Neutral Citation Number: [2020] EWHC 1236 (QB)

Case No: M20Q215

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY (sitting at Liverpool)

Date: Monday 18 May 2020

Before :

MRS JUSTICE YIP DBE

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Between :

MOHAMMED RAZAQ	**Claimant/ Appellant**
- and -	
MOHAMMED ZAFAR	**Defendant/ Respondent**

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- -

Ms Alexandra Itari Wills (instructed by **Ansari Law**) for the **Appellant/Claimant**
Mr Sam Harmel (instructed by **Integra Solicitors**) for the **Respondent/Defendant**

Hearing dates: Thursday 7 May 2020

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Approved Judgment

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Covid-19 Protocol:
This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunal Judiciary website (press.enquiries@judiciary.uk). The date and time for hand-down is deemed to be 14:00 on Monday, 18 May 2020.

Mrs Justice Yip :

1. This matter comes before me by way of an appeal from a decision by HHJ Sephton QC on 10 December 2019 to refuse the Claimant relief from the automatic sanctions in CPR 32.10 which prevent him calling evidence at trial because his witness statements were served later than the time directed by the court. There is also an application by the Defendant to strike out the claim on the basis it cannot succeed in circumstances where the Claimant is not permitted to call evidence. On 8 January 2020, Turner J directed a rolled up hearing of the Claimant's application for permission to appeal and the substantive appeal. He also transferred jurisdiction to the High Court to allow the Defendant's application to be listed at the same time. It is agreed that the Defendant's application only remains live if the appeal is dismissed. It follows that I must first determine the appeal. I granted permission to appeal at the start of the hearing.

2. At the outset of this hearing, rather a lot of time was spent considering a submission by Ms Wills that I should exercise a discretion to hear the application for relief from sanctions afresh. I believe that her application arose from a misunderstanding of the rules and/or of something said by Turner J at the previous hearing. However, as I ruled at the outset, the appeal proceeds in the usual way as a review of the decision below. It follows that this court can only intervene if it is demonstrated that the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity in the court below.

3. As the Court of Appeal has reinforced on many occasions, an appellate court will not lightly interfere with case management decisions or the exercise of judicial discretion. Further, it has been said that it is vital that appellate courts uphold robust case management decisions by first instance judges. See *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 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."

Background to the application

4. The circumstances of the claim may be stated briefly. Following protracted negotiations, the Defendant agreed to sell his private hire taxi business to the Claimant for £100,000. There is a dispute between the parties as to whether this was intended to be a binding agreement or to be subject to contract. However, there is no dispute that the Claimant made payments to the Defendant totalling £60,000. It is the Claimant's case that he remained willing and able to pay the balance but that the Defendant refused to transfer the business. He claims that the Defendant has retained the sum of £60,000 which the Claimant had paid. He seeks specific performance of the contract or, in the alternative, the return of the sum of £60,000 plus interest. The Defendant maintains that the parties agreed to the cancellation of the agreement on condition that the Claimant's money was returned immediately and that he did return

the Claimant's money. To put it bluntly, one party or the other is being dishonest. The central factual issue is whether or not the £60,000 was returned to the Claimant.

5. It is the Defendant's case that he repaid all the Claimant's money on 6 August 2018, in the presence of the Claimant's wife and the Defendant's brother. The Claimant says that is not true. His case is that he attended the business premises on 6 August 2018 with his sons and two witnesses but that the Defendant refused to hand over the business. He maintains that the Defendant had assembled a group of people who were verbally aggressive and that he had to leave to avoid confrontation without receiving any repayment.

6. The Defendant contends that his signature has been forged on a handwritten agreement which the Claimant relies upon in support of his claim. The court directed the joint instruction of a handwriting expert. She describes the evidence as "inconclusive".

7. The matter was first brought before the court by way of an ex parte application for an injunction restraining the Defendant from selling or otherwise transferring the business, pending determination of the Claimant's claim which had yet to be issued. In support of that application, the Claimant filed a statement dated 14 August 2018 and a copy of the agreement to which I have referred. HHJ Platts granted the injunction on 16 August 2018, having received various undertakings, including an undertaking to issue the substantive claim by the following day and to serve the application and evidence in support. The Claimant did duly serve the application and evidence in support. At an inter partes hearing on 28 August 2020, HHJ Platts extended the injunction until trial or further order. The judge also gave directions, including providing for a Defence. I am told by Ms Wills that the Defence was filed and served later than it should have been.

8. The claim was initially stayed to allow the parties to consider mediation. On 10 July 2019 (order drawn 25 July 2019), District Judge Goodchild allocated it to the fast track and gave directions, including directing the joint instruction of a handwriting expert to report by 31 October 2019. Disclosure by list was directed by 11 September 2019. The District Judge directed sequential service of witness statements with the Claimant to file and serve any statements upon which he intended to rely by 2 October 2019, the Defendant to serve his witness statements by 16 October 2019 and the Claimant to file and serve any statements in response, if so advised, by 23 October 2019. The matter was not listed for trial, all directions for trial being left for the pre-trial review.

9. It is said by the Claimant that the Defendant caused a delay in the instruction of the handwriting expert. If that is right, it had no impact whatsoever on the timetable or the course of the litigation, since the report was still available by the time directed. Otherwise, the Defendant did comply with the directions, filing and serving his list of documents and witness statements on time.

10. The Claimant did not comply with the directions in relation to his list of documents and witness statements. On or around 22 October 2019, the Claimant's solicitor, Mr Ansari, appears to have realised that the directions had not been complied with. By way of explanation for the default, he relies upon the fact that his firm was investigated by the Solicitors Regulation Authority in the period from July to October

2019. This resulted in the Claimant's file being taken by the SRA for auditing on 18 September 2019. Having got the file back on 16 October 2019, he attempted to contact the Claimant but found that he was abroad and accordingly made the application on 24 October 2019. He sought to extend the time for disclosure and initial witness statements to 29 October 2019 and for the supplementary statements to 8 November 2019 (although as I understand it the Claimant does not require provision for supplementary statements).

11. The Claimant filed and served his List of Documents and three of the statements upon which he seeks to rely on 29 October 2019. A statement from a fourth witness was served unsigned on that date but served in a signed format the following day. The List of Documents was therefore provided about six weeks late and the witness statements three-and-a-half weeks late and six or seven days after the date that had been provided for service of statements in response to the Defendant's statements.

The application before the judge

12. The Defendant contends that the 'wrong' application had been made in that the written application was not expressed to be an application for relief from sanctions pursuant to CPR 3.9. However, nothing turns on this. The judge was plainly right to treat the application before him as an application for relief from the automatic sanction under CPR 32.10, which provides:

> "If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission."

13. This point appears to have taken Counsel for the Claimant somewhat by surprise at the hearing below. She initially sought to argue that CPR 3.9 did not apply. However, having accepted, as she was bound to, that the Claimant did require relief from sanctions and that the application was to be considered by reference to CPR 3.9 and the approach set out in *Denton v TH White Ltd* [2014] EWCA Civ 906, Ms Wills then made some brief submissions about pragmatism. She contended that the delay was excusable and relied upon the fact that the default had not prejudiced a trial date.

14. Mr Harmel's submissions for the Defendant were also brief and, as he now readily accepts, not framed according to the correct test as laid down in *Denton*. He wrongly submitted that unless the claimant could establish a good reason for the breach there was no need to even consider the third stage of Denton, that is evaluating all the circumstances of the case. However, it is fair to say that the judge was not misled and did have the correct framework in mind.

15. The hearing before the judge was brief. I understand that he was required to take the application at short notice as another judge was indisposed and that he interposed it during a trial. Having considered the transcript of the hearing, regrettably I do not consider that the judge was greatly assisted by the submissions made on either side. I well understand the pressure on the judge and counsel and have no doubt that everyone was seeking to assist as best they could and to be efficient. Unfortunately, though I do not believe the judge got the succinct, well-focussed and legally accurate submissions that I think he was entitled to expect. In particular, the result of the

misunderstandings on both sides was that neither party addressed the judge in any detail as to the exercise of his discretion under the third stage in *Denton* nor did they conduct any real analysis of all the circumstances of the case as required by CPR 3.9.

16. The judge gave a brief judgment. Having set out the correct legal framework within which the Claimant's application was to be considered, he addressed the three stages in *Denton*. He concluded that the breach was serious, gave consideration to the explanation for the default and then turned to the third stage, which he dealt with briefly, as follows:

> "… it is submitted by Miss Wills that there should be no difficulty with the timetable and no prejudice to the defendant. I therefore have to balance those circumstances against the other circumstances in the case, including the need for litigation to be conducted efficiently and to enforce compliance with the rules, practice directions and orders. If I allow this application, there will be further delay whilst the claimant complies with orders that should have been complied with several months ago. In my judgement, in view of the poor excuses proffered by the claimant solicitors for their failures, in view of the many breaches by the claimant's side, and in view of the wholly unexplained and unremedied failure to give disclosure, the balance falls heavily in favour of the defendant. Litigants and their solicitors must realise that they cannot ignore the directions of the court and expect the courts to indulge them when they seek relief from sanctions. Such a practice delays the litigation in question and clogs up the lists with applications for relief, thus inconveniencing other court users. I dismissed this application for relief from sanctions."

Grounds of appeal

17. The grounds of appeal advanced by the Claimant may be summarised as follows:

i. The judge made material errors of fact, which infected the exercise of his discretion, namely:

a. He said that if he allowed the application, there would be further delay while the Claimant complied with orders that should have been complied with months ago. In fact, the Claimant had already filed and served his disclosure list and all witness statements.

b. He relied on "the many breaches by the Claimant's side" and the "unexplained and unremedied failure to give disclosure" whereas there had not been many breaches on the Claimant's side and the failure to give disclosure had been remedied.

ii. The judge erred in assessing the seriousness and significance of the failure to comply and misdirected himself in stating (at paragraph 4) that "The seriousness of the breach is perhaps illustrated by the fact that a breach will result (see 32.10) in the inability to call the evidence which is required."

iii. The judge failed to consider properly or at all why the default occurred and/or all the circumstances of the case.

iv. The judge failed to consider the severity of the sanction and whether it was proportionate to the breach.

v. The judge should not have allowed the Defendant to seek to take advantage of the Claimant's solicitor mistake to obtain a windfall.

vi. The judge did not exercise his discretion properly.

vii. The decision infringes the Claimant's right to a fair trial.

viii. The judge erred in making an order for costs in the Defendant's favour.

18. Some of these grounds may be disposed of fairly readily. As far as the order for costs is concerned, the judge ordered that the Claimant should pay the costs of the hearing. Ms Wills did not argue that such an order lay outside the reasonable exercise of the judge's discretion. Of course, if the substantive appeal is allowed, the order for costs will have to be reconsidered.

19. There is clear authority that a decision not to grant relief from sanctions made by applying the regime under CPR 3.9 does not offend against the right to a fair trial under Article 6 of the ECHR, see *Momson v Azeez* [2009] EWCA Civ 202.

Analysis

20. The first stage of the *Denton* approach involved "an assessment of the seriousness and significance of the very breach in respect of which relief from sanctions is sought." In this case, that was the failure to serve the witness statements in time.

21. In my judgment, the judge erred in his approach to the first stage by equating the seriousness of the breach with the seriousness of the sanction. Of course, the service of witness statements is an important part of the litigation process and its importance is supported by the provision in the rules of an automatic sanction for breach. However, that does not mean that every failure to serve witness statements on time is inevitably to be regarded as serious or significant. Suppose the Claimant had served his witness statements a matter of moments after the 4pm deadline. It is hard to see how that could be described as a serious or significant breach and yet, in theory, the same automatic sanction under CPR 32.10 would apply.

22. As the Court of Appeal made clear at paragraph 26 of *Denton*, the concepts of seriousness and significance are not hard-edged and there are degrees of seriousness and significance. A breach which imperils future hearing dates or otherwise disrupts the conduct of litigation will generally be considered to be significant or serious. However, it is not the case that a breach which does not threaten the timetable will automatically be considered not to be serious.

23. The assessment of the seriousness of the breach at the first stage is important for two reasons. First, if the court concludes that the breach was not serious or significant, relief will usually be granted without the need to spend much time on the second or third stages. Secondly, even if the court has concluded the breach is significant, the

assessment made at the first stage is to be taken into account in considering all the circumstances of the case at the third stage. See *Denton* [35]:

> "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."

24. The assessment of the seriousness of the breach was therefore an important stage, involving an evaluative rather than a binary process. Seen in that context, I consider the flaw in the judge's reasoning to be material, notwithstanding that I would not fault his conclusion that the breach was serious such that it was necessary to examine the second and third stages.

25. I acknowledge that the short judgment may not fully reflect all that was in the judge's mind and I do recognise the pressure of time under which he was giving judgment. However, it is not clear that the judge engaged in any real analysis of how serious the breach was. That, in my judgment, impacted on the exercise of his discretion at the third stage.

26. The judge considered why the default occurred at paragraph 5 of his judgment. He succinctly and fairly summarised the explanation given by the Claimant's solicitor. He then said:

> "No explanation is given as to why witness statements were not taken well in advance of the date on which they were required. No explanation is given as to why witness statements were not taken from the other witnesses prior to the claimant's return from holiday or absence in Pakistan. And, perhaps most tellingly, no explanation is given as to why the claimant's solicitors failed to duplicate the file if it was taken away by the SRA so that work did not cease altogether while the file was being dealt with."

27. Ms Wills accepted that the judge's analysis of the reason for the late service of witness statements could not be faulted. The judge was plainly entitled to conclude that the excuses put forward by the Claimant's solicitor did not provide a good reason for the breach. I take the same view.

28. However, I consider that the judge did err when he came to the third stage of *Denton*.

29. As the judge correctly reminded himself, CPR 3.9 requires the court to have regard to all the circumstances including the need -

    a) for litigation to be conducted efficiently and at a proportionate cost; and

    b) to enforce compliance with rules, practice directions and orders.

30. The correct approach to the third stage is to be found in *Denton* at paragraphs 31 – 38. The court must consider all the circumstances of the case "so as to deal justly with the application." The two factors specifically set out in rule 3.9 are to be given particular (although not paramount) importance. Factor (a) makes it clear that the court must

consider the effect of the breach in every case. Factor (b) stresses that the court must always bear in mind the need for compliance with rules, practice directions and orders and that the old lax culture of non-compliance is no longer tolerated (see *Denton* at [34]). In considering all the circumstances, including the two important factors mentioned in the rule, the court must take account of the assessment of seriousness and significance of the breach (as assessed at the first stage) and of any explanation (considered at the second stage).

31. I have already said that I consider that the lack of any real analysis of the seriousness of the breach impacted on the exercise of the judge's discretion. I also accept that the Claimant has identified material errors of fact in the judge's reasoning.

32. First, the judge said that if he allowed the application, there would be further delay whilst the claimant complied with orders that should have been complied with months ago. That was not right. In fact, the Claimant had served his list of documents and all his witness statements six weeks before the hearing. No procedural steps remained outstanding and there was no reason to think there would be any further delay. Indeed, the Claimant was not seeking any direction that required future compliance.

33. I note that in the course of the hearing, the judge identified that the wording of the statements of truth attached to Claimant's witness statements did not strictly comply with the wording set out in the relevant Practice Direction, The statement of truth on the Claimant's statement referred to the Particulars of Claim rather than his witness statement. Further, Ms Wills had suggested that an interpreter might be required at trial, yet none of the witness statements contained an endorsement that the contents had been read to the witness in their own language. Mr Harmel invited me to infer that this was the basis on which the judge found that orders had still not been complied with and that if relief was granted, there would be further delay.

34. I am unable to accede to that submission. The transcript makes it clear that the judge acknowledged that the point about the statements of truth was probably a matter of form rather than substance and he appeared to put it aside and indicated to Ms Wills that she need not address that point further. Mr Harmel accepted before me that no real objection could be taken to the statements of truth attached to two of the witness statements. The error in the Claimant's statement of truth could be cured simply by correcting the words "Particulars of Claim" to "witness statement" and having him re-sign it. Further, there was no evidence that the other witness did not understand the contents of his written statement when he signed it, even if he might require an interpreter to assist him at trial. The minimal amendment to the Claimant's statement would not have necessitated any delay or materially increased costs. I conclude that the judge was wrong to say that granting relief would result in further delay. In fact, the case was trial ready, and directions could have been given for trial at the pre-trial review on 10 December 2019.

35. The judge appeared to refer to the list of documents as something of an afterthought, saying:

> "I omitted to mention earlier at the first and second stages there has been a failure to serve a list of documents or a disclosure statement as required by the order, and no separate explanation

> appears in the witness statement of Mr Ansari as to why that was the case."

He then relied on "the wholly unexplained and unremedied failure to give disclosure" as a factor to put in the balance against granting relief.

36. In fact, the failure to serve a list of documents was not 'unremedied' at the time of the hearing. Disclosure by list had been given on 29 October 2019. Further, it was not right to say that there was no explanation for the failure to serve the list of documents in time. At paragraph 4(b) of his statement, Mr Ansari said that the fee earner had "oversighted" (I think he meant "overlooked") that direction as the firm was then engaged with the SRA investigation. It may be said that this was not a good explanation, but the default was not wholly unexplained. Further, the significance of that breach was limited as the only material document in the Claimant's possession was the handwritten agreement, which had been disclosed at the outset with the injunction application.

37. Further, it is difficult to see how there could be said to have been "many breaches by the Claimant's side." The Claimant had breached two directions – those relating to the list of documents and to witness statements. There was no prior history of non-compliance. Although the judge referred to the directions "mercifully" allowing the Claimant a "second bite of the cherry" in that he had permission to serve witness statements in response to the Defendant's by 23 October 2019, the fact that there were two potential dates for service of statements cannot be considered to have given rise to two separate breaches. The second date allowed for the Claimant to serve additional statements "if so advised". It did not compel him to do so. I do not believe the judge was treating the wording of the statements of truth as one of the "many breaches" to put in the balance given that he had acknowledged during Ms Wills' submissions that it was probably not important.

38. Having considered the short judgement, I am driven to the conclusion that the judge erred in the exercise of his discretion because he:

    i) misdirected himself on the assessment of seriousness at the first stage;

    ii) made material errors of fact in the factors he put into the balance against granting relief;

    iii) did not stand back and look at the consequences of the breach or consider the impact of the sanction.

39. Analysis of the seriousness of the breach at the first stage did properly lead to the conclusion that it was serious or significant, albeit not for the reason given by the judge. A delay of three-and-a-half weeks in serving witness statements was significant in the context of the timetable, particularly where the effect was to reverse the order of sequential exchange directed by the court. The effect was that the Claimant had the Defendant's statements before serving his, and the Defendant's opportunity to respond to his evidence was removed.

40. On the other hand, the pleadings, including the detailed Reply to the Defence which the Claimant had served, clearly identified the parties' respective factual cases.

Further, within the injunction proceedings, the Claimant filed and served a witness statement in August 2018. While not intended to be his evidence at trial and the directions plainly envisaged him serving further evidence, this statement was sufficient to establish a prima facie case. Arguably, the Claimant could rely on this evidence even without seeking relief from sanctions. The Defendant did not suggest that he had been prejudiced by the reversal of the order of service of the evidence. The directions envisaged that the Claimant would have the opportunity to serve further witness statements after the Defendant served his and that exchange of witness evidence would be complete by 23 October 2019. In fact, that stage was completed a week later. The late service did not impact upon the timetable in any other way. There was no threat to the trial date. By the time of the pre-trial review, the case was ready for trial. The breach did not in fact disrupt this litigation or cause an increase in costs, beyond the need for an application to be made (which could have been dealt with by an appropriate costs order). The application for relief could be dealt with at the pre-trial review and listing for trial could have occurred in the same way as had been envisaged. Therefore, the breach did not have any significant impact on other court business.

41. I conclude that the breach was not insignificant, but it was certainly not at the upper end of the scale of seriousness. That assessment is to be carried through into the balancing required at the third stage.

42. I have already indicated that I think the judge was right in his consideration of the explanation for the breach. It was fair to describe the excuses put forward by the Claimant's solicitor as 'poor'. It cannot be said that there was a good reason for the default, albeit it was not wholly unexplained.

43. I turn then to the third stage. Looking at factor (a) in CPR 3.9, it was relevant that the breach did not affect the efficient conduct of this or other litigation and did not significantly increase costs. It did not imperil any trial date or otherwise impact on the timetable. Contrary to what the judge appeared to think, all necessary steps had been completed by the pre-trial review so that the case was trial ready. Granting relief at that hearing would not have resulted in any further delay nor would it have required the court to make additional time for the case so impacting on other court users.

44. Factor (b) did remain an important point to weigh in the balance against granting relief. There was no good reason for the delay. The Claimant's solicitors appear to have failed to prioritise compliance with the court's directions. The judge was right to say that litigants and their solicitors cannot ignore directions and then expect the court to indulge them.

45. However, it could not be said that there was a history of non-compliance. The failure to serve a list of documents on time was really part of the same problem, in that the Claimant's solicitors had not made proper arrangements to ensure they complied with the directions order made on 10 July 2019. Up to that point, they had conducted the litigation appropriately. Once they realised that they had overlooked directions, they took steps to remedy the position and made the application reasonably promptly. All this was done well in advance of the pre-trial review.

46. I consider also the impact of not granting relief. As I have already said, arguably the Claimant could rely on his witness statement which had been filed and served in

August 2018. However, as Mr Harmel put it in submissions, he would have been "significantly hamstrung" in the conduct of his case. If not allowed even to rely on his August 2018 statement, he could not proceed at all. The fundamental issue in the case is which of the parties is being dishonest. Either this is a fraudulent claim or the Defendant has sought to defraud the Claimant of £60,000. The Claimant seeks to call witnesses who are said to have directly witnessed the relevant events. Without their evidence, the Court will not have a full picture. The Claimant *may* still be able to have a trial, but he will be at a very significant disadvantage. In my view, this claim ought to be tried with the benefit of all the available evidence so that the Court can reach a fair decision, particularly as a finding of dishonesty on one side or the other is likely to be made. Of course, this is not a decisive factor but it is a factor to be weighed in the balance along with all the other circumstances.

47. Standing back and weighing all the circumstances, I consider that the judge was wrong to refuse to grant relief. It was true that there was no good reason for the breach and that the need to enforce compliance with court orders was an important factor to put in the balance against granting relief. However, the judge was wrong to say that there had been many breaches on the Claimant's side, that the failure to give disclosure was wholly unexplained and unremedied or that there would be further delay while the Claimant complied with orders that should have been complied with several months ago. In fact, the breaches had been remedied well before the pre-trial review. Disclourse was complete and all witness statements had been exchanged. The case was ready to be listed for trial. The Defendant had not been prejudiced and the breach had not disrupted the course of this or other litigation. Refusing to grant relief would significantly harm the Claimant's case, if not prevent him from proceeding with his claim altogether. I conclude that relief from sanctions should be granted and the Claimant should be permitted to give evidence and to call the three witnesses whose statements were served at the end of October 2019.

Disposal

48. I therefore allow the Claimant's appeal. I will extend the time for the Claimant to give disclosure to 29 October 2019. I grant relief from sanctions and extend the time for service of the Claimant's witness statements to 30 October 2019 so that he be permitted to give evidence and to call Mohammed Nabeel, Khalid Parwiz and Choudry Imran Hussain.

49. Mr Harmel accepted that the Defendant's strike out application would fall away if the appeal was successful.

50. Directions will now need to be given for trial. The claim having been transferred to the High Court by Turner J, it will need to be transferred back to the County Court. Unless the parties are able to agree directions, I will remit to the County Court for a further pre-trial review.

51. In the event that the parties are unable to agree the appropriate orders for costs of the appeal and in the court below, I will receive short written submissions, to be filed within 7 days of the judgment being handed down.