Neutral citation number: [2023] EWHC 215 (Ch)

Case No: E30MA245

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN
MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: Tuesday 24 January 2023

Before:

HIS HONOUR JUDGE HODGE KC
Sitting as a Judge of the High Court

Between:

889 TRADING LIMITED

Claimant

-v-

CLYDESDALE BANK PLC and Others

Defendants

MR DAVID TAYLOR the Managing Director of **the Claimant** appeared on its behalf
MR IAN WILSON KC and **MR RICHARD HANKE** (instructed by **DLA Piper UK LLP**, Leeds) appeared on behalf of **the Defendants**

APPROVED JUDGMENT

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JUDGE HODGE KC:

1. This is my extemporary judgment on an application dated 21 April 2022 by the claimant, 889 Trading Limited, against the first defendant, Clydesdale Bank Plc, for relief from sanctions in accordance with CPR 3.9. The application notice states that the claimant was advised by HHJ Cawson KC to seek the relief. The relief is sought due to what is said to be the court's own administrative error in failing to serve and/or disclose an order of DJ Khan dated 18 October 2018, and sealed four days later on 22 October 2018.

2. The claim is proceeding in the Business and Property Courts in Manchester under claim number E30MA245. Although initially it had instructed solicitors, the claimant has for most of this litigation been represented by its sole director, Mr David Taylor, who has represented it before me today. The only active defendant is the first defendant, Clydesdale Bank Plc. That is represented by Mr Ian Wilson KC, leading Mr Richard Hanke (of counsel).

3. The application is supported by a witness statement from Mr Taylor dated 21 April 2022. The first defendant has filed and served evidence in answer in the form of a witness statement, dated 13 July 2022, from Mr Adam James Ibrahim, a solicitor and partner in the solicitors' practice representing the first defendant, DLA Piper UK LLP. Mr Taylor has responded to that witness statement in the form of a document styled 'Supplementary Skeleton from Mr Taylor' dated 24 July 2022. Both Mr Wilson and Mr Hanke (for the first defendant) and Mr Taylor (for the claimant) have also written produced skeleton arguments for the purposes of today's hearing.

4. It is necessary to relate a little of the history of this claim. The claim form itself was issued as long ago as 12 April 2018. The claimant seeks remedies against the first defendant in relation to its misrepresentation and/or breach of duty of care and/or unjust enrichment. The claim arises out of loan agreements, charges and mortgages entered into by the claimant with the first defendant bank. The claim also sought declaratory relief as to the invalid appointment of the second and third defendants as Law and Property Act receivers of land at Meek Street, Royton, Oldham. The claim form was amended on 8 August 2018 but only to correct the addresses for service of the defendants in the service box.

5. On 13 June 2018, the court gave notice of the proposed allocation of the case to the multitrack. That was on the footing that the claim was defended, a defence having already

been sent to the claimant. Paragraph 3 of the notice required the claimant, by 16 July 2018, to complete a directions questionnaire in form N181 and to file it with the court office in Manchester and serve copies on all other parties. The claimant was also required to attempt to agree directions with the defendants and to file proposed directions, whether or not agreed, with the directions questionnaire.

6. The claimant did not comply with that direction. In consequence, on 23 August 2018, DJ Khan made an order which was sealed on 29 August. Paragraph 1 ordered that unless, by 4pm on 14 September 2018, the claimant should lodge the requisite directions questionnaire or pre-trial checklist and prescribed fee, the claim was, by the order, struck out and judgment should be entered for the defendant accordingly.

7. The reference to lodging a pre-trial checklist and prescribed fee was clearly an error on the part of the court. Therefore, on 20 September 2018, DJ Khan made an amended order, which was sealed on 3 October 2018. Paragraph 1 of that order ordered that unless, by 4pm on 17 October 2018, the claimant should lodge the requisite directions questionnaire, the claim was, by the order, struck out, and judgment should be entered for the defendant accordingly. Both of those orders had contained, in paragraph 2, the usual provision that because the order had been made without a hearing, the parties had the right to apply to have it set aside, varied or stayed within seven days of service of the order.

8. The reasons given for the amended order were (1) that the order dated 23 August should only have referred to the claimant having to file a directions questionnaire, and not a pre-trial checklist; and (2) that the claimant's letter dated 14 September 2018 was not a directions questionnaire and, if the claimant thought that he had had to file a pre-trial checklist, it was not that either.

9. On 17 October 2018, at 4pm, the claimant produced a document described as 'Response to threat by DJ Khan to retrospectively strike out claim E30MA245 and "enter judgment" in favour of "the defendant" unless by 4pm on Wednesday 17 October 2018. The claimant, 889 Trading Limited, represented by Taylor Price Solicitors and heard by counsel lodges "the requisite directions questionnaire"'. That document made reference to a document stamped 4 October 2018. It was clearly not a directions questionnaire. During the course of today's hearing, Mr Taylor has at least twice accepted that it was a mistake on his

part not to file the directions questionnaire. No directions questionnaire was in fact filed by the claimant until 6 April 2021. That was done in circumstances to which I will refer shortly.

10. Looking at the court file, it would appear that on 17 October one of the court listing officers had referred the case to DJ Khan by way of a manuscript note in 'boxwork'. The written referral recorded that the claimant had until 4pm on 17 October, the day of the note, to lodge its directions questionnaire. It had not lodged one but had sent an email instead. It was recorded that the claimant (by Mr Taylor) had attended court on 16 October to inspect the case file and had spent two hours looking at the papers on this matter and other proceedings. The court had reminded the claimant about lodging the directions questionnaire and Mr Taylor had said that he would be filing it. The note concluded: "Should this matter be listed for directions and, if yes, what estimated length of hearing? Thank you." That, as I say, was on 17 October.

11. DJ Khan responded in manuscript. He stated: "If the claimant does not comply with the order of 20 September 2018, the claim is struck out. If it does, the court file will be considered and, if appropriate, a costs and case management conference listed." That was written in manuscript by DJ Khan on 18 October 2018.

12. It is not clear to me whether that written referral by the court has previously been noted by any of the parties, or by the court, in connection with the hearings that followed. It does however explain what has later been referred to as an "odd" order. That order has however to be construed on its face and I have not taken that referral into account in construing the order. However, it does provide the context to the order to which I now come.

13. On 18 October 2018, the court drew up an order in the name of DJ Khan, which was sealed on 22 October. Paragraph 1 reads: "If the claimant does not comply with the order of 20 September 2018, the claim is struck out." Paragraph two reads: "If the claimant does comply, then the file will be considered and if appropriate, a costs and case management conference will be listed." It is that order that has given rise to a number of subsequent applications, including the present.

14. It is, I think, common ground that both parties proceeded after October 2018 on the footing that the claim had been struck out. It is clear from Mr Taylor's most recent witness

statement - see paragraphs 8 and 9 - that it was confirmed to him by the court staff, both before and on 20 November 2018, that the claim had been struck out. It is also clear from that witness statement that the claimant, through Mr Taylor, understood that the defendant had "admitted" the claimant's allegations of fraud to Greater Manchester Police on 20 November 2017, and that this had been confirmed by a detective constable in his investigation summary dated 16 August 2018.

15. On the common understanding that claim E30MA245 had been struck out, on 28 November 2020 the claimant made an application (through Mr Taylor) for pre-action disclosure against the first defendant in claim PT-2020-MAN-000185. That application was dismissed by DDJ Brightwell on 27 January 2021. In the meantime, on 13 December 2020, the claimant had issued a third claim against, amongst others, the first defendant under claim number BL-2020-MAN0-000120. The first defendant took the view that this was simply a repetition of the claim E30MA245 which it understood had been struck out. It therefore applied to strike out that third claim as an abuse of process.

16. The hearing of that application came before HHJ Cawson QC on 29 March 2021. The judge reserved judgment and, in due course, he circulated a draft of his reserved judgment. After that draft was circulated, Mr Taylor says that he discovered, as a result of a reference to it in the draft judgment, the existence of DJ Khan's order made on 18 October 2018 for the first time: see paragraph 17 to 20 and 25 of Mr Taylor's latest witness statement. It was as a result of the discovery of that order that Mr Taylor filed his directions questionnaire with the court on 6 April 2021. He did so on the basis that his reading of that order was that the strike out of the claim effected by DJ Khan's earlier order, made on 20 September, had effectively been suspended or rescinded, and that the claimant had, as a result, an indefinite period of time for filing the directions questionnaire.

17. On 9 April 2021 HHJ Cawson QC formally handed down his judgment in claim number BL-2020-MAN-000120. The neutral citation reference of that judgment is [2021] EWHC 850 (Ch). It sets out in detail the factual background to both that claim and the earlier claim (E30MA245) and it is therefore unnecessary for me to recite the factual background to the litigation in any detail. However, at paragraphs 27 and 28, HHJ Cawson QC did refer to DJ Khan's order of 18 October. HHJ Cawson QC observed that that was a somewhat "odd" order in that, by 18 October 2018, it was too late to comply with the order

dated 20 September 2018, which had required performance by 4pm on 17 October. HHJ Cawson QC said that it was clear in his judgment however, that the claimant, having failed to file its directions questionnaire by 4pm on 17 October 2018, the effect was that by operation of the order made on 20 September 2018, its claim had been struck out, notwithstanding what might have been maintained by the document lodged by Mr Taylor timed at 4pm on 17 October. At no stage thereafter had the claimant sought relief from sanctions or otherwise sought to revive E30MA245.

18. At paragraph 28, HHJ Cawson QC noted that in emails sent following the circulation of a draft of his judgment, Mr Taylor had contended that the effect of the order made on 18 October 2018 was effectively to extend the time for the claimant to lodge a directions questionnaire indefinitely, and to nullify the effect of the order made on 20 September, striking out the claim if a direction questionnaire was not filed by 4pm on the 17th. HHJ Cawson QC made it clear that he did not read the order made on 18 October 2018 as having that effect, and he did not consider that that was what DJ Khan could have intended. HHJ Cawson QC noted that no directions questionnaire was subsequently filed, at least until what purported to be such a document was attached to an email dated 6 April, sent in response to the draft judgment. HHJ Cawson QC also recorded that, for the reasons he detailed later in his judgment, the reason why the claimant had not complied with the order made on 20 September, or had otherwise filed a directions questionnaire, was because it had decided to pursue other courses of action.

19. Following the hand down of that judgment, the Court Service wrote to the parties on 12 April 2021. Email correspondence from Mr Taylor, on behalf of the claimant, seeking case management in respect of case E30MA245 had been referred to HHJ Cawson QC. He had directed that any issues as to the status or otherwise in respect of those proceedings should be dealt with at the hearing at which he would deal with outstanding issues in respect of case BL-2020-MAN-000120. He directed that the parties should therefore be prepared to deal therewith and, in particular, Mr Taylor's suggestion that case management directions should be given at that hearing

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20. That hearing took place on 27 May 2021. For the purpose of that hearing, Mr Taylor produced a witness statement dated 25 May 2021. At that hearing, HHJ Cawson QC made an order, which was sealed on 2 July 2021, reciting that the claim previously brought by the

claimant with claim number E30MA425 had been struck out on 17 October 2018. On that basis, the claimant's application for disclosure of 8 February 2021 was dismissed, and the claim form and particulars of claim in BL-2020-MAN-000120 were struck out. The claimant's application for permission to appeal was refused.

21. The approved transcript of HHJ Cawson QC's judgment is before the court. He goes into considerable detail about the status of DJ Khan's orders made on 20 September and 18 October 2018. As recorded in the recital to his formal order, HHJ Cawson QC concluded that the claim E30MA245 had indeed been automatically struck out on 17 October 2018 by reason of the claimant's failure to comply with DJ Khan's order made on 20 September; and that the later order of DJ Khan, made on 18 October, had not reversed or affected that strike out. On that footing, there was no basis for the judge to direct that any case management directions should be given in respect of case E30MA245. HHJ Cawson QC's reasoning is set out in detail at paragraph 27 of his judgment, which I do not propose to repeat.

22. HHJ Cawson QC's conclusion, as expressed at paragraph 27 (n) of that judgment, was that he was satisfied that the effect of the failure to comply with the order dated 20 September 2018 was that the first proceedings were automatically struck out with effect from 17 October and that nothing had subsequently occurred, whether by the order dated 18 October 2018 or otherwise, to reverse the effects of the 20 September 2018 order.

23. There was an application by the claimant to appeal HHJ Cawson QC's order. That came before Nugee LJ on 10 November 2021. Permission to appeal was refused. However, and without reference to sight of the transcript of HHJ Cawson QC's second judgment of 27 May 2021, at paragraph 5 of his reasons Nugee LJ said that the contention of the claimant that claim E30MA245 had never been struck out, as DJ Khan's order of 20 September was superseded by his order of 18 October 2018, appeared to Nugee LJ to be reasonably arguable. Nugee LJ commented:

"The order of 18 October 2018 is indeed 'odd', as the judge said, as by the time it was made, there had already been non-compliance with the order of 20 September. But DJ Khan clearly intended by his order of 18 October to give the claimant a further opportunity to comply. And the argument that that amounted to a variation of his order of 20 September, with the result that the proceedings did not there and then stand struck out, seems to me well arguable. And if that is right, it is also arguable that the order of 18 October did not itself cause the proceedings to be struck out, as it did not contain any time for compliance. So, it needed to be superseded by a further order before the action was struck out."

24. However, Nugee LJ went on to say that:

"The difficulty for Mr Taylor and the claimant was that even if that were right, it did not mean that the appeal should be allowed. That is because the judge had struck out the present claim on both bases, so that even if he was wrong to strike it out as an abuse, it would still have been struck out as not disclosing a reasonable cause of action."

Nugee LJ saw no answer to that; and, in those circumstances, that ground did not mean that there was any reasonable prospect of success on the claim. It is clear therefore, that that part of Nugee LJ's reasons was strictly obiter. It was also, as I say, made without having seen the approved transcript of HHJ Cawson QC's second judgment of 27 May (which was not then available).

25. In the light of Nugee LJ's observations, however, and emboldened by them, the claimant issued fresh applications in claim E30MA245, including applications for directions and disclosure. Those applications were dismissed by HHJ Cawson QC on 20 April 2022. The recital to that order recorded that the court had determined on 27 May 2021, and, to the extent necessary, had further determined on 20 April 2022, that claim number E30MA245 had been struck out on 17 October 2018.

26. There is before the court, the approved transcript of HHJ Cawson QC's judgment of 20 April 2022. Having heard further argument, HHJ Cawson QC adhered to the view that he had expressed in his earlier judgment that the claim had been struck out on 17 October 2018; and that DJ Khan's order of the following day had not affected that. HHJ Cawson QC noted that that issue had not been argued before Nugee LJ, and that he had not been determining the point; and that his observations as to the effect of the order of 18 October had clearly been obiter. The court was therefore not bound by anything that Nugee LJ might have said.

27. At paragraph 59, HHJ Cawson QC stated that he was satisfied that the conclusion that he had come to on 27 May 2021 was the correct conclusion, so far as the effect of the orders of 20 September and 18 October was concerned. He was satisfied as to the correctness of his decision that the present proceedings remain struck out for the reasons that he had set out at paragraph 27 of his judgment given on 27 May 2021. HHJ Cawson QC noted that not only had the position not been argued before Nugee LJ, but he had not had the benefit of the arguments that HHJ Cawson QC had received and, in particular, he had not been referred to the provisions at paragraph 1.9 of Practice Direction 3A or CPR 3.8 as to the effect of the

order of 20 September 2018. The effect of the order of 18 October could only properly be considered once one had the effect of those provisions in mind. At paragraph 62, HHJ Cawson QC said:

"The more I look at the terms of the order of 18 October, the more I am sure that DJ Khan was not by that order granting relief from sanctions or attempting to grant relief from sanctions or granting any form of extension of time, not least because any judge of experience granting an extension of time would only do so on a time limited basis and that could not be the proper meaning of the order."

28. HHJ Cawson, at paragraph 66, recorded that he was not persuaded that the judgment he had given on 27 May 2021 determining the point was in any sense incorrect. In any event, he considered that Mr Wilson was probably right that there had already been a binding determination by the court on the issue. He therefore concluded that the first proceedings remained struck out and so it would not be appropriate to give case management directions in respect of them.

29. At paragraph 69 and following, HHJ Cawson QC addressed a few further points that needed dealing with. He referred to Mr Taylor's reliance on behalf of the claimant on the case of *Takhar v Gracefield*, relating to the circumstances in which a judgment might be set aside on the grounds of having been obtained by fraud. At paragraph 70, HHJ Cawson QC noted, correctly, that: "In the present case, no judgment had been or could conceivably have been obtained by fraud. The proceedings had been struck out because the claimant had failed to comply with DJ Khan's order and for that reason and that reason alone." So, HHJ Cawson QC saw no basis for reliance upon the principles considered by the Supreme Court in *Takhar v Gracefield* as suggesting that the present proceedings ought to remain on foot on that basis.

30. At paragraph 73, HHJ Cawson QC noted that the claimant had made no application for relief from sanctions. Were such an application to be made, then the court would be concerned with the provisions of CPR 3.9, and would need to apply the principles considered by the Court of Appeal in *Denton v White*, where the court would be concerned to consider the seriousness of the breach, the reasons why the default had occurred, and all the circumstances of the instant case. There were said simply not to be the materials before the court, on the instant application, to begin any consideration as to whether this was an appropriate case in which relief from sanctions might be granted.

31. At paragraph 75, HHJ Cawson QC noted that he had been asked to consider whether the order of 18 October 2018 was to be regarded as void or whether it was an effective order. He said that it was clearly not a void order, in the sense that it was properly made by the court. At paragraph 76, HHJ Cawson QC said this:

"As I read that order, what it was seeking to do was to record the status of the proceedings, dependent upon whether in fact a directions questionnaire had or had not been served by 4pm on 17 October 2018. If it had, then paragraph 2 of the order would apply, namely if the claimant does comply, then the file will be considered and if appropriate, a costs and case management conference will be listed. So, it has given the discretion that if the order of 20 September 2018 is complied with then a costs and case management conference will be listed. But then paragraph 1 says that: "If the claimant does not comply with the order of 20 September 2018, then the claim is struck out." Compliance with the order of 20 September 2018 must mean lodging a directions questionnaire by 4pm on 17 October 2018, which did not happen. Therefore, my reading of that order was that DJ Khan was seeking to record the effect of the particular circumstances dependent upon whether the directions questionnaire had been filed, as required by the order of 20 September 2018."

So, for those reasons, HHJ Cawson concluded that the claimant's application should be dismissed.

32. The claimant sought permission to appeal that order. That application came before Arnold LJ and was refused on 20 September 2022. Arnold LJ's reasons were as follows:

"The appeal has no real prospect of success, nor is there any other compelling reason to hear it. The appellant commenced these proceedings as long ago as 12 April 2018. On 23 August 2018, DJ Khan made an order that unless the appellant filed a directions questionnaire by 4pm on 14 September 2018, the claim would be struck out and judgment entered for the respondent. The appellant did not comply with that order. On 20 September 2018, DJ Khan made an order that unless the appellant filed a directions questionnaire by 4pm on 17 October 2018, the claim would be struck out and judgment entered for the respondent. The appellant did not comply with that order either. It follows that the claim was automatically struck out at 4pm on 17 October 2018 at the latest: CPR PD3A, paragraph 1.9 and CPR rule 3.8. The only possible argument to the contrary arises out of an order made by DJ Khan on 18 October 2018."

Arnold LJ then set out the terms of that order. He continued:

"HHJ Cawson QC held in a judgment in other related proceedings dated 27 May 2021 that on its proper interpretation, the order dated 18 October 2018 had not given the appellant relief from sanctions, no application for relief having been made, nor had it granted the appellant an open ended extension of time, no application for an extension having been made. Rather, it had simply set out what the effect would be of the appellant's compliance or non-compliance with the order dated 20 September. Nugee LJ refused the appellant permission to appeal from the order made by HHJ Cawson on that occasion. In giving his reasons, Nugee LJ considered it arguable that the order dated 18 October 2018 had given the appellant an open ended extension of time. But Nugee LJ did not have the benefit of a transcript of HHJ

Cawson's judgment dated, he says, 21 May 2021 nor does Nugee LJ appear to have been referred to the relevant provisions of the CPR. In the judgment under appeal, HHJ Cawson has reconsidered the question and reached the same conclusion. In my judgment, HHJ Cawson is plainly correct for the reasons given in his two judgments and there is no real prospect of this court reaching a different conclusion. Although the appellant advances certain other grounds of appeal, none of them has any substance. In particular, the appellant's complaint that HHJ Cawson's decision was infected by actual or apparent bias is without merit."

33. Notwithstanding that, the claimant has pursued the contention on this application that the effect of DJ Khan's order of 18 October was in some way to revive the claim, notwithstanding its strike out for non-compliance with DJ Khan's earlier order of 20 September. I am entirely satisfied that it is not open to the claimant to contend that this claim has not been struck out. HHJ Cawson QC has determined that that is the case on two separate occasions; and permission to appeal from his decision to that effect has been refused by the Court of Appeal. This court can only proceed on the footing that this claim has been struck out.

34. I should add that I agree entirely with the reasoning of HHJ Cawson QC as to the interrelationship between DJ Khan's two orders. It seems to me quite clear that the order of 18 October was not seeking to revisit or revise his earlier order of 20 September. All it was doing was explaining to the court staff, and to the parties, the effect of that earlier order. If it is permissible to refer to the note on the court file, to which I have already made reference, then that clearly reinforces that view of the later order.

35. The short answer to the point is that the later order of 18 October proceeds on the footing that the order of 20 September 2018, which is clearly referenced within the later order, operates according to its terms. If there is compliance with it, then the file will be considered, and, if appropriate, a costs and case management conference will be listed. If however, there is non-compliance with the order, then the claim is struck out. That was the interpretation adopted by HHJ Cawson QC; and, in my judgment, it is clearly correct.

36. As HHJ Cawson QC said, the only escape route from the conclusion that the claim has been struck out is an application for relief from sanctions. That application, as HHJ Cawson QC explained, has to be determined in accordance with the *Denton* guidelines. The court must first identify and assess the seriousness and significance of the failure to comply with DJ Khan's order of 20 September. Second, the court must consider why the default occurred.

And, thirdly, all the circumstances of the case must be evaluated so as to enable the court to deal justly with the application. Particular consideration has to be given to the need for litigation to be conducted efficiently, and at proportionate cost; and to enforce compliance with court orders, rules and practice directions. The court is also required to have regard to the other constituent elements of the overriding objective in CPR 1.1 (2).

37. The reality is that neither in his witness statement, nor in his skeleton argument, nor in his oral submissions before the court today, has Mr Taylor, on behalf of the claimant, sought to engage with the requirements of *Denton v White*. Mr Taylor refers to the three-part test in *Denton v White* at paragraph 7 of his witness statement; but the bulk of the remainder of his witness statement is supportive of Mr Taylor's submission that HHJ Cawson QC's decision on the interrelationship between the two orders made by DJ Khan was wrong in law. As I say, that is a point that is not open to the claimant.

38. At paragraph 29 of his witness statement, Mr Taylor makes the point that claim E30MA245 is predicated upon a fraud and that "fraud unravels everything". He says that the court is obliged to assist in the unravelling in accordance with the overriding objective. It is also obliged to correct its own administrative error by not serving the order of 18 October 2018.

39. At paragraph 31, Mr Taylor agrees that the breach, and the time elapsed, are significant; but the extenuating circumstances, and the "comedy" of the court's own errors are said to have impeded the claimant's progress. He refers to the defendant having allegedly admitted the fraud to the claimant and to Greater Manchester Police. Therefore, in accordance with the overriding objective, and the court's own negligence in this matter, Mr Taylor asks the court of its own motion to grant relief from sanctions to save any further appeals.

40. In his witness statement in answer to the application, Mr Ibrahim sets out various reasons why relief against sanctions should not be granted at paragraphs 54 to 58. Mr Taylor's supplementary skeleton in response to that witness statement does not really address those matters. Again, at paragraph 72 to 79, Mr Taylor challenges the fact that the claim has been struck out. At paragraph 80, he says that relief from sanctions is sought due to the

fundamental mistake in the claimant not having been served with the 18 October order, and the fact that, had it been served, the claimant would have been able to comply

.

41. The first defendant disputes that the order was never served on the claimant. However, taking the claimant's evidence and case at face value, the fact that the order was not served cannot give the claimant any good reason for not having complied with the earlier order, which had been served upon it. It is that earlier order of which the claimant clearly knew - and which it blatantly disregarded - in relation to which the application for relief from sanctions has to be made. The claimant had deliberately elected not to comply with that order. There is no good reason offered for that, beyond the fact that the claimant had elected not to pursue the litigation but rather to proceed through the offices of the police and the Financial Conduct Authority. That is no good reason for the failure to comply with the order. The consequences of non-compliance are serious. As a result, case management directions which would otherwise have been made in the Autumn of 2018 have still not been made, over four years later. This is all in relation to an alleged case of fraud dating back a decade or more before 2018.

42. In his oral submissions, Mr Taylor relied heavily upon the case of fraud which the claimant advances against the first defendant, and its alleged deliberate concealment of that fraud and suppression of known adverse documents. However, the substantive claim is itself founded upon that fraud, and that fraud has nothing to do with the non-compliance with the court order that has led to the strike out of the claim. This is not a case where a judgment has been obtained by fraud; rather, a claim has been struck out by the claimant's deliberate non-compliance with a peremptory court order.

43. Mr Taylor addressed me at length on the conduct and state of mind required to establish a case of fraud on the part of the first defendant, and he emphasised its allegedly deliberate concealment of known adverse documents. At the end of his initial oral submissions, I gave Mr Taylor an adjournment of 30 minutes to allow him to consider Mr Wilson's skeleton argument, which, although he had received it, Mr Taylor told me he had not had adequate opportunity to address.

44. When he returned, Mr Taylor emphasised that that skeleton argument made no reference to fraud, and contained no rebuttal of what the first defendant's relevant employee,

Mr Kelly, had said or done. He described Mr Wilson's skeleton as a 'moot' point. The 'elephant in the room' was said to have been that Mr Kelly had made false representations as to the Lamb & Swift valuation report. The first defendant had deliberately concealed evidence from the claimant; and Mr Wilson's skeleton argument had contained no rebuttal of the claimant's allegations of fraud. He said that the matter could not be ruled on until after the claimant had fully disclosed unredacted documents to prove its own wrongdoing through its employee, Mr Kelly. He reiterated the effect of the Supreme Court's decision in *Takhar v Gracefields* that 'fraud unravels all'. He invited the court to order disclosure, and to adjourn this hearing until that disclosure had been made. He said that it would be irrelevant for Mr Wilson to stand up and go through his skeleton because the case - whether the claim had been struck out or not - was a matter for another day, and the main issue was that of fraud.

45. I cannot accept that. This is an application for relief from sanctions in relation to an order of 20 September 2018, striking out the case for failure to serve a directions questionnaire. As I have said, that breach was serious and significant. There is no adequate explanation for the default beyond the fact that the claimant had, at that stage, decided to pursue its claims through agencies other than the court, namely the police and the Financial Conduct Authority.

46. Mr Taylor's focus upon the order of 18 October 2018 cannot provide any explanation as to why the claimant had not filed the directions questionnaire, as required initially by the Civil Procedure Rules, and later the notice of allocation to the multitrack and the orders of 23 August and 20 September 2018. It also provides no explanation for the claimant's failure to make an application for relief from sanctions soon after the failure to comply with the 20 September order. The claimant's asserted ignorance of the later order of 18 October makes that failure even more inexplicable and inexcusable.

47. It is clear that, by the very latest, Ms Bagnell's email from the court of 20 November (referenced at paragraph 9 of Mr Taylor's latest witness statement) that by 20 November 2018, the claimant knew that its claim had been struck out. Despite that knowledge, it did nothing by way of application for relief from sanctions until 21 April 2022, having failed to serve its directions questionnaire until a little over a year earlier on 6 April 2021.

48. Turning to the third of the *Denton v White* criteria - all the circumstances of the case - this is clearly a case where relief from sanctions should not be granted, for the reasons explained by Mr Wilson at paragraph 44 of his skeleton argument. First, the breach of the 20 September 2018 order had followed the earlier breach of the 23 August order, and the earlier requirement to file a directions questionnaire under the Civil Procedure Rules, and in response to the notice dated 13 June 2018 of proposed allocation to the multitrack. Therefore, the claimant failed to file a directions questionnaire on three occasions, and delayed doing so from October 2018 until April 2021.

49. Second, the failure to file the directions questionnaire meant that the court lacked an important case management document required to enable the making of effective and efficient directions to trial. Over four years on, in January 2023, the court has not made the directions that would otherwise have been made to enable the progression of a fraud claim to trial in October 2018. Third, the claimant was aware of the application of both the sanction of striking out the first proceedings, and the need to apply for relief from that sanction, from no later than November 2018; yet the claimant took the deliberate decision not pursue those proceedings but to adopt a different course. Fourth, the breach, and the failure to correct it, were deliberate. Fifth, some three-and-a-half years elapsed since the failure to comply with the 20 September order before any application for relief was made. It cannot on any conceivable view be said that this application for relief was made promptly, in the sense of it being made as soon as it had become apparent that it was necessary or desirable to make it. The time between the sanction and the application for relief in this case was the very opposite of prompt.

50. Sixth, instead of properly making an application for relief, the claimant embarked upon an abusive course of parallel litigation, which included the application for pre-action disclosure, and then the issue of the third set of proceedings under claim number BL-2020-MAN-000120, which were struck out by HHJ Cawson QC. At paragraph 44.6, Mr Wilson sets out a catalogue of other proceedings as well, which are amplified at paragraphs 44.7 and 44.8.

51. Seventh, the claimant's conduct has resulted in four costs orders being made against the claimant in favour of the first defendant. These are referenced at paragraph 53 of Mr Ibrahim's witness statement and total over £135,750. All of those remain unsatisfied. Even

if the court had been minded to grant relief from sanctions, it would have been on condition that those costs orders should be satisfied within a relatively short timescale. Eighth, the present application for relief from sanctions appears only to have been initiated after the failure of the previous alternative courses of litigation taken on behalf of the claimant by Mr Taylor.

52. Finally, the claimant has continued to dispute the application of the sanction and to deny that it has acted in breach of DJ Khan's order of 20 September. It has sought to relitigate matters that have already been determined by HHJ Cawson QC and which have been said to be not realistically arguable by Arnold LJ. Mr Wilson notes that the only circumstance, apart from the serious nature of the fraud on which the substantive claim is founded, upon which Mr Taylor relies to seek to balance the other factors is the claimant's alleged non-receipt of the 18 October 2018 order. But even if one assumes in the claimant's favour that it was not received - and the defendant's position is that it was - that non-receipt could never overcome the many circumstances militating against the grant of relief.

53. By at least 20 November 2018, and almost certainly before, Mr Taylor was aware that the directions questionnaire which was required had not been filed, and he was proceeding in the understanding that the first proceedings had, as a result, been struck out. Even after becoming aware of the existence of DJ Khan's later order of 18 October in April 2021, Mr Taylor persisted for a further year in the claimant's approach of issuing further claims and applications, rather than applying for relief from sanctions. That has led to significant additional costs, and has been wasteful of court time and resources.

54. All of those factors, and, in particular, the delay in mounting the application and the failure to combine it with earlier applications all decisively militate against the grant of relief from sanctions in the claimant's favour. For all of those reasons, I am satisfied that this is a wholly inappropriate case to grant relief from sanctions. Everything militates against the grant of such relief. This application for relief from sanctions is totally without merit and the application will be dismissed; and the court's order will record the fact that the application was totally without merit. That concludes this extemporary judgment.
