Neutral Citation Number: [2014] EWHC 505 (Ch)

IN THE HIGH COURT OF JUSTICE **Appeal Court Ref. CH/2014/0103**

CHANCERY DIVISON **Claim Nos. HC10C03951 and HC12E02707**

Before Mr R Hollington QC sitting as a Deputy Judge of the High Court

Hearing date: 25 February 2014

Judgment: 27 February 2014

On appeal from a decision of Deputy Master Arkush dated 12 February 2014

B E T W E E N:

STEVEN GERALD CLARKE

Claimant/Respondent

- and -

BARCLAYS BANK PLC

Defendant/Appellant

- and -

LAMBERTS SURVEYORS LIMITED

Third Party/Appellant

MR. J. LEABEATER (instructed by Berrymans Lace Mawer) appeared on behalf of the Third Party.

MISS A. KNIGHT (instructed by DLA Piper UK LLP) appeared on behalf of the Defendant.

MR. J. STEINERT (instructed by Duffield Harrison Solicitors) appeared on behalf of the Claimant.

Approved Judgment

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

Robin Hollington QC

1. This is an appeal, expedited by order of Mr Justice Mann dated 19 February 2014, against an interlocutory order of Deputy Master Arkush dated 12 February 2014. The matter is urgent because the trial is due to take place in a 2 week trial window commencing on 10 March 2014, with a time estimate of 5 days. That trial window was fixed at a listing appointment which took place on 10 May 2013, which has a particularly significant place in the chronology as appears below, because it was 7 days after the Claimant's original expert, Mr. Dall, informed the Claimant's solicitors that he was withdrawing from the case because he had retired, a piece of information the Claimant's solicitors did not share with the other parties until late November 2013. If this appeal is successful, then the parties have to prepare for that trial, including exchanging witness statements. If this appeal is unsuccessful, it is now agreed by all the parties that the trial will be adjourned.
2. In a nutshell, I am concerned with what expert evidence the Claimant is entitled to rely upon: can he rely upon a recently served expert report of Mr. Yates dated 14 February 2014, which the Deputy Master allowed (although there is a question as to whether it does in fact fully comply with what the Deputy Master directed), or is he stuck with the expert report dated 22 November 2010 of his original expert, Mr. Dall, who has retired from practice and does not wish to attend trial to give evidence? The proceedings were commenced on 23 November 2010. The nub of the claim was that the Claimant had spent £250,000 converting the property into a state-of-the-art recording studio and the property should have been marketed as such, not as a development opportunity.
3. The proceedings concern a claim against Barclays Bank ("the Bank"), the Claimant's mortgagee, for having sold the mortgaged property at a gross undervalue. The Bank have brought in as third parties Lamberts Surveyors Limited ("the Surveyor"), upon whose advice the Bank says it relied. The property was sold in May 2005 for just under £250,000. Mr. Dall said that it should have been sold for £500,000. Mr. Yates says it should have been sold for £860,000, which he arrives at first by valuing the property at £555,000 and then adding the Claimant's estimate of the cost of the works of conversion to a recording studio. Whilst Mr. Dall took into account the fact that the property had been converted to a fully-functional recording studio, he did not, so far as I can see, add those costs to the value that he arrived at for the property as a recording studio.

4. I would first pay tribute to the Deputy Master for having disposed of the application before him, including delivering judgment, in an afternoon. I have had the considerable advantage of almost a full day's argument from Counsel and immaculately prepared Appeal Bundles. I have also had the luxury of being able to reserve my judgment overnight, which has enabled me to consider the authorities with more time. I have further had the advantage of reading the illuminating recent judgment of Mr Justice Andrew Smith in AEI v. Alstom, handed down the day before the appeal was heard.
5. As I say, the proceedings were commenced as long ago as November 2010. I ascribe no blame to anyone for the delay. The limitation period expired in May 2011. The procedural history thereafter is crucial to the appeal before me.
6. By the end of 2012, following wrangles over the consolidation of the proceedings against the Surveyor, it was finally possible to move forward. The parties agreed directions between themselves and the agreed minute of order was sent to the Court for its approval by the Claimant's solicitors by letter dated 18 January 2013. With some polite chasing by the Claimant's solicitors, the directions were finally approved by Master Bragge, with some slight amendments, on 11 April 2013, and received back from the Court by the Claimant's solicitors on or about 18 April 2013. His directions are central to this appeal and I summarise them as follows:
    - Amended pleadings were to be exchanged by 26 April 2013, with a stay of two months thereafter for ADR (paras. 1-4)
    - Each party permitted to adduce expert evidence on property valuation, limited to one expert per party (para. 5)
    - The Claimant to serve "any additional expert valuation evidence" by 5 July 2013 (para. 6) – this direction was inept – there was no direction which permitted the Claimant to rely upon Mr. Dall's report, but it went without saying that he could - on its face, this paragraph permitted the Claimant to adduce a supplemental report from Mr. Dall. However, because it appears that the Claimant had in December 2011 indicated an intention to rely upon expert music industry evidence (I take this from Miss Knight's Skeleton Argument), it may be that the Claimant erroneously thought that he could adduce such evidence – but I note that the Claimant's solicitor, Mr. Keens, makes no mention of this in his witness statement dated 17 January 2014.

- The Bank and the Surveyor to serve their expert evidence by 2 August 2013 (para. 7)
- Standard disclosure by list by 30 August 2013 – inspection 14 days thereafter (paras. 8-9)
- The experts to hold a discussion to narrow the issues and where possible to reach an agreement on those issues by 27 September 2013, and were to file a statement of issues on which they were agreed and disagreed respectively, with a summary of their reasons for disagreeing, by 1 November 2013 (paras. 10 and 12)
- Exchange of witness statements of oral evidence and service of notice of any hearsay notices by 19 October 2013 (para. 11)
- The parties to notify the Court in writing by 29 November 2013 that they have complied in full with all the directions or state the steps they are taking to comply with the outstanding directions (para. 17)
- That there be a PTR not later than 14 days before the trial (para. 18)

7. No point has been pressed about the exchange of pleadings in accordance with the above directions. It appears that there was slippage in the timetable, in part due to agreed extensions of time. I am in any event quite satisfied that any slippage in this regard has no relevance to what I have to decide.
8. What is relevant is the fact that, in response to a request from the Claimant's solicitors for his availability given the imminent fixing of the trial at an appointment on 9 May 2013, Mr. Dall sent an email to the Claimant's solicitors on 3 May 2013, informing them that "*I am unable to continue in the capacity as Expert in this matter, as I am unable to offer any Professional Indemnity cover and, as a retired member of the RICS I am no longer authorised to practice or accept fees for providing advice*". The Claimant and his solicitors kept this information to themselves until the end of November 2013. I will return to the question of why they did so, and what they were doing in the meantime so far as concerns finding another expert to replace Mr. Dall.
9. The parties plainly proceeded on the basis that the Claimant was still proposing to rely upon Mr. Dall and his report. Para. 6 of Master Bragge's order required the Claimant to serve "any additional expert valuation evidence" by 5 July 2013 and that date appears to have passed without comment in correspondence. So, pursuant to the Master's order, the Bank and the Surveyor served their respective experts' reports on

the Claimant on 6 and 9 August 2013. Mr. Steinert took a point that these reports were not served on time and therefore could not be relied upon unless the court was asked for and granted permission to extend the time retrospectively. In my judgment that was a foolish point for his client to take and the less said about it the better. By letter dated 7 August 2013, immediately upon receipt of the Bank's expert report, the Claimant's solicitors proposed putting back disclosure to 30 October 2013 and all subsequent directions by 2 months to allow time for mediation. The Claimant's solicitors wrote again to the same effect by letter dated 15 August 2013. By letter dated 2 September 2013 the Surveyor's solicitor stated that they had no instructions to agree a 2 month extension for mediation but would agree to put back disclosure to 13 September 2013. By a subsequent letter dated 13 September 2013 the Surveyor's solicitor stated that mediation could take place after disclosure. The Claimant did not give disclosure until 1 October 2013, there being some heated correspondence over the delay.

10. By letter dated 9 October 2013 the Claimant's solicitors proposed again mediation, with a revised timetable putting back the discussions between the experts to 29 November 2013, i.e. after the mediation had taken place, with exchange of witness statements by 21 December 2013, and the experts to file their Joint Statement by 11 January 2014. The Claimant provided inspection on 23 October 2013. This appears to have held up the mediation proposal, and a mediation was not booked to take place until 16 December 2013. It never happened because the Claimant's solicitors dropped the bombshell about the retirement of Mr. Dall in letters dated 27 November 2013, in response it would appear to a reminder from the Surveyor's solicitors on 26 November 2013 about the need to comply with para. 17 of the Master's order, i.e. to notify the Court how compliance with its directions was progressing. In their letters dated 27 November 2013 the Claimant's solicitors announced that Mr. Dall had withdrawn and that they had appointed Mr. Yates in his stead and he would provide his report in advance of the mediation arranged for 16 December 2013. The Claimant's solicitors responded to queries about Mr. Dall's replacement by letter dated 4 December 2013. In that letter, they stated that they had tried unsuccessfully to find a replacement for Mr. Dall for a variety of reasons, they had finally approached Mr. Yates at the beginning of October 2013, had a meeting with him on 19 November and instructed him on 26 November. In other words, it is easy to infer

that they waited until they had found a new expert to replace Mr. Dall before they informed the other parties of Mr. Dall's withdrawal.

11. Indeed, Mr. Keens, the Claimant's solicitor, admitted as much. As he explained in paragraph 39 of his witness statement, with such remarkable candour that the Claimant's counsel sought to distance himself from it in oral submissions before me:

> "*I acknowledge that the parties were not notified as to the position until after an alternative valuer had accepted instructions from the Claimant to prepare a report. ... [T]he nature of the Claimant's claim against the Defendant bank is such that he cannot realistically succeed without supportive expert valuation evidence. Had the Claimant acted otherwise then this would have demonstrated serious weakness in the Claimant's case. I also respectfully suggest that the present Application [i.e. for permission to rely on the new expert's evidence] could not have been made to the Court until such time as the new expert instructed had produced his report.*"

Mr. Steinert, counsel for the Claimant, submitted that the proper position was that the Claimant had Mr. Dall's report and nothing else – the Claimant was entitled to rely upon it and so he could "keep mum" about the problem he had with Mr. Dall. He was not obliged to disclose his problem until para. 17 of the Master's order obliged him to do so, which was the whole purpose of para. 17. He also drew my attention to CPR 35.5(1), which provides that expert evidence shall be given in a written report unless the court otherwise directs, but I do not see how that rule takes the matter any further, particularly in the present case where the court has given detailed directions for the experts to meet and to co-operate in producing a joint statement of issues upon which they are not agreed.

12. Before I address this submission, I should conclude my summary of events. By email dated 5 December 2013 the Surveyor's solicitor demanded that the Claimant disclose copies of all correspondence relating to the prospective instruction of experts described in the Claimants' solicitors' letter dated 4 December 2013. The Claimant's solicitor responded by email dated 6 December 2013, stating "*we aim to provide you with the relevant information by midday .. 10 December ..*". In the event, perhaps because the mediation fell through, the Claimant provided none of the disclosure it had promised to provide, and the Claimant's counsel submitted to me that this was because privilege was claimed.

13. The battlelines for the present application then began to form. By letter dated 6 December 2013 the Surveyor's solicitors notified the Claimant's solicitors that the Claimant had no permission to rely upon any report other than Mr. Dall's and that any application by the Claimant to admit Mr. Yates' evidence would fail and should in any event be supported by full disclosure of inter alia all documents relating to the Claimant's attempts to identify and instruct a new expert. The Claimant served Mr. Yates' 1st report dated 20 December 2013 on the same date. Mr. Yates relied upon what he described as the expert report of a Mr. Veale dated 29 August 2013 which evaluated the costs incurred by the Claimant in fitting out the property as a recording studio – no previous mention had been made of such a report.

14. The Claimant issued its application seeking permission to rely upon Mr. Yates' report dated 20 December 2013 on 20 January 2014. It was supported by Mr. Keens' witness statement dated 17 January 2014. The application was determined at a hearing before the Deputy Master on 12 February 2014. He granted permission to the Claimant to rely upon Mr. Yates' report subject to the proviso that all reliance upon Mr. Veale's report be removed. Hence, the Claimant served the 2nd report of Mr. Yates dated 14 February 2014, which I have referred to above.

15. This appeal is brought with the permission of the Deputy Master.

16. As to how I am to approach this appeal, it is common ground that this is a true appeal, not a rehearing. As it was put in both sides' Skeleton Arguments and I accept:

"*Case management decisions are discretionary decisions. An appellate court can interfere with the exercise of the discretion by the first instance judge only where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree*": Broughton v Kop Football (Cayman) Ltd [2012] EWCA Civ 1743, paragraph 51 per Lewison LJ."

17. I would summarise, and identify the most pertinent parts of, the reasoning of the Deputy Master as follows:

- "*Unfortunately the claimant and his advisers decided not to disclose that to the defendant and third party, and not to make any application at that stage to adduce different expert evidence. The claimant's position, as I think I can understand it from Mr. Steinert's skeleton argument, is that during this period, and until the end of 2013 there were various comings and goings with regards to seeking to settle the proceedings by ADR, in particular at mediation. I do not know if that ascribes too much to what is in the claimant's mind, and as I*

have said that it was unfortunate that the claimant did not disclose the position to the defendant and third party because in my judgment the claimant ought to have done so." Para. 11

- This was not a case about relief from sanctions within the guidelines of the well-known recent Court of Appeal decision in Mitchell because the Claimant had already served the Dall report before Master Bragge's directions – para. 16
- The Claimant could simply rely upon Mr. Dall's report as hearsay but that would not be satisfactory – para. 18
- This is an application for an extension of time to adduce expert evidence – para. 19. On that basis:

  "20. I have to consider the application against the background of the overriding objective to deal with cases justly. I have to consider whether the application could and should have been made earlier, and I have to consider and balance the consequences of not granting the application. I have already made clear that the application could and should have been made earlier. While it goes some way to explaining its lateness by the hope that the proceedings might be settled, I do not regard this as an entirely exculpating factor.

  21 Against that, if I refuse the application the claimant's case in reality cannot proceed. It would be without expert evidence save only possibly for Mr. Dall's witness statement on which he cannot be cross-examined. The claimant's solicitor has said in evidence that the case really could not be proceeded with, and I think that is probably correct. I also need to consider that the consequences of permitting Mr. Yates' expert evidence now is that a considerable burden would be placed on the experts for the defendant and third party in having to address it, and that might - I think the defendant and third party, at least the third party said, almost certainly would - require the trial date to be aborted. I accept that if the trial date is aborted, that is a prejudicial factor. It causes enormous inconvenience. It causes disruption to the list and to other litigants.

  22. In the end and balancing all these factors my judgment is that if the claimant's case was to come to a sudden end because of the lack of expert evidence, that would be a greater injustice than the injustice that would be inherent and is inherent in allowing the application. It seems to me that professional valuers such as those instructed by the defendant and third party should be able to address Mr. Yates' report, which they have already had since the end of last year even if, as I was told, they have not done any work on it, and produce any further amendments to their existing reports at a time which would not threaten the trial date, even if the timetable is tight."

- There is probably no need for an adjournment of the trial – any adjournment would not in any event be lengthy – para. 23
- But that is not the end of the matter - para. 24

- This is not a case of relief from sanctions because Mr. Dall's report had already been served – para. 25 (echoing para. 16 above)
- If it is a case of relief from sanctions, then

"27. Directing myself in accordance with Rule 3.9, I need to deal justly with the application, and it would seem that the matters in sub-paragraphs (a) and (b) have some sort of particular importance because they appear in the rule itself. For reasons I have already given, I do not think that this is a case about enforcing compliance with rules, practice directions and orders because it is not clear to me that there has been a breach, or a sufficiently serious breach, of any."

...

29. So far as there is a bearing on the case from the Mitchell decision, it seems to me that this is in a different category, because what happened in Mitchell was a breach of a time limit set either in a rule or a court order to file a costs statement. It is against that context that one can understand the emphasis in Mitchell in enforcing compliance with the rules, practice directions and court orders. Mitchell itself considered cases where the failure to comply might be for reasons outside the parties' control. In this case it was outside the claimant's control that Mr. Dall was to be unavailable. The only matter he is to be blamed for, and I do blame him for, is not applying sooner. So even if this was, against my main view, a claim for relief from sanctions I would grant that relief."

..

31. It was also put to me that there had been a breach of the Practice Direction to Part 23. Practice direction 23A at paragraph 2.7 reads: "Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it." It could be said that the claimant is in breach of that practice direction because it was necessary or desirable to make the present application much sooner. The words are "necessary or desirable". It is not so clear-cut to me that in the circumstances facing the claimant and with negotiations and a mediation on foot it was either necessary or desirable to make this application sooner, although I do think it certainly would have been preferable to have done so. Even so, and even if there had been a breach of this practice direction at 2.7, I would still reach the same conclusion – that the justice of the case is that the claimant should be able to rely on the evidence of Mr. Yates[.]"

The applicable rules of court and guiding principles

18. The rules and practice directions material for present purposes are CPR 1.1 (The Overriding Objective), 3.1(2)(a) (power to extend time for compliance even after it has expired), 3.9 (relief from sanctions), 35.4 (court permission needed for expert evidence), and Practice Direction 23A para. 2.7. The latter PD provides:

"Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it."

19. There have been cited to me a number of recent cases. They all turn on their facts. Some are true cases of relief from sanctions, i.e. cases where the order or direction which has not been complied with expressly provides for a sanction. Some are cases which are in substance if not in form cases of relief from sanctions, such as applications for the retrospective extension of time, i.e. where a party is late in serving a document which it relies upon. The present case, in my judgment, is analogous to such an application, but it has the added feature of whether the Claimant acted wrongly in failing to disclose the withdrawal of Mr. Dall.

20. The guidance given in the Mitchell case, [2013] EWCA Civ 1537, is obviously very important in the present context. I will not overburden this Judgment with extensive citations from it. I can best express the guidance I derive from the Mitchell case in the present context by respectfully adopting what Mr Justice Andrew Smith said in his very recent decision in AEI v. Alstom [2014] EWHC 430 (Comm). That was a case where a claimant had served its particulars of claim "realistically" 20 days late under the rules (without there being any sanction in the rules expressly provided for such breach). The learned Judge said:

> *"46. ..... Alstom's real argument is the importance of enforcing the requirements of the CPR.*
> *47. One reason that dealing with a case in accordance with the overriding objective includes enforcing compliance with rules, practice directions and orders is to enable the courts' resources to be shared fairly between litigants, and to prevent a defaulting party from using them excessively. As I have said, AEI's non-compliance with the CPR did not have a significant impact on resources. However, there is a more general reason that the Court of Appeal has emphasised: it is considered that* ***"once it is well understood that the courts will adopt a firm line on enforcement, litigation will be conducted in a more disciplined way and there should be fewer applications under CPR 3.9. In other words, once the new culture is accepted, there should be less satellite litigation, not more":*** *Mitchell (loc cit) at para 48, and see para 60. I must balance this against my conclusion that as between the parties it is a disproportionate response and unjust to refuse an extension and strike out the claim form. ....."*

21. I think I should make it clear, however, that my agreement with the above passage in his Judgment should not be taken as agreement with what follows it. I would respectfully doubt whether the learned Judge then went on, in the following section of his Judgment, to apply correctly what the Court of Appeal had said about the result in his earlier Raayan al Iraq decision, [2013] EWHC 2969 Comm. In Mitchell, the Court of Appeal significantly did not say that his earlier case had been wrongly

decided, only that it disapproved of his reasoning. In its later decision in Thevarajah v. Riordan [2014] EWCA Civ 14, in my judgment it is clear that Richards LJ was not saying that Raayan al Iraq had been wrongly decided: all he was doing, consciously *obiter* and without argument, was echoing the Mitchell judgment, i.e. it was the reasoning alone that the Court of Appeal disapproved. So, whilst I agree with the passage from his Judgment cited above, that is not to be taken as agreement with what follows. In my judgment, there is no reason to doubt that Raayan al Iraq was rightly decided on its facts. It was a case where it would bring the law into disrepute with right-thinking users if the courts were to enforce procedural discipline by striking out the claim. My understanding of Mitchell is that the court should strive to be a tough but wise, not an officious or pointlessly strict, disciplinarian.

The significance of the Claimant's delay in disclosing Mr. Dall's withdrawal

22. The Claimant's delay in disclosing Mr Dall's withdrawal as an expert in the case is the pivotal issue in this case. I will express my conclusions on it.

23. I was referred to para. 8.12 of the Chancery Guide: where a witness statement has been served and a decision has been made not to call that witness, prompt notice must be given of that fact to the other side. In practice, that rule may be more honoured in the breach, because of the difficulty in proving when the material decision has been made. Mr. Steinert also accepted in oral submissions, rightly so in my judgment as CPR PD 35 para. 2.5 expressly so provides, that if Mr. Dall had informed his client that he had changed his opinion, his client would have been under a duty to bring that to the attention of the parties and also as appropriate the court. An expert is, of course, in a different position to that of a witness of fact: not only does the court have to give express permission for expert evidence (CPR 35.4), but the expert owes an overriding duty to the court to give independent advice. Mr. Steinert submitted, however, that his client was under no duty to notify the court or the other parties that Mr. Dall had told his client that he was withdrawing from the case.

24. As the Claimant acknowledges, the expert evidence was critical to the Claimant: it was his case essentially on both liability and quantum. Master Bragge's directions envisaged a sequential exchange of expert evidence, with the Bank and the Surveyor responding to the Claimant's expert evidence once it had been finalised. They also

envisaged that, following that exchange of expert evidence, the experts would meet and seek to narrow the issues. In those circumstances, in my judgment there was no excuse for the Claimant withholding the information about Mr. Dall's withdrawal. The Claimant's counsel submits that whether or not to disclose the information about Mr. Dall was one of those tricky areas of professional judgment where professionals can reasonably differ and the rules are unclear. I disagree emphatically. In my judgment, it was wholly improper for the information about Mr. Dall's withdrawal to be withheld beyond a reasonable period to allow the Claimant to decide whether he could persuade Mr. Dall to change his mind or that some other arrangement could be made which would mean that the Claimant could still rely on Mr. Dall. Once the Claimant had decided that he had to find a new expert to replace Mr. Dall, which in the absence of evidence to the contrary I infer to be very soon after 3 May 2013, and most probably even before the listing appointment on 10 May 2013, then it is clear in my judgment that the Claimant should have disclosed the problem he faced to the court and the other side. For all the court knows, given the claim of the Claimant to privilege in respect of correspondence with prospective experts which has not been disclosed, some potential experts may have had to refuse instructions in the case because they were not available for a trial in the trial window. There is little doubt that the Court would have been sympathetic to the Claimant if it had applied to the court promptly for directions, because Mr. Dall's withdrawal was outside his control. The inference is irresistible on the evidence before me, particularly the correspondence I have referred to after service of the expert reports in August 2013: the Claimant withheld the information from the court in order to see if he could settle the case in a proposed mediation on favourable terms before he disclosed his difficulty to the other parties and thereby undermined his negotiating position. That strategy failed when the mediation was delayed beyond the end of November. A mediation conducted in, say, October 2013 would have been a mediation conducted on a premise which the Claimant knew to be false unless of course he disclosed his problem with Mr. Dall.

25. It is clear furthermore in my judgment that the Bank and the Surveyor will have suffered serious prejudice as a result of the delay in the disclosure of this information if the Claimant can rely upon Mr. Yates' report. They have responded, as directed, to Mr. Dall's report. The Claimant has now seen their experts' positions and has the

forensic advantage of preparing his new expert's reports in the light of it. The Bank and the Surveyor will have to respond again to a wholly new expert report if Mr. Yates' 2nd report is allowed in. The trial will have to be adjourned in my judgment if it is let in: it would be wholly unfair to allow the trial to take place in the current circumstances. In this connection, the words of Waller LJ (said in the context of late amendments) are in my judgment directly applicable in this case:

> "*In the modern era it is more readily recognised that, in truth, the payment of the costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time and may not adequately compensate him for being totally (and we are afraid there are no better words for it) 'mucked about' at the last moment. Furthermore, the courts are now much more conscious that in assessing the justice of a particular case, the disruption caused to other litigants by last minute adjournments and last minute applications have also to be brought into the scales.*"
>
> *Worldwide Corporation v GPT Limited* [1998] EWCA Civ 1894, cited in *Swain Mason v Mills & Reeve* [2011] 1 WLR 2735 with approval in at paragraph 69.

26. Taking all the above factors together, the Claimant's conduct amounted in my judgment to a serious abuse of the process of the court.
27. The Claimant's counsel submitted that there was no abuse because para. 17 of Master Bragge's order covered the situation which had arisen: his client had up to the end of November 2013 to disclose Mr. Dall's withdrawal. I reject that submission. The purpose of para. 17 was to ensure compliance with all the directions generally by the end of November at the latest – it did not excuse non-compliance with them, or any other abuse of process in relation to their operation, before then.

The Deputy Master's judgment

28. In my judgment, the Deputy Master failed to appreciate that the Claimant's conduct amounted to a serious abuse of the court's process. In particular, as paragraphs 11 and 31 of his judgment show, he regarded the Claimant's desire to settle first without disclosing the problem with Mr. Dall as an exculpatory factor whereas it was in my judgment clearly an inculpatory factor. He further failed to find, as he should have done, that the Bank and the Surveyor would suffer serious prejudice as a result if the

new expert evidence were allowed in. He made a fundamental error of principle and an error of law.

29. For good measure, in my judgment the Deputy Master also failed to apply the important guidance given by the Court of Appeal in the Mitchell case. It was the Claimant's clear duty, in my judgment, under Practice Direction 23A para. 2.7 to apply to the court for further directions in respect of expert evidence very soon after 3 May 2013. He did not need to wait until he had a new expert's report. The court would have managed the time within which the Claimant had to identify and instruct a new expert. It would have been sympathetic to the Claimant. As it is, if Mr. Yates 2nd report is allowed in, the trial would have had to be vacated, to the detriment of other court users who would have liked such a trial window. It is an important factor that the Court should enforce procedural discipline in order to raise standards of time-keeping in the courts, which the Deputy Master did not do.

Disposal

30. Since the Deputy Judge's decision cannot therefore stand, I therefore have to exercise my discretion as to whether or not to grant to the Claimant the permission he seeks. The starting point in my judgment is the clear and serious abuse of the court's process by the Claimant, coupled with the prejudice to the Bank and the Surveyor which I have already referred to. On the other side of the balance is the serious prejudice to the Claimant if he is denied permission to rely on his new expert. In my judgment, the balance of justice as between the parties comes down firmly in favour of refusing the Claimant's application for permission to rely upon the new expert. He has only himself to blame for his predicament – he gambled that he could settle the case on a basis which he knew to be false, he has lost the gamble and he must make do with the only conceivable theoretical justification for the non-disclosure (which I derive from his Counsel's submission I set out in paragraph 11 above), namely that he was always going to fall back on the Dall report but without Mr Dall. That is where I see the justice of this case. I would decide the case on that basis but if necessary I would add that it is reinforced in my judgment by the Mitchell guidance. And on any basis in my judgment the Deputy Master plainly reached the wrong conclusion.

31. I would be prepared to give directions which provide that the Dall report is in evidence at trial even though Mr. Dall may not attend or otherwise engage in the directions for the experts to co-operate in narrowing the issues, leaving it to the trial

judge to attach such weight to the Dall report as is appropriate in all the circumstances. I appreciate, however, that this may be little comfort to the Claimant in the light of the findings I have expressed in this Judgment. It is enough, however, for me to decline to accede to the application by the Bank to strike out the claim. It is for the Claimant to decide what course he wishes to take.

32. Directions are also needed for the exchange of witness statements before trial, which I trust the parties can agree.

33. Otherwise, I allow the appeal and dismiss the Claimant's application for permission to rely upon any further expert evidence.