not be made. The company received a notice on 3 May 1948, although the notice itself was dated 30 April 1948. The notice required the company to show cause within the period of fourteen days next ensuing after 2 May 1948. By a majority (Latham CJ dissenting) the High Court of Australia held that the "date of the notice" was the date when it was served, rather than the date that it bore. Consequently the notice was too short. In passage which was clearly *obiter*, Fullagar J discussed some of the earlier authority. None of the other justices did so. He said:

> "It was argued on the other hand that the Act required that fourteen clear days should elapse between the date of the notice and the first day on which the commissioner could commence an investigation. On this view the period would not expire until the end of the fifteenth day after the date of the notice, and the first day on which the investigation could commence would be the sixteenth day after that date. In the view which I take of the case the question does not really arise, but I may say that, in my opinion, the former view is clearly the correct view. There is some authority for saying that the use, in a statute prescribing a time limit, of such expressions as "at least" and "not less than" indicate an intention that the specified number of "clear days" must elapse between two acts or events."

42. The final authority to which we were referred was the decision of Middleton J in the Ontario Supreme Court in *Ashton v Powers* (1921) 51 OLR 309. He held that where a company's bye-laws required "at least" 10 days' notice to be given "previous to" a meeting, that meant 10 clear days. Having referred to the *Shropshire Justices* case of 1838 he said:

> "I think it is better for me, on this question, to follow that which was regarded as a settled matter for one hundred years, and adopt the view, which has been acted upon ever since."

43. To return to the Fees Order, the trial fee must be paid "at least 28 days prior to the trial date or the Monday of the first week of the notified trial period". Mr Atwal argues that if the order set the trial date on 21 June 2018, then at least 28 days prior to that date would have been 23 May. If the order set a trial window beginning on 21 June, then the correct date would have been 18 May 2018. Paradoxically, on this interpretation, the

order (which required payment by 24 May) gave Mrs Boodia a period within which to pay the fee that was *longer* than she was entitled to. Yet that, said Mr Atwal, meant that the fee notice was invalid and the sanction was not triggered.

44. This is certainly a counter-intuitive argument. In my judgment there are three answers to the point. First, the Fees Order does not use the expression “clear days”; and I do not consider that authority binds to hold that that is to be implied. Second, I consider that the fact that the court (on Mr Atwal’s argument) gave Mrs Boodia too much time in which to pay the trial fee can fairly be characterised as “an error of procedure” which, in accordance with CPR Part 3.10 did not invalidate the step. The payment of a court fee is, in essence, a matter between the court and the litigant who is liable to pay the fee. That litigant’s opponent has no real interest in precisely when the fee is to be paid. Third, I do not see why the court’s power to extend time under CPR Part 3.1 (2) (a) cannot validly extend time for compliance thus deferring the operation of the sanction. The point can be tested in this way. Suppose that the trial fee notice gave the correct date for payment (on Mr Atwal’s argument 23 May). Suppose that on, say, 20 May, Mrs Boodia had applied to court for an additional few days in which to make the payment (perhaps because of a problem with cash flow). Can it really be said that the court would have had no jurisdiction to entertain the application or to make the order requested? In my judgment, no. If an extension of time can be granted on application, then there is no reason why it should not be granted on the court’s own motion, in accordance with CPR Part 3.3 (1).

45. Indeed, Mr Atwal accepted that the court could extend the time in which the fee had to be paid on a subsequent application for that purpose. But, to my mind, he was unable to explain whether in such a case the sanction for non-payment of the fee was triggered by the non-payment within the time as extended by the court on application and, if it was, why the result should be any different in a case in which the court had extended time in the first place. At one point in his argument he seemed to be suggesting that the sanction could never have effect on hypothetical facts like those. That cannot, with respect, be right.

46. I would conclude, therefore, that the trial fee notice was effective; and that because Mrs Boodia failed to pay the fee on time, her claim was struck out automatically.

Was the claim reinstated by the listing notification of 3 September 2018?

47. CPR Part 2.5 enables a member of the court staff to perform an act “of a formal or administrative character”. There is authority which suggests that the formulation of a listing *policy* is a judicial rather than an administrative act: *R (Adath Yisroel Burial Society) v HM Senior Coroner for Inner North London* [2018] EWHC 1286 (Admin), [2018] 4 Costs LR 749. Certain individual listing decisions about listing (such as whether to expedite a hearing) would normally be considered to require a judicial decision. But I do not consider that the mere listing of a case is, without more, outside the scope of an act of “an administrative character”.

48. If, however the document of 3 September 2018 was effective to do more than merely list the case (i.e. by reinstating it when it had already been automatically struck out) as DJ Jarzabkowski considered, and as Mr Atwal argued, that would, in my judgment, be more than an act of an administrative nature. It follows that in order to have had that effect, it would have had to have been an order made by a judge. Thus it is necessary

to decide what was the status of the document of 3 September 2018. Was it an order made by a judge? Or was it something else?

49. With certain irrelevant exceptions, CPR Part 40.2 (1) provides that:

> "Every judgment or order must state the name and judicial title of the person who made it… "

50. The documents of 3 September and 25 September on the other hand, do not contain the name or title of the person who made it. That is a pointer to the conclusion that it was not an order at all, still less one made by a judge. CPR Part 3.3 enables the court to make an order of its own initiative. CPR Part 3.3 (2) says that the court "may" give those likely to be affected the opportunity to make representations; but rule 3.3 (4) says that the court may make an order of its own initiative *without* hearing the parties or giving them an opportunity to make representations. In that event, rule 3.3 (5) states that the order *must* contain a statement of the right of a party affected by the order to apply to have it set aside. Both the original directions orders contained that statement. The document of 3 September, on the other hand, does not contain such a statement; and that is another pointer towards the conclusion that it was not an order.

51. When one turns to the form of the documents, they do not purport to be an order. Despite its use in places of imperative language ("you must"), it purports to be no more than a notice.

52. Nor did it say in terms that the claims had been or were being reinstated; although it clearly assumed that there were claims that were capable of being listed and in respect of which trial fees were liable to be paid. That strongly suggests that whoever drew up the document had not actually considered whether the claims should be reinstated.

53. In my judgment, therefore, both in form and in content the documents do not purport to be orders of the court, still less orders made by a judge. Contrary to the view taken by DJ Jarzabkowski, and in agreement with HHJ Luba QC, I consider that both claims remained struck out.

54. In those circumstances HHJ Luba QC took the view that DJ Jarzabkowski's "only possible response would have been to invite an appropriate application, which in the event was not made." He seems, therefore, to have proceeded on the basis that it was not possible to grant relief against sanctions without an application to that effect.

55. Is it an essential prerequisite to reinstatement of the claim that the claimant must have made an application for reinstatement? CPR Part 3.8 appears to say that the answer is yes. It provides, as we have seen, that a sanction has effect unless the party in default "*applies for* and obtains relief from the sanction". But in *Keen Phillips v Field* [2006] EWCA Civ 1524, [2007] 1 WLR 686 this court held that CPR Part 3.8 did not cut down the court's powers to extend time; and to act of its own motion. Jonathan Parker LJ said that the contrary interpretation would be "perverse". He went on to say at [19]:

> "The words "has effect" in CPR r 3.8 mean, in my judgment, no more than that, absent any exercise by the court of its general case management powers in extending time or otherwise granting relief from the sanction, the sanction will remain in

> effect until relief from it is granted by the court on an application made under CPR r 3.8 by the party in default."

56. In *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463, [2007] 1 WLR 1864 the existence of that jurisdiction was accepted, but Moore-Bick LJ said at [33]:

> "However, the jurisdiction is one which is likely to be exercised only rarely because it will usually be necessary for evidence to be placed before the court to enable it to consider the various matters to which rule 3.9 refers."

57. In *Nelson v Circle Thirty Three Housing Trust Ltd* [2014] EWCA Civ 106, [2014] 3 Costs LO 355 Mrs Nelson, despite her efforts, was in breach of an unless order. Fresh evidence was placed before this court. Sir Robin Jacob confirmed that this court was able to grant relief against sanctions of its own motion, relying on *Marcan*. The court then proceeded to consider the circumstances itself; and granted relief against sanctions.

58. It follows, in my judgment, that HHJ Luba was not correct to say that DJ Jarzabkowski's "only possible response" would have been to invite an application for relief against sanctions.

Relief against sanctions

59. The approach to the grant of relief against sanctions is now that laid down by this court in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926. That requires a three-stage approach:

    i) Identify and assess the seriousness of the breach.

    ii) Consider whether there is a good reason for the breach.

    iii) Consider all the circumstances of the case.

60. As the authorities show, it is not always necessary for a formal application for relief against sanctions to be made before the court has the power to grant such relief. In fact, as I have said, a formal application has been made to the county court; and we have seen the evidence filed by both parties in support of and in opposition to the application.

61. One of the cases heard with *Denton* was *Decadent Vapours Ltd v Bevan*. That was a case in which the claimant failed to pay a trial fee on time. The judge at first instance refused relief against sanctions. At stage one of the inquiry Lord Dyson MR and Vos LJ said in their joint judgment at [62]:

> "All failures to pay court fees are serious, because it is important that litigants pay court fees on time. But some failures to pay fees are more serious than others."

62. They went on to say that there was no good reason for the failure and thus proceeded to the third stage. As to that, they said:

> "[64] At the third stage, however, the judge should have concluded that factor (a) pointed in favour of relief, since the late

> payment of the fees did not prevent the litigation being conducted efficiently and at proportionate cost. Factor (b) also pointed in favour of the grant of relief since the breach was near the bottom of the range of seriousness: there was a delay of only one day in sending the cheque and the breach was promptly remedied when the loss of the cheque came to light. It only affected the orderly conduct of the litigation, because of the approach adopted by the defendants and the court.
>
> [65] On a consideration of all the circumstances of the case, the only reasonable conclusion in this case was to grant relief. If relief were not granted, the whole proceedings would come to an end. It is true that the claimant had breached earlier court orders (as indeed had the defendants). As discussed at paras 27 and 36 above, previous breaches of court orders may be taken into account at the third stage. Nevertheless, even taking account of the history of breaches in the Decadent litigation, this was not a case where, in all the circumstances of the case, it was proportionate to strike out the entire claim. In our judgment, the defendants ought to have consented to relief being granted so the case could proceed without the need for satellite litigation and delay."

63. There are four other cases in which the effect of a failure to pay court fees has been considered.

64. In *Hyslop v 38/41 CHG Residents Company Ltd* [2018] EWHC 3893 (QB) parties arrived at court for a trial, when the point was taken that the trial fee had not been paid. The trial judge gave relief against sanctions on the basis of a solicitor's undertaking to pay the required fee; and proceeded to hear the claim. He gave judgment for the claimant. On appeal to the Queen's Bench Division, Freedman J held that the judge was wrong not to have required a formal application for relief against sanctions, which would have allowed evidence to have been considered on all three aspects of the *Denton* test. Nor did he in fact go through those stages; and he did not appear to have appreciated that the failure to pay a court fee was, of itself, serious. He declined to carry out the exercise himself, but remitted the matter to the county court. Of some significance to this appeal is what he said at [43]:

> "I have heard from the parties that they both consider that the failure to have an application supported by evidence does not, by itself, invalidate the trial below and so I do not have to consider that aspect."

65. I find it difficult to see what useful purpose was served by remitting the question of relief against sanction to the county court, if the validity of the trial that had actually taken place was not in question.

66. *Alesco Risk Management Services Ltd v Bishopsgate Insurance Brokers Ltd* [2019] EWCA Crim 1552 was another decision of Freedman J sitting in the Queen's Bench Division (with the consequence that its neutral citation number appears to be erroneous). That was also a case of failure to pay a trial fee, which was remedied some

three weeks before trial. In that case, however, he decided to grant relief despite the fact that the breach was serious and there was no good reason for it. He summarised his reasons at [7]:

> "It is plain, in the circumstances, that it will be just to grant relief from sanctions first of all because all the Defendants have consented; secondly, because it was an inadvertent failure to comply with the rules and to pay the fee on time, which has not caused any prejudice; thirdly, because of the swift way in which the Claimants' solicitors acted; fourthly, the default in this case was not indicative of any other failure; and fifthly, because to strike out this claim would be disproportionate."

67. *Chalfont St Peter Parish Council v Holy Cross Sisters Trustees Inc* [2019] EWHC 735 (QB), [2019] Costs LR 227 was another case of a failure to pay a trial fee; but it was paid shortly after the claimants discovered that their claim had been automatically struck out. Sir Alistair McDuff granted relief against sanctions. He said at [7]:

> "This was an oversight, which is not a good reason, but the level of seriousness is modest, the fee was paid shortly afterwards as soon as the strikeout was disclosed. There had been, clearly, a misunderstanding though that is no excuse but there is no disservice to the defendants by reinstating the case. There is no injustice and it would be wholly disproportionate at this very late stage when this trial is about to commence to say that the whole case would be struck out with all that that entailed when everybody is, effectively, ready for trial."

68. The last of these cases is *Badejo v Cranston* [2019] EWHC 3343 (Ch), [2019] Costs LR 1993. The trial fee was not paid on the due date; but the claimant's solicitor realised the mistake a week later; and two days thereafter applied for relief against sanctions. The county court did not expedite the hearing of that application; but instead vacated the trial date because of the automatic strikeout. One of the matters that weighed heavily with the judge at first instance was that the trial date had been lost. He also held that because the strikeout was the consequence of the rules themselves, the claimant could not say that the sanction was disproportionate. On appeal Fancourt J disagreed. In fact what had been argued was not that the sanction itself was disproportionate, but that the refusal of relief would be.

69. At [22] Fancourt J said:

> "If the county court had heard the application shortly before or at the trial, I cannot conceive that if a solicitor's undertaking had been given to pay the trial fee, relief would have been refused, though no doubt relief would have been granted on terms as to the costs of the application and any costs wasted. Those costs would have been significantly less than the budgeted costs of the whole claim."

70. It is of some interest that this is the opposite view to that which Freedman J expressed in *Hyslop* (to which Fancourt J does not appear to have been referred). I agree that it is

not always necessary to require a formal application to be made, and that in some circumstances acceptance of a solicitor's undertaking to pay the trial fee would suffice; just as in the old days a court would often accept a solicitor's undertaking to pay the stamp duty (plus any necessary penalty) on a document which was required to be stamped before it became admissible in evidence. If, for example, the parties arrive at court expecting a trial to take place and are ready for it, it places an unnecessary burden on them to send them away again. There will inevitably be irrecoverable costs thrown away; the parties will have to reinstruct their lawyers and reassemble their witnesses. The court will (at least potentially) not be able to make good use of the slot that has been allocated for the trial. The court would also have to allocate time for the hearing of a formal application for relief against sanctions; and, if successful, another trial window. And if the application is unsuccessful, the court will not be paid the trial fee (although it will have been paid the lower fee due on an application).

71. Fancourt J set out a number of factors that pointed in favour of relief against sanction and summarised his view at [23]:

> "Ultimately, in my judgment, despite the fact that a moderately serious breach was committed without mitigating circumstances, justice is better done in this case by enabling the current action to proceed to a trial, rather than requiring the appellant to start new proceedings for his claim, or alternatively a claim for negligence against the solicitors, or possibly both. Paying all the costs of the current claim, and incurring the cost of funding two new actions, would in my judgment be disproportionate to the seriousness of the breach and any harm done to the administration of justice or to the respondent that is attributable to the breach, as opposed to being attributable to the court's failure to list the application urgently. So far as prejudice to the respondent is concerned, the respondent would be equally troubled by a new claim that the appellant would be able to bring."

72. Of these five cases, there is only one (*Hyslop*) in which relief against sanctions has not been granted; and even then that was on the basis (a) that it might be on an application for that purpose and (b) that the trial that had taken place was not invalidated.

73. In the present case:

i) Mr Williams (Mrs Boodia's solicitor) has explained that the failure to pay the court fee was inadvertent.

ii) The court did not comply with PD 3B paragraph 1 by notifying Mrs Boodia that her claim had been struck out, thus alerting her to the need to apply for relief against sanctions. Mr Williams said that had such notification been given, an application for relief against sanctions would have been made.

iii) The original trial date was vacated because of lack of court time. The failure to pay the court fee was not the cause of the adjournment. If (as I think) the purpose of the trial fee is to throw onto the litigant part of the cost to HMCTS of

providing the trial (both in terms of the cost of the venue and judicial and other staff time) then that purpose was not, in the event, compromised.

iv) Non-payment of the trial fee did not disrupt the orderly conduct of the litigation. Nor does non-payment of a trial fee generally have any direct impact on the opposing party.

v) The court itself proceeded to give directions (and thus to cause the parties to continue to incur costs) on the basis that the claim had been reinstated. Both parties complied, more or less, with those directions. Thus Mrs Boodia was led to believe (albeit erroneously) that the claims were still on foot.

vi) The court could have been asked at the hearing on 23 November 2018 to set aside the listing of 3 September; but it was not.

vii) The trial fees in both cases were in fact paid in obedience to the listing notification of 3 September before the trial took place. If the argument for Mr Yatsyna is correct, Mrs Boodia need not have paid them. If the claims are not reinstated, it is an open question how Mrs Boodia can get her money back.

viii) The trial of the Barn claim has now taken place. A judge has considered the merits of the claim and has pronounced judgment.

ix) Once Mrs Boodia was disabused by HHJ Luba's judgment of the belief that the claims had been reinstated, an application for relief against sanctions was made very promptly.

x) It would be grossly disproportionate to invalidate the trial of that claim, and thus either cause both parties to incur yet further legal costs (some of which may be duplicated); or prevent Mrs Boodia from having her claims heard at all if, as seems likely, both claims would now be statute-barred. Moreover, the court would itself have to devote more time and resources to managing any new proceedings, with only partial recovery of the cost of doing so. That would put a strain on an already overstretched system.

74. In his evidence in opposition to the application, Mr Batra (Mr Yatsyna's solicitor) did not identify any particular prejudice that the non-payment of the trial fee had caused. Like Mrs Boodia, Mr Yatsyna proceeded on the basis that the trial was to go ahead on 7 January 2019. Mr Batra did intimate that Mr Yatsyna wished to apply for relief against sanctions in relation to the procedural rulings that went against him at trial. But despite Mr Goodfellow's valiant attempts to argue the contrary, there was no causative link between the procedural shortcomings on Mr Yatsyna's part and Mrs Boodia's failure to pay the trial fee on time.

75. Mr Goodfellow suggested in oral argument that reinstating the claims would deprive Mr Yatsyna of the advantage of costs judgments in his favour which arose by reason of CPR Part 3.7A1 (7) and CPR Part 44.9 (1) (a). In the first place, that prejudice would always be caused to a defendant every time that a claim is reinstated; so it is not something peculiar to this case. Second, since both parties were proceeding until the eve of trial on the basis that the claims would be heard, it is not an advantage that Mr Yatsyna was aware that he had, or on which he relied. I do not consider that that

disadvantage to Mr Yatsyna can outweigh all the manifold disadvantages that would be caused to Mrs Boodia in the event that the claims were not reinstated.

76. I would have no hesitation in granting relief against sanctions, even though no formal application is before us.

77. Finally, Mr Goodfellow argued that if we were to grant relief against sanctions, as I consider we should, that relief should not be retrospective, but should operate only from the date of our order. I can see no good reason to limit the effect of an order in that way. It would have the consequence of invalidating the trial of the Barn claim which has already taken place; and it is difficult to see what effect it would have on the claim relating to the Gables, which has yet to be tried.

78. The objection taken by Mr Yatsyna is, in my judgment, wholly opportunistic. I would allow the appeal.

Lord Justice Newey:

79. I agree.

Lord Justice Baker:

80. I also agree.