Neutral Citation Number: [2023] EWHC 2840 (KB)

APPEAL REF: KA 2023 000084

IN THE HIGH COURT OF JUSTICE
ROYAL COURTS OF JUSTICE
KING'S BENCH DIVISION

Date: 13th November 2023

Before :

MR JUSTICE RITCHIE

- -

BETWEEN

RU TAN

Appellant/Claimant

- and -

MOHAMAD YASSER IDLBI [1]
MAYA AL NASHAWATIE [2]

Respondents/Defendants

Rupert Cohen of counsel (instructed by **Kain Knights Costs Lawyers**) for the **Appellant/Claimant**.
Philip Galway-Cooper of counsel (instructed under the **Public Access Scheme**) by the **Respondents/Defendants**

Hearing date: 3rd November 2023

- -

APPROVED JUDGMENT

Mr Justice Ritchie:

The appeal

1. This is an appeal from a decision of HHJ Luba KC (the Judge) made at the trial of the action on 26th April 2023.

2. The Judge dismissed the Claimant's application for relief from sanctions in relation to a late delivered costs budget thereby leaving the effects of CPR r.3.14 in place. This rule prevented the Claimant from recovering any part of the estimated forward legal costs and disbursements which were set out in the costs budget. Although those totalled around £24,500 for the trial and contingencies A and B (A: making an urgent application and, B: defence of any adjournment application), once the latter are deducted the forward budgeted costs amounted to around £18,500.

3. By notice of appeal issued on 16.5.2023 the Appellant seeks to set aside the dismissal of the relief application and the application to regularise the service thereof.

4. Permission to appeal was granted on the papers by Sir Stephen Stewart on 3.7.2023.

Bundles and evidence

5. The Court was provided with an appeal bundle in 3 lever arch files, a supplementary bundle, an authorities bundle and two skeleton arguments.

The issues

6. The Appellant asserts that the Judge was wrong: (1) to refuse the Claimant's application to regularise defective service of the application for relief; and (2) to dismiss the relief application by failing to take into account relevant matters and taking into account irrelevant matters when exercising discretion at stage 3 of the test for relief from sanctions under CPR r.3.9.

Appeals - CPR 52

7. I take into account that under CPR rule 52.21 every appeal is a review of the decision of the lower Court and the appellate Court may allow the appeal if the decision was wrong or unjust due to procedural or other irregularity.

8. This appeal is restricted to the evidence before the lower Court unless this Court has allowed the new evidence in under CPR rule 52.21(2) and the three grounds in *Ladd v Marshall* [1954] 1 W.L.R. 1489 (CA), namely that it was: (1) not obtainable with reasonable diligence before the lower Court, (2) would have an important influence on the result and (3) was apparently credible though not incontrovertible.

9. Under CPR rule 52.20 this Court has the power to affirm, set aside or vary the Order; refer the claim or an issue for determination by the lower Court or Order a new trial or hearing.

Against findings of fact

10. I take into account the decisions in *Henderson v Foxworth* [2014] UKSC 41, per Lord Reed at [67]; *Grizzly Business v Stena Drilling* [2017] EWCA civ 94, per Longmore LJ at [39-40] and *Deutsche Bank AG v Sebastian Holdings* [2023] EWCA Civ. 191, per Males LJ at [48-55], that any challenges to findings of fact in the Court below have to pass a high threshold test. The trial Judge has the benefit of hearing and seeing the witnesses which the appellate Court does not. The Appellant needs to show the Judge was plainly wrong in the sense that there was no sufficient evidence upon which the decision could have been reached or that no reasonable Judge could have reached that decision.

Appeals against case management decisions

11. Appeals from case management decisions have a high threshold test, see *Royal & Sun v T & N* [2002] EWCA Civ. 1964, in which Chadwick LJ ruled as follows:

> "37. … these are appeals from case management decisions made in the exercise of his discretion by a Judge who, because of his involvement in the case over time, had an accumulated knowledge of the background and the issues which this Court would be unable to match. The Judge was in the best position to reach conclusions as to the future course of the proceedings. An appellate Court should respect the Judge's decisions. It should not yield to the temptation to "second guess" the Judge in a matter peculiarly within his province.
> 38. I accept, without reservation, that this Court should not interfere with case management decisions made by a Judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the Judge."

12. In *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, at [52] the Master of the Rolls said:

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

13. In *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ. 506, [2014] 3 Costs LR 588, Davis LJ said at [63]:

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

14. In *Clearway Drainage Systems Ltd v Miles Smith Ltd* [2016] EWCA Civ 1258, the test in considering an appeal against a decision of this nature was neatly encapsulated by Sir Terence Etherton MR at paragraph 68:

> " … The fact that different judges might have given different weight to the various factors does not make the decision one which can be overturned. There must be something in the nature of an error of principle or something wholly omitted or wrongly taken into account or a balancing of factors which is obviously untenable."

Chronology of the action

15. The Claimant owns 76 Newman close, London NW10 2F (the Property). The two Defendants rented the Property under a written tenancy agreement dated 24th January 2015. That came to an end after a year and the Defendants held over on a periodic tenancy. The parties fell out in 2019. The Claimant issued a section 21 notice seeking to repossess the property.

16. On the 28th of January 2020 the Claimant sent a claim form to Court seeking possession which was issued the next day. On the 14th of February 2020 the Defendants defended and counterclaimed. Attwells solicitors, acted for the Defendants who asserted that the Claimant had failed to protect their deposit; rented them an unlicensed property when it should have been licensed by Brent Local Authority; failed to provide them with the prescribed information as tenants; failed to repair the property in various aspects and failed to provide an energy performance certificate (EPC). The Defendants counterclaimed for three times the deposit (£7,380) under S.213 of the *Housing Act 2004* and claimed £21,480 for repayment of rent for failing to obtain a licence to rent the property. Additionally, the Defendants claimed £14,320 for dilapidations, including defective ventilation, a broken shower screen, a leaking water pipe, a faulty washing machine and a blocked sink.

17. By amended particulars of claim dated 2nd March 2021 the Claimant admitted that the tenancy was not an assured shorthold tenancy; asserted she had protected the

deposit in February 2015; asserted an EPC certificate was given in November 2019 and denied that the property was covered by the social housing licensing provisions in Brent. In addition, rent arrears of £25,779 to 25th February 2021 were claimed.

18. In the Claimant's reply and defence to counterclaim, dated 20th July 2021, the Claimant asserted a new written tenancy agreement was signed in 2018 and that she had protected the deposit from 2017 (para. 5(a)).

19. It can be seen from that summary of the pleadings that the Claimant's pleaded statements in relation to the protection of the deposit and the EPC were contradictory.

20. Despite being allocated to the fast track the action involved multiple hearings and orders. I shall set them out chronologically. On the 8th of December 2020 District Judge Kanwar, at Wilson County Court, invited the parties to file agreed directions. On the 12th of January 2021 District Judge Kanwar, at a hearing where both parties were represented, allocated the claim to the fast track, permitted various pleadings and ordered: disclosure by 9th February 2021; witness statements by 23rd March 2021; refused expert evidence; required pre trial checklists by the 20th of April 2021 and set the trial down for one day on the first open date after the 20th of April 2021.

21. On the 8th of March 2021 deputy District Judge McCormack, by consent, extended various time limits in the directions and put back the trial to the first open date after the 8th of June 2021.

22. On the 18th of May 2021 deputy District Judge Lawrence, by consent, again extended the time limits in the directions and put the trial back to the first open date after the 1st of August 2021.

23. On the 21st of October 2021 the Defendants personally wrote to the Court and did not copy in the Claimant or their own solicitors, asking to vacate the trial which had been listed on the 2nd of November 2021. The trial was vacated by a notice sent out by the Court which stated that the Court had insufficient resource is to hear the trial on that date. On the 13th of November 2021 the trial was listed for the 15th of March 2022.

24. On the 7th of March 2022 the Defendants wrote direct to the Court but did not copy the communication to their own solicitors or to the Claimant, asking for the trial on the 10th of March 2022 to be adjourned. District Judge Kumrai, on the papers, without having checked that the Claimant was unaware of the adjournment application, vacated the trial and re-listed it for the 16th of August 2022. This should not have been allowed without notice to the Claimant.

25. On the 29th of June 2022 the Claimant applied to transfer the claim to the Central London County Court, with a trial time estimate of two days and for summary judgment against the Defendants on the claim for rent repayment.

26. On the 26th of July 2022 the Defendants applied to adjourn the hearings listed for the 1st and the 16th of August 2022 due to the 1st Defendant's alleged ill health. Notice of this communication was not given to the Claimant or to the Defendants' own solicitors.

27. On the 1st of August 2022, at the hearing of the Defendants' application, where both parties were represented, the adjournment application was dismissed. The Defendants' counterclaim for rent repayment was struck out and the case was allocated to the multitrack. In addition, the action was transferred to Central London County Court and the Defendants were ordered to pay the Claimant's costs assessed at £5,000 by the 15th of August 2022. This costs Order has never been paid by the Defendants.

28. On the 22nd of August 2022, at Central London County Court, the Judge considered the action on paper and gave directions. These included that no party should communicate with the Court unless at the same time providing evidence of service on the other party. The Judge listed the case for a costs and case management hearing and required the parties to serve and file costs budgets 14 days before the hearing. The Order stated that, based on the cost budgets being agreed, the hearing would be listed for one hour and that any applications were to be issued no less than five days before the hearing.

29. On the 31st of October 2022 the Judge heard an application by Messrs Attwells, the Defendants' solicitors, to come off the record. He granted that application and ordered the Defendants to pay Attwells' costs of £875. The Order also set out that the Defendants' new address for service was the property.

30. The Claimant's costs budget was drawn up and emailed to the Defendants at the e-mail address which the Defendants had used to communicate both with the Court and with the Claimant's solicitors on the 5th of December 2022 at 16.38 hours. It is a fact that in doing so they had breached the Order of the Judge, dated 22nd August 2022, which required them to serve the costs budget by the 1st of December 2022 (a Thursday). The attempt at service on the 5th was on the following Monday. In addition, they used the wrong method of service. Email was not an agreed method. On the same day the Claimant's solicitors emailed the Defendants with proposed directions, a case summary and a bundle. E-mail communication took place between the Claimant's solicitors and the Defendants about difficulties in opening the link to the bundle. No objection was made by the Defendants to the method of service. The costs budget, which had been sent to the Defendants was for £49,982.

31. On the 14th of December 2022 the Defendants applied (by email) to the Court for another adjournment without informing the Claimant's solicitors.

32. On the 15th of December 2022 the Judge held the costs and case management hearing. The Claimant attended, but the Defendants failed to appear. The Defendants' application to adjourn was dismissed. As for the Claimant's cost budget, the Judge adjourned the costs budgeting and required the Claimant to apply for relief from sanctions because the Claimant had failed to file and serve it 14 days before the hearing. This was not because the Defendants had taken the point. It was because the Judge noticed the late service. The trial was to be listed on the first open date after the 1st of February 2023. At that time no one spotted that service by email was not permitted under the Rules.

33. On the 29th of December 2022 the Claimant issued a notice of application for relief from sanctions. Despite a half-hearted attempt by the Defendants, at the appeal before me, to submit evidence that they denied receiving that notice of application, the attempt was withdrawn. The Defendants accepted that the grounds for admission of new evidence on this appeal could not be made out. Therefore, it was not in dispute that the notice of application had been sent by the Claimant to the Defendants by e-mail soon after it was issued and was received by the Defendants.

34. I note that on the 31st of December 2022 the Defendants requested the Court to communicate and send documents by e-mail (not post) to the Defendants.

35. On the 5th of January 2023 the Claimant applied by notice of application to expand the scope of the evidence of one of the Claimant's witnesses. This was sent to the Defendants by e-mail. On the 17th of January 2023 the claim was listed for trial on the 26th of April 2023.

36. On the 23rd of January 2023 the Judge considered the case on the papers and ordered that the Court should seal the Claimant's application dated 5th January 2023 and ordered that the application and the Order made on that date and the Order dated 15th December 2023 should be sent by the Court to the parties. The Judge granted the application for further evidence from the Claimant. However, the Court did not list the application for relief from sanctions dated 29th December 2022 for hearing before the trial. Thus, costs budgeting (in advance) for the trial was becoming less feasible.

37. On the 7th of February 2023 the Claimant applied to adjourn the trial due to non availability of counsel. On the 21st of February 2023 the Judge considered the application on the papers and refused it. The Claimant failed to ask the Court to list the relief application at that time. This therefore made costs budgeting less feasible.

38. In the week before the trial the Defendants obtained advice from direct professional access counsel and on the 24th of April 2023 the Defendants applied to adjourn the trial. During the week before trial the parties had been in communication by e-mail in relation to the trial bundle and a few days before trial the Claimant sent hard copies of the trial bundle to the Defendants at the Property.

39. On the 26 of April 2023 the trial took place before the Judge. The Defendants' application to adjourn the trial was refused. I was informed by counsel that the substantive trial then took place. The Defendants called no evidence after the Claimant had completed her evidence. Therefore, the Judge found in favour of the Claimant and dismissed all of the defences and the counterclaims. Then the Judge dealt with the relief from sanctions. I was informed during the appeal that counsel for the Defendants was only instructed to seek an adjournment and take the procedural points about service of the application for relief from sanctions and the costs budget. He was not instructed on the substantive trial. The Claimant's procedural applications were successfully defeated. So, both (1) the Claimant's oral application to resolve issues concerning inadequate service of the cost budget and the application for relief from sanctions and (2) the substantive relief from sanctions application, were dismissed.

Judgment

40. In the judgment the Judge noted that the Defendants had separated and the second Defendant had left the property and resided in Saudi Arabia. Moving on to the Claimant's application for relief from sanctions dated 29th December 2022, the Judge recorded that it related to a failure to serve the cost budget in accordance with the directions. The Judge found that once the Defendants' solicitors had come off record, the rules no longer required the Defendants to serve a cost budget, but still required the Claimant to serve a cost budget. The Judge recorded the history of the hearing on the 15th of December 2022 and noted the contents of the witness statement of Mr Lin Hou in support of the relief from sanctions application. The Judge noted the Defendants' submission that the notice of application had been mis-served by email, which was not permitted under the requirements for service in CPR Part 6 practice direction 6A. That states that service cannot be by e-mail unless the Defendants have first been asked by the Claimant whether they would accept service by e-mail and agreed to it. The Defendants invited the Judge to reject the Claimant's application for relief on the basis that the application for relief had never been properly served. The Claimant accepted that her mis-service did not comply with the Civil Procedure Rules and applied orally for the Court either to dispense with service or direct that the mis-service be regularised under CPR Part 6 rules 6.27 and 6.15.

41. Without any mention of the long factual matrix background the Judge, at paragraph 15, held that the application for relief from sanction had not been served. The Judge stated that the purported service by e-mail was ineffective under PD6A and that the unsealed copy of the notice of application in the physical trial bundle delivered to the Defendants on the 21st of April 2023, three working days before the trial, could not constitute good service of the application either. The Judge considered this to be "another failure of the case preparation undertaken by the Claimant solicitors."

42. At paragraph 17 the Judge refused the Claimant's application for substituted or alternative service on the grounds that no supporting evidence had been provided either in a witness statement or from the witness box. Looking at the chronology I have set out above, the Defendants had not objected to e-mail service at any stage during the proceedings until the trial. The Defendants had asked the Court to communicate by email. The Claimant was unaware of any dispute in relation to service by e-mail before trial. There was no issue raised by the Defendants until the point was taken at trial. The Judge did not take into account or make any mention of the Defendants' failure to raise this point at an earlier stage or at all until trial and therefore the conclusion that the Claimant's application for service to be regularised was not supported by evidence was stating the obvious. Until the Claimant was informed that the point had been raised she did not know that she needed to put in a witness statement explaining why her solicitors had served by e-mail, for she did not know that the service point was being taken.

43. The Judge went on to consider the substance of the application for relief from sanctions in case he was wrong about the issue of service. Dealing with the three-stage test applied to CPR rule 3.9 by the Court of Appeal in *Denton v White* [2014] EWCA Civ. 906; [2014] 1 WLR 3926, the Judge ruled that the Claimant's breach, in failing to serve the costs budget on time, was serious and significant (this was admitted by the Claimant). The Judge next found that there was no good reason for non-compliance because the reasons put forward: (1) human error of the Claimant's solicitors on dates and (2) delay in counsel's clerk providing an estimated brief fee, were not good reasons. In particular, the second reason given was not a good reason because the Claimant's solicitors had only contacted counsel's clerk at the very last moment. The Judge described the Claimant's solicitors' witness statement on the reasons for their breach as "disingenuous".

44. The Judge then went on to consider the third stage of the test in *Denton,* which requires the Court to have regard to all of the circumstances in the case and specifically the two factors set out in CPR rule 3.9. At paragraph 23 the Judge specifically rejected the Claimant's assertion that a relevant factor was that the short period of delay in serving the costs budget (two or three working days). The reason why the Judge rejected that was that he had found that the costs budget had not been served in accordance with the Rules, so he found that it had never been served. The Judge went on to consider the conduct of the parties and in particular the Defendants' conduct, which he described as "not properly playing the game", multiple applications to vacate trials and hearings, withdrawing their substantive defences at trial and getting close to behaving in a way which suggested their asserted defences were totally without merit.

45. At paragraph 26 the Judge provided the ratio of his decision on relief from sanctions stating:

> "I am not satisfied there is any good reason in the circumstances of this case for granting relief from sanctions."

In relation to prejudice the Judge provided a postscript in paragraph 27 finding that there was no windfall to the Defendants and that there was unlikely to be a prejudice to the Claimant because:

> "I would be very surprised if the Claimant solicitors would seek to recover anything more from her than disbursements."

Grounds of appeal

46. In his elegantly set out and clearly espoused submissions and skeleton argument Mr. Cohen, on behalf of the Appellant, submitted that the Court had power to hear an application to regularise service without a formal notice because CPR rule 6.15 (1) provided such a power and did not require a notice of application. In addition, sub-section 2 set out the Court's power on application, to regularise previous efforts to serve. The application may be made without notice but must be supported by evidence. The Appellant submitted that the Judge should have looked at whether the Defendants' ability to oppose the application for relief from sanctions had been impaired by the application being served by e-mail rather than by post. The Appellant submitted that the Judge had before him all that he needed to be able to decide the application to regularise service. He had the notice of application and the acceptance by the Defendants that they had received the e-mail with the notice of application and supporting evidence soon after it had been issued. The Appellant relied on the judgment of Foxton J in *Serbian v Kesar* [2021] EWHC 1025, at paragraph 53, referring back to the judgment of Lord Sumption JSC in *Barton v Wright Hassle* [2018] UKSC 12. The Appellant submitted, extracting the relevant factors from those judgments: that the Judge should have considered that service has a purpose, which is to bring to the other party's attention the contents of the documents; the Court had to consider what prejudice the Defendants had suffered by not being properly served. The application for regularisation would be stronger if the other party knew that the applicant was attempting formal service. The Appellant submitted that in this case the application was even stronger. The Defendants, being litigants in person, having communicated by e-mail for many months with the Claimant's solicitors and the Court, thought that they had been properly served at the time that they were mis-served with the notice of application. This also applied to the attempted e-mail service of the costs budget back in December 2022. Therefore, it was submitted, the Defendants had suffered no prejudice because the Defendants were not even aware that good service had not taken place and thought that they had been served. The Appellant also submitted that the Defendants did nothing, both in relation to the costs budget and in relation to the application for relief. The Defendants did not dispute the costs budget and did not even attend at the hearing on the 15th of December 2022. Furthermore, the Defendants did not defend the application for relief from sanctions or reply to it with any evidence at all until the trial. The mis-service point was only

taken by the Defendants after instructing counsel just before trial who, quite properly, advised the Defendants that this point was available to them.

47. In relation to relief, the Appellant submitted that the Judge's decision was wrong in law because he omitted to consider relevant matters and because he took into account one irrelevant matter at stage 3. Firstly, the Judge discarded any consideration of the shortness of the delay in serving the costs budget on the basis that he found that the costs budget had never been served. This, the Appellant suggests, was wrong in law. The Defendants had received the cost budget by e-mail as an attachment 9 or 10 days before the hearing and did not know that it had not been served in accordance with the Rules. Thus, with the Defendants believing it to have been properly served, the Judge should have looked at what the Defendants did. In fact they did nothing. They did not respond to or challenge it. They did not ask for the Claimant's costs of trial or before trial to be reduced. They did not attend the hearing on the 15th of December and they made no written submissions to the Judge, other than asking for the hearing to be adjourned. Thus, says the Appellant, the Defendants clearly were not prejudiced. Secondly, the Judge failed to consider the Defendants' conduct throughout the litigation which, as set out above, involved raising substantive defences and counterclaims which they completely abandoned a trial; seeking multiple adjournments all of which were rejected; falling out with their solicitors; failing to take procedural points in good time and taking them at the last minute and failing to pay the costs order for the interlocutory hearing on the 1st of August 2022. In relation to considering the balance of prejudice the Appellant submits that the Judge again erred in law by working on the assumption that the Claimant's solicitor would not charge the Claimant for the costs in the budget which had been disallowed. The Appellant also asserted that the late service of the costs budget had no impact on the litigation because the costs and case management hearing in December 2022 was only listed for an hour and was not to be an assessment of the cost budget in any event because it was premised on the costs budgets being agreed as stated on the face of the 22nd August 2022 Order. Finally, the Appellant submits that the Judge exceeded the generous ambit of his discretion and so the test in *Tanfern* v *Cameron MacDonald* is made out.

48. The Respondents' submissions relied upon CPR rule 3.13, in the first place, which requires that parties (except litigants in person) must file and exchange budgets. In the second place on CPR rule 3.14, which states that a party who fails to file a costs budget, despite being required to do so, will be treated as having filed a budget comprising only of the applicable Court fees. The Respondents submitted that the costs budget had never been served at all because it was sent by e-mail and e-mail communication was not a valid method of service, without prior authorisation under CPR rule 6 practice direction 6A paragraph 4.2, The Respondents relied on the judgment of Lord Sumption in *Barton v Wright Hassle* in support of the Judge's decision, and in particular the ruling that the mere fact that the Defendants had learned of the existence and contents of a claim form would not be a good reason to

regularise inadequate service. The main relevant factors included: whether the Claimant had taken reasonable steps to effect service in accordance with the rules; the purpose of the rules which was to bring the claim form to the attention of the Defendants; and the ruling that the manner in which service takes place for claim forms is important.

49. Interjecting there, I take into account that the Judge was not dealing with service of a claim form, which of course is a crucial document starting off a claim. The Judge was dealing with service of a notice of application in a long running case where the parties had been communicating by e-mail as the preferred method.

50. The Respondents' skeleton focused on stage three of the test under CPR rule 3.9 and *Denton v White*. The Respondents submitted the facts were similar to the facts in *Mitchell v News Group* [2014] 1 WLR 795. The Respondents submitted that the sums involved were not modest and were in excess of £60,000. The Respondents criticised the contradictory evidence of the Claimant's solicitor in the witness statement in support of the application. The Respondents submitted that the Claimant did not attempt to comply with the Rules but completely ignored them. It was submitted that the breach had led to the need for an adjournment of the costs budgeting hearing and should have led to an additional hearing. It was accepted that the additional hearing to assess the costs budget and to consider the Claimant's application for regularisation and relief never took place because that application was eventually listed for hearing at the trial. The Respondents asserted that the Appellant was raising new arguments in paragraphs 45 and 46 of the skeleton. Stopping there, I reject the new evidence assertion because it is clear to me that the Claimant raised the Defendants' conduct before the Judge and the Judge dealt with that in his judgment. Overall, the Respondents relied on the high threshold for overturning case management decisions.

Law

51. CPR Part 6 governed service of the notice of application for relief. It states:

> "**Methods of service**
> 6.20 (1) A document may be served by any of the following methods:
> (a) personal service, in accordance with rule 6.22;
> (b) first class post, document exchange or other service which provides for delivery on the next business day, in accordance with Practice Direction 6A;
> (c) leaving it at a place specified in rule 6.23;
> (d) fax or other means of electronic communication in accordance with Practice Direction 6A"

52. PD 6A states:

"**Service by fax or other electronic means**
4.1 Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means –
(1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving –
(a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and
(b) the fax number, e-mail address or e-mail addresses or other electronic identification to which it must be sent; and
(2) the following are to be taken as sufficient written indications for the purposes of paragraph 4.1(1) –
(a) …;
(b) an e-mail address or e-mail addresses set out on the writing paper of the solicitor acting for the party to be served but only where it is stated that the e-mail address or e-mail addresses may be used for service; or
(c) a fax number, e-mail address or e-mail addresses or electronic identification set out on a statement of case or a response to a claim filed with the court.
(3) Where a party has indicated that service by email must be effected by sending a document to multiple e-mail addresses, the document may be served by sending it to any 2 of the e-mail addresses identified."

53. CPR part 6 governs regularisation of service.

"**Service of the claim form by an alternative method or at an alternative place**
6.15
(1) …
(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.
(3) An application for an order under this rule –
(a) must be supported by evidence; and
(b) may be made without notice."

By CPR r. 6.27 this above rule is applied to other documents.

"Service by an alternative method or at an alternative place
6.27 Rule 6.15 applies to any document in the proceedings as it applies to a claim form and reference to the defendant in that rule is modified accordingly."

54. In *Serbian Orthodox Church v Kesar* [2021] EWHC 1025, one party served the other at the wrong address after an agreement for service by email. It so happened that the wrong email address was configured to forward the email to the right email address but the email was not read or acted upon. The Costs Master dismissed the application for retrospective validation. On appeal Foxton J ruled that the attempted service was invalid and then considered whether it should be regularised in arrears. Foxton J brought together a summary of the proper approach to regularisation of service applications thus:

> "**When Should the Court Make an Order Under CPR 6.27**?
> 53. CPR 6.15(1), and hence CPR 6.27, requires "good reason" to be shown before ordering that the steps already taken constitute good service. In *Barton*,
> i) At [9], Lord Sumption JSC referred to Lord Clarke JSC's judgment in *Abela v Baadrani* [2013] UKSC 44, [38], and Lord Clarke's approval of the statement that "service has a number of purposes, but the most important is to ensure that the contents of the document are **brought to the attention of the person to be served"**. However, "the mere fact that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under rule 6.15(2)" and "the question is whether there is good reason for the court to validate the mode of service used, not whether the claimant had good reason to choose that mode".
> ii) At [10], he stated that "in the generality of cases, the main relevant factors are likely to be (i) **whether the claimant has taken reasonable steps** to effect service in accordance with the rules and (ii) whether the defendant or his solicitor was aware of the contents of the claim form at the time when it expired, and, I would add, (iii) what if any **prejudice** the defendant would suffer by the retrospective validation of a non-compliant service of the claim form, bearing in mind what he knew about its contents. None of these factors can be regarded as decisive in themselves. The weight to be attached to them will vary with all the circumstances".
> iii) At [16], he noted that "although the purpose of service is to bring the contents of the claim form to the attention of the defendant, the manner in which this is done is also important. Rules of court must identify some formal step which can be treated as making him aware of it. This is because a bright line rule is necessary in order to determine the exact point from which time runs for the taking of further steps or the entry of judgment in default of them."
> iv) At [17], he noted that there were "**particular problems associated with electronic service**, especially where it is sought to be effected on a solicitor" because "a solicitor's office must be properly set up to receive formal electronic communications such as

> claim forms" and "there must be arrangements in place to ensure that the arrival of electronic communications is monitored, that communications constituting formal steps in current litigation are identified, and their contents distributed to appropriate people within the firm".
>
> v) Finally, at [21], he noted that "the claimant need not necessarily demonstrate that there was no way in which he could have effected service according to the rules within the period of validity of the claim form".
>
> 54. The criteria for making an order under CPR 6.15 were also considered by Popplewell J in *Société Générale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS* [2017] EWHC 667 (Comm), [49]. He noted that the strength to be afforded to the fact that the document "served" came to the notice of the defendant:
>
> > "will depend upon the circumstances in which such knowledge is gained. It will be strongest where it has occurred through what the defendant knows to be an **attempt at formal service.** It may be weaker or even non-existent where the contents of the claim form become known through other means."
>
> 55. It is clear that what constitutes "good reason" may vary with the context (e.g., what constitutes "good reason" in an ordinary service case may not constitute good reason in a Hague Service Convention case: see the authorities collected in *M v N* [2021] EWHC 360 (Comm)). I accept, therefore, that something incapable of constituting "good reason" for making an order under CPR 6.15 when there had been a failure to effect service of originating process in accordance with the CPR might be capable of amounting to good reason for making an order under CPR 6.27 in respect of other documents (reflecting the significant difference between the two types of document identified by Popplewell J in Integral , [37], and the fact that service of other types of document will not engage the limitation issues which may arise from the expiry of a claim form before service).”
>
> (My emboldening)

55. I glean from this helpful summary that relevant factors to take into account when considering whether to grant retrospective validation of mis-service include, but are not limited to, the following:
    (i) Whether the sender took reasonable steps to bring the documents to the attention of the receiver.
    (ii) Whether the documents were actually received by the receiver.
    (iii) Whether the receiver thought that the documents were being “served” or not.

(iv) The nature of the documents: were they a claim (perhaps with particulars of claim) which are "bright line documents" or another type of "dimmer line" document?

(v) Whether any prejudice will be suffered by the receiver if retrospective validation is granted.

56. Relief from sanctions is governed by CPR Part 3, r. 3.9 which states:

> "**Relief from sanctions**
> 3.9 (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."

57. In *Denton v White* (cited above), Lord Dyson considered the frenzy of applications caused in litigation by *Mitchell v News Group* [2013] EWCA Civ. 1537, and ruled as follows:

> "35. Thus, the court must, in considering all the circumstances of the case so as to enable it to deal with the application justly, give particular weight to these two important factors. In doing so, it will take account of the seriousness and significance of the breach (which has been assessed at the first stage) and any explanation (which has been considered at the second stage). The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted.
> 36. But it is always necessary to have regard to all the circumstances of the case. The factors that are relevant will vary from case to case. As has been pointed out in some of the authorities that have followed the *Mitchell case* [2014] 1 WLR 795, the promptness of the application will be a relevant circumstance to be weighed in the balance along with all the circumstances. Likewise, other past or current breaches of the rules, practice directions and court orders by the parties may also be taken into account as a relevant circumstance."
> …

On the facts of *Decadent,* one of the cases involved in the *Denton* appeal he ruled thus:

> "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."

Analysis

The application to validate mis-service retrospectively

58. I take into account that there is a substantial difference between communicating during litigation and service of documents and I take into account that the Rules must be followed by solicitors and parties.

59. The CPR permit an application for regularisation of service to be made ex-parte and/or orally, see *Park v Hadi* [2022] EWCA Civ. 581, a joint Court of Appeal judgment, at para. 49.

60. CPR r.6.15 lays down the requirement that the application must be supported by evidence. The format of the evidence is not prescribed. The Claimant relied upon the fact that the issue was only raised at trial, and relied on the evidence in court file, the trial bundle and the witness statement of Lin Hou. I do not accept in the circumstances that the Judge was right to find that the application was unsupported by any evidence at the hearing.

61. When considering whether the Judge approached the exercise of the discretion to validate the mis-service, I will look at the relevant factors identified from the case law above.

    (i) Whether the sender took reasonable steps to bring the documents to the attention of the receiver.
    (ii) Whether the documents were actually received by the receiver.
    (iii) Whether the receiver thought that the documents were being "served" or not.
    (iv) The nature of the documents: were they a claim (perhaps with particulars of claim) which are "bright line documents" or another type of "dimmer line" document?
    (v) Whether any prejudice will be suffered by the receiver if retrospective validation is granted.

62. In my judgment the the factors set out above in *Serbian* weigh overwhelmingly in favour of granting retrospective validation in the circumstances of this case. The steps taken by the Claimant's solicitors were in breach of the CPR but in my judgment were objectively reasonable. Considering factor (i): the first Defendant had asked the Court to communicate with and hence to serve him by email. He had communicated with the Claimant's solicitors wholly by email since his solicitors had come off record. He had not objected to service by email of the costs budget. He had taken no procedural point.

63. Considering factor (ii): the application notice document came to the Defendants' attention in January 2023. In relation to factor (iii): I infer that the 1st Defendant (the 2nd Defendant had gone abroad) considered that he had been served. He knew no better. Turning to factor (iv): the documents were not a claim form, they were not bright line documents, and the Defendants knew that they were in the middle of litigation. I infer that the notice was sealed by the Court because no evidence was put before the Judge to the effect that it was not. In relation to factor (v): the Defendants suffered no prejudice because the notice was received months before trial. They did nothing in relation to the application. This is to be added to the fact that the Defendants did nothing in relation to the costs budget which they likewise received 9 days before the CCMC and to which they did not object. I take into account that balanced against the lack of any prejudice to the Defendants is the substantial prejudice to the Claimant in failing to have regularisation of the faulty method of service.

64. In my judgment, the test in retrospective validation applications is different from the test for granting prospective authorisation by an alternative method. The latter needs good reason which often involves difficulties finding or serving an evasive party. The former involves different matters, for instance: issues about who knows what; justice and proportionality; Court efficiency; litigation efficiency; issues of conduct and prejudice. The Claimant's solicitors' failure to serve on the Defendants at the

Property, as was required by the CPR, and their mis-service by email, was approached by the Judge through the test of "good reason" but was carried out in my judgment in error. He focussed too much on the Claimant's witness statement and their poor explanation for the late service of the costs budget and the emailing mis-service of the substantive relief application. The Judge did not set out or consider the relevant factors for the granting of retrospective validation.

65. As for the lack of evidence in support. The Claimant was responding to a procedural point taken at trial which should have been taken straight after the alleged bad service of both the costs budget and the notice of application. The lack of evidence was because the Defendants failed to take the point when they should have done in December 2022 and in January 2023. I accept the submission of Mr Cohen to the effect that the Judge had before him all that was needed to determine whether the efforts to serve should be regularised and a lack of further evidence was not a bar. The witness statement of Lin Hou gave the Claimant's explanation for the error of late service of the costs budget, albeit poorly, but it did not cover email mis-service because at that time the issue had not been raised. The Judge concentrated on that witness statement ignoring other relevant factors. I consider that the Judge fell into error in relation to the "lack" of evidence in support of the Claimant's oral application for regularisation and the factors to be considered on retrospective validation.

66. I set aside the Judge's decision on regularising service.

67. Turning to this Court's power, on appeal, in relation to post event regularisation of service of the notice of application, I consider it would not be proportionate to remit the issue to the Judge. It can be determined on appeal. I consider that an order should be made declaring that the efforts made by the Claimant to serve the application constituted good service.

68. The service failure in relation to the costs budget was really part of the relief from sanctions application, so I will consider it below.

The Relief application

69. Taking the first factor under CPR r. 3.9: the efficient running of the litigation and proportionality, the default by the Claimant in failing to serve the budget on time led to an application for relief and should have led to an interlocutory hearing before the trial at which that was decided. In the event, it did not. Instead, it led to no costs budgeting in advance at all. It defeated the object of costs budgeting. This is a weighty factor in my judgment. It was compounded by the Claimant's failure to get the application listed before trial. It was a waste of time and fruitless for the Court to hear the relief application at trial and, if granted, to budget the costs in arrears for the very trial at which the budget was being considered.

70. Had the rules been complied with by the Claimant the Judge would have considered the costs budget at the December hearing (it having been served on time and by the correct method) with no submissions from the Defendants (because they chose not to attend or make any in writing). This would then have been a budgeted case.

71. As for the importance of the Rules being observed, the Claimant's solicitors' "disingenuous" witness statement, as the Judge held it to be, was an aggravating factor which weighs against granting relief from sanctions.

Conduct

72. The Defendants' conduct was wholly inappropriate in communicating directly with the Court, whilst refusing to copy the Claimant in, or their own solicitors, despite two clear Court orders to do so. Repeatedly seeking to delay the action by applying to adjourn was also inappropriate. Running multiple substantive defences and then failing to evidence any of them was inappropriate. Refusing to comply with the costs Order made against them was direct disobedience of a Court Order. Finally, failing to attend the CCMC was inappropriate. All of this inappropriate conduct was serious and did not merit any windfall gain from avoiding paying the Claimant's budgeted costs. However, that was taken into account by the Judge, who had conduct of the case from the start at Central London County Court. The Judge balanced that conduct against the Claimant's lawyers' rule breaching in relation not only to late service of the costs budget but by ignoring the Order of October 2022 which set out the Defendants' address for service at the Property. The Judge also, rightly, put weight on the Claimant's solicitors disingenuous conduct, as set out above. In addition, I put some weight on the Claimant's poor conduct in failing to invite the Court to have the relief application listed in good time before trial. No such efforts were made.

Prejudice

73. As for prejudice, the budget was served by email, received and never responded to. The lack of response was not because the Defendants took any procedural point. They simply ignored the budget. They did not attend the CCMC. They did not even write to the Court to ask for the budget to be reduced. I do not see any grounds on those facts for finding any prejudice to the Defendants. I consider it is clear that communication by the Defendants with the Claimant's solicitors and the Court and vice versa by email was their preferred method.

74. The sums involved were not small. The costs budget totalled over £49,000 for incurred costs and forward estimated costs. The effect of the sanction was in relation to £24,500 of forward estimated costs at most and at the least it was perhaps £18,500, taking into account that £6,000 was for contingencies A and B.

75. The Judge took into account that after his decision the Claimant's solicitors would probably have a difficult time trying to persuade the Claimant to pay them for the costs disallowed due to their own conduct in breaching the CPR. No doubt in any

solicitor-own client assessment, if the Claimant's solicitors did seek to enforce, those fees would have been the subject of a serious challenge. The notes to the White Book at 3.14.3 recognise the difficulties which the solicitors will face seeking to charge their clients for their own mis-conduct which has caused loss of the clients' right to recover those costs in the claim. I reject the ground of appeal based on this factor being wrongly taken into account by the Judge. I consider it was rightly taken into account.

Overall

76. So where did the justice of the relief decision lie? Should the Claimant or perhaps more likely the Claimant's solicitors suffer the costs sanction? Or should relief have been granted? Following the clear guidance of the appellate courts I conclude that the decision is not mine, nor should I substitute my judgment for the Judge's decision. The role of this Court is to determine whether the decision was wrong in law, outside the reasonable boundaries of judicial decision making on the facts or irregular procedurally. The facts in this case were finely balanced. There was fault on both sides.

77. Whilst the Judge's reasoning was not set out as fully as it might have been and was expressed so that it looked like he focussed too much on a narrow interpretation of "good reason", I consider that the decision was well within the generous ambit of his discretion on such relief applications. I do not consider that he overlooked either conduct or prejudice. I do not consider that the Judge took into account an irrelevant matter, namely the likelihood or possibility that the Claimant's solicitor would bear the financial loss. Quite the opposite, in my judgment the Judge followed the sanctions set out clearly in the Rules for failing to serve a costs budget on time.

Conclusions

78. For the reasons set out above I dismiss the appeal.

END