IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY APPEALS LIST
[2020] EWHC 3871 (Ch)

No. CH-2020-000107

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 17 December 2020

Before:

MR JUSTICE MILES

B E T W E E N :

M/S UNIQUE PART TRADING LLC & ANOR — Claimants/Appellants

- and -

REGAL LODGE ROAD LIMITED — Defendant/Respondent

MR D. MACPHERSON (instructed by Zaiwalla & Co Limited) appeared on behalf of the Claimants/Appellants.

MR J. DAVEY QC (instructed by Clyde & Co LLP) appeared on behalf of the Defendant/Respondent.

J U D G M E N T

(v i a M i c r o s o f t T e a m s)

MR JUSTICE MILES:

1 This is an appeal from the order of Deputy Master Linwood of 13 March 2020 by which he which dismissed an application by the claimants to set aside an order of Deputy Master Arkush of 3 February 2020 striking out the claim for failure to serve particulars of claim within the time required by the CPR.

2 The proceedings relate to the development of some flats in North London overlooking Lord's Cricket Ground. In brief summary, the defendant agreed to sell a number of flats off plan to one of the claimants. There were disputes between the parties that led to a series of further agreements by which the parties sought to resolve their differences. There were three supplemental agreements in all. The further agreements changed the dates for completion, the specification of the works, and the terms on which payments were to be made. The claimants paid certain sums to the defendant as deposit and, in addition, advances in respect of the construction works. The total contract price was more than £5 million. The claimants paid more than £700,000, including a deposit.

3 The relationship continued unhappily. Ultimately the defendant required the claimants to complete the purchase in November 2019. The claimants rejected the notice on the basis that the defendant had failed to complete the works by 27 November 2019. The defendant agreed to extend this deadline but, when it was not met, served a formal notice to complete. The claimants continued to contend that the construction works were defective and that, therefore, the defendant was not ready, willing, and able to complete. The defendant said that, if there were any defects, they were in the nature of snagging.

4 On 17 December 2019 the defendant terminated the contract and forfeited the deposit. The defendant then proposed to exchange contracts with another purchaser. The claimants commenced proceedings on 14 January 2020 seeking a declaration that the termination of the contract was ineffective, and an injunction preventing a sale to a third party. They applied for an interim injunction and the defendant gave a short term undertaking. Trower J ordered the claimants to fortify their cross-undertaking in damages by paying £1.25 million as fortification in default of provision of which the undertaking would be released. As the funds were not forthcoming, the undertakings were released and on 24 January 2020 Trower J made an order dismissing the application for an injunction and ordering the claimants to pay £27,900 as costs. The defendant sold the flats shortly afterwards to a third-party purchaser.

5 The claim form was not endorsed with particulars of claim. In the letter serving the claim form, the claimants' then solicitors stated that particulars of claim would be served separately in due course. The deemed date of service of the claim form was 17 January 2020. Particulars of claim were therefore required to be served under CPR 7.4 by 31 January 2020. The claimants did not seek an extension of time before 31 January 2020. The particulars of claim were not served by that date. The next working day, 3 February 2020, the defendant applied for an order under CPR 3.4 to strike out the claim. It asked for the application to be dealt with on paper and, on the same day, Deputy Master Arkush struck out the claim. He gave the defendant the standard permission to apply to set aside his order. The claimants have made a number of criticisms of the procedure adopted by Deputy Master Arkush in making his order. However, they did not claim that these were matters for me to determine and I make no comments on that point.

6 The claimants duly applied to set aside the order of Deputy Master Arkush. Ms Shaikh, the then solicitor for the claimants, stated in the evidence in support of the application to set aside the order that the claim form contained particulars of claim in a section headed "Claim form endorsement". She asked for thirty-five days to provide further and better particulars of that

claim. That position was at odds with her firm's letter of service which said that particulars of claim would be served separately and in due course. The contention that the claim form contained the particulars of claim was not pursued before Deputy Master Linwood and has not been argued on this appeal.

7 On 9 March 2020 draft amended particulars of claim were exhibited to Ms Shaikh's second witness statements. This draft did not contain a signed statement of truth. Ms Shaikh said that the failure to serve the particulars of claim had arisen from her own misunderstanding and pressure of work. She said that she had thought that the endorsement in the claim form constituted particulars of claim. She explained that the second claimant travelled extensively and had not yet been able to confirm that he was ready to sign the statement of truth. However, during the hearing, counsel for the claimants explained that the particulars of claim had, by then, been approved by the second claimant.

8 The defendant's solicitor, Mr Stephens, served a witness statement on 9 March 2020 referring to the test in the well-known case of *Denton v TH White Limited* [2014] EWCA Civ 906. He said that, though framed as an application to set aside the order of Deputy Master Arkush, it required the claimants to justify an extension of time for serving the particulars of claim late.

9 Deputy Master Linwood heard the application on 13 March 2020. The costs ordered to be paid by Trower J had not been paid by then. The parties' counsel agreed that the hearing should be conducted on the basis of the principles in the *Denton* case. Counsel for the claimants expressly stated in his skeleton argument that the claimants agreed to that course. That skeleton was of course served in advance of the application. The skeleton argument said that the reason for the failure to serve the particulars of claim had been confusion.

10 Counsel pointed out in his skeleton that if the order of Deputy Master Arkush was not set aside, it would, as he submitted, mean that the defendant would have a windfall. During the course of the hearing counsel for the claimants submitted that the result of a refusal to set aside the order would be disproportionate. He said that the claimants would undertake to pay the outstanding court costs and to serve the particulars of claim in a day or so if the Master was minded to set aside the order of Deputy Master Arkush.

11 I should also explain that the hearing lasted some thirty minutes or so. The decision that the Deputy Master had to make was the kind of case management order that masters are required to make daily, in dealing with a large number of cases.

12 The Deputy Master gave an *ex tempore* judgment immediately after hearing submissions. He decided that the failure to serve the particulars of claim was a serious failure. He decided that there was no adequate explanation for the delay. He then went on to consider the third limb of the *Denton* test, namely, all of the circumstances of the case. He decided that the defendant had not been opportunistic in applying to strike out without warning the claimants. He gave some weight to the failure of the claimants to pay the earlier costs order of Trower J. He noted that there was still no signed statement of truth on the draft particulars of claim. He took account of the risk that if he did refuse to set aside the earlier order and the claimants brought a fresh claim, the defendant might apply to strike that out too but concluded that that was not a reason for refusing to strike out. He declined, in all the circumstances, to set aside the earlier order. He did not expressly refer to the concept of the proportionality of the outcome. I shall return to the significance of this in a moment.

13 The claimants have advanced a number of grounds of appeal. They say, in broad terms, that the Deputy Master followed the wrong test; alternatively, that he applied the *Denton* test

wrongly; that he misunderstood the concept of an application being made opportunistically; and that he failed to take into account the absence of prejudice to the defendant. They also say that he operated on a mistaken understanding of the facts concerning certain monies which were returnable by the defendant to the claimants and which were greater than the amount of costs ordered by Trower J.

14 There are essentially two main applications and one subsidiary application. The two main applications are the substantive appeal itself and an application by the claimants to adduce evidence which was not available to the court below. The subsidiary application is to be allowed to run a point which was not made in the court below to the extent that may be necessary.

15 I shall return to the particular grounds of appeal below. I should though start with some general points.

16 The first is that the decision was a case management decision made at a hearing listed for thirty minutes. The Deputy Master had clearly read the evidence and the skeleton arguments filed in advance of the hearing. He gave a short *ex tempore* judgment (as was fitting). The judgment is to be read fairly and not as one would read a statute, and it is also to be read on the footing that the Deputy Master understood the various submissions that were made to him.

17 Second the guidance in paragraph 52.21.5 of the White Book explains that reasons for judgment will always be capable of having been better expressed. A judge's reasons should be read on the assumption that the judge knows, unless demonstrated to the contrary, how to perform their functions, and which matters they should take into account. An appellate court should not substitute its own discretion for that of a judge by a narrow, textual analysis which enables an appellate court to claim that there has been a misdirection.

18 Third, it has often been said that appellate courts will uphold robust case management decisions of first instance judges, reached fairly (see, for example, *The Commissioner of Police of the Metropolis v Abdulle & Ors* [2015] EWCA Civ 1260 at [26] - [28]).

19 The question for this court is not whether it would have reached the same conclusion but whether the Deputy Master went wrong.

20 I turn to the specific grounds of appeal. The first is that the Deputy Master applied the wrong test. It is said that he should have applied the test for strikeout under 3.4 of the CPR, not the test for relief from sanction under CPR 3.9. It is said that the three-stage *Denton* test is relevant but not determinative.

21 The starting point is that the parties agreed before the Master that he should follow the criteria set out in the *Denton* case. The parties structured their submissions on the basis of that agreement.

22 The claimants now submit that counsel previously instructed was wrong to agree that approach. They rely, in particular, on the case of *Walsham Chalet Park Ltd (t/a the Dream Lodge Group) v Tallington Lakes Ltd* [2014] EWCA Civ 1607. That case has been followed in many subsequent cases. The claimants argue that *Walsham* shows that where an application to strike out is made under CPR 3.4 for failure to comply with a rule, while the *Denton* principles are relevant and important, the court must make a proportionality assessment and decide whether it is appropriate to strike out or not. They say that the court may have a number of sanctions available to it, including, for example, security for costs, an order for the payment

of costs, and other conditional orders; and that the court should look at the range of responses available to it before deciding whether to strike out the claim.

23 I was also taken to a series of cases including *Price v Price (t/a Poppyland Headware)* [2003] EWCA Civ 888 where the Court of Appeal held that on an application for further time to serve particulars of claim made after the expiry of the period for service, the court should apply CPR 3.9 by analogy. The Court of Appeal pointed out that if time was not extended, the claimants who had not served particulars of claim would not be able to proceed with the action. This case is noted in the White Book as a guide to extensions of time in these circumstances at paragraphs 7.4.3 and 7.6.8.

24 In *Price v Price*, Brooke LJ referred to the concept of proportionality. He also explained that, in general, where the court properly applies its mind to the requirements of CPR 3.9 and acts in accordance with that rule, it will generally have complied with the requirement of proportionality as spelt out in the European jurisprudence underlying Article 6 of the European Convention on Human Rights.

25 The claimants say that to the extent this is a new point not argued below, it is one of law. They refer to the guidance about taking viewpoints on appeal summarised in *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337 at [25] - [28]. Snowden J, who gave the lead judgment in that case, set out the main principles at paragraph 25.

26 The defendant says, that to the extent that the claimants are running a different case, they should not be given permission. They say that they would be prejudiced were the court to entertain a different approach. They say that the agreed basis of the hearing in the court below was to follow the *Denton* principles. The parties structured their arguments on that basis and that was how the Deputy Master approached things. They say that the hearing in the court below should not be treated as a dress rehearsal. This is a review and not a re-hearing and that if the argument was that an entirely different approach should have been taken, no doubt the way that the matter would have been addressed in the court below would have been different.

27 I consider that there is a good deal of force in the defendant's submission that had the basis of the hearing not been as agreed, the submissions and the hearing would have taken a different course. I note that similar a similar issue in the *Walsham* case, where an argument not run below (based on the rules concerning a failure to serve witness statements on time) was not permitted to be run as the argument would have been approached rather differently. However, for reasons which follow, I do not need to reach a firm conclusion on this point.

28 I have concluded that the Deputy Master was justified in using the *Denton* principles as the framework for his decision. There are several reasons for this.

29 First, I consider that the Deputy Master was justified in addressing the application to set aside the order of Deputy Master Arkush the light of the circumstances as they stood on 13 March and he was not required to blinker himself to events since the strikeout order of 3 February 2020. In particular, he was, to my mind, entitled to give appropriate weight to the failure of the claimants to serve finalised particulars of claim by the date of the hearing before him and to pay the outstanding costs order made by Trower J by that date.

30 Second, though the matter before him was an application to set aside the order of Deputy Master Arkush, that could only succeed if the claimants could justify an extension of time for service of the particulars of claim. If they could not do that, then there was no logical basis on which he could set aside the earlier order of Deputy Master Arkush. Since the claimants had

not applied for an extension before expiry of the time limit, *Price v Price* established that the court had to apply the approach governed by CPR 3.9.

31 Third, I am not persuaded that the approach and *Walsham* would have led to a materially different approach from that set out in *Denton*. In *Walsham*, Richards LJ explained that the principles in *Denton* were relevant and important even to the situation before the court in that case. The distinction he identified was that in a case where there was an existing sanction, the court had to proceed on the basis that the existing sanction was proportionate. Where there was no existing sanction, the court had to consider the proportionality of the order being sought afresh. It is important to note, however, that he rejected the attempt by the appellant to argue (on the basis of CPR 32.10) that the respondent would not have been allowed to rely on witness evidence at trial and would therefore not have been able to prove its case. In other words, the appellant was not able to run an argument based on an implied sanction. That was because the appellant did not run the point below. Richards LJ acknowledged that the arguments might well have been different had that point been available.

32 In the present case, as I have said, if the claimants could not justify an extension of time, the action could not proceed, and there would have been no basis for setting aside the order striking out the claim for failure to serve the particulars of claim. As already explained, in light of *Price v Price*, the claimants had to persuade the Deputy Master at the March hearing that they should be granted an extension of time and therefore had to fulfil the requirements of CPR 3.9. In other words, this is a case where there was at least an implied sanction by reason of the failure of claimants to comply with the rules of the court.

33 Fourth, and in any event, the third limb of the *Denton* test requires the court to consider issues of proportionality. That is seen from the reasoning in *Denton* itself at [65]. It was also a factor expressly addressed in *Price v Price*, as I have already explained.

34 The concept of proportionality is indeed a drumbeat that runs through the relevant jurisprudence. It is found in the overriding objective itself. A shorthand for the concept used there is dealing with cases justly. CPR 3.9 requires the court expressly to have regard to this. Moreover, as Brooke LJ explained in *Price v Price*, CPR 3.9, if properly followed, is likely to be compliant with Article 6, which has proportionality at its core. The third limb of *Denton* in turn requires the court to consider all the circumstances of the case so as to enable the court to deal justly with the application, including the specific matters referred to in the rule.

35 Fifth, it was self-evident that the consequence of refusing to set aside the order of Deputy Master Arkush would be that the present proceedings would end. This point was indeed at the heart of the claimants' submissions. So when the Deputy Master was asked to address the third limb of *Denton* and the requirement to deal justly with the application, he is to be read as having in mind the consequences for the claimants of dismissing their application.

36 Ultimately, the submission of counsel for the claimants on this appeal was that the Master was obliged separately and expressly to consider the issue of proportionality. He submitted that it was important that a separate exercise takes place in order to ensure that the judicial mind is properly applied to the requirement. While I accept that proportionality is an important element of the overall exercise, particularly in any case involving the striking out of a set of proceedings, and that the court must apply its mind to proportionality, I do not accept that the court has expressly to use the precise word when stating its reasons.

37 I therefore conclude, for these reasons, that the Deputy Master did not err in principle in following the course agreed by the parties of structuring the debate and analysing the case

using the *Denton* framework as long as he did address his mind to the question of proportionality. As I have already said, I consider that he did (see also further below).

38 The next set of grounds of appeal (which overlap with the first) concerns the application of the *Denton* principle and, in particular, whether the Deputy Master did consider the issue of proportionality. As I have already said, an appeal court starts by assuming that the lower court has understood the relevant principles in the absence of some evidence to the contrary. It also accepts that judgments are not a perfect or comprehensive record and the appellate court does not mark judgments like exam papers. Here, the principles are very well-known. The Deputy Master referred to a number of passages from *Denton* itself. It is to be assumed that he understood the principles set out in *Denton* and that he understood the submissions that were made to him.

39 Though he did not refer to the concept of proportionality in terms, on a fair reading of the judgment he took it into account.

40 First, as I have already explained, the concept of proportionality is a drumbeat of the relevant jurisprudence and is referred to in *Denton*. Second, the concept was expressly mentioned by counsel for the claimants during the hearing. At one point in the hearing, he said this:

> "Thirdly, where does justice lie? I ask two rhetorical questions: should the claimants be denied the opportunity to pursue their claim and, secondly, should the defendant be allowed to keep a £600,000 windfall payment as a result strikeout? In my submission, strikeout in these circumstances is disproportionate and the order of Deputy Master Arkush should be set aside."

41 It is right to assume that the Deputy Master had these submissions in mind. Indeed, at paragraph 22 of his judgment, the Deputy Master quoted or paraphrased the submission of counsel that I have just quoted. Moreover, at paragraph 28, the Deputy Master specifically addressed another submission of counsel for the claimants, that the court should make a conditional order setting aside the order of Deputy Master Arkush on the basis that the costs would be paid and the particulars of claim would be served with a signed statement of truth forthwith. Here, the Deputy Master considered the alternatives which had been proposed by the claimants and decided that they did not meet the justice of the case. In doing so he was carrying out a proportionality exercise. The claimants did not suggest any other form of order that might be made (such as the provision of security for costs) and I consider that the Deputy Master was justified in considering the alternative which was actually proposed to him. He thought about it and rejected it.

42 I therefore conclude that the Deputy Master did, indeed, address his mind to proportionality issues and that even if he had been taken to the test in *Walsham*, it would have made no material difference to his decision. Putting it another way, I do not think that there was an error of principle and nor do I think that he erred in his approach to the issue of proportionality.

43 The next series of grounds of appeal concern the application of the *Denton* test. In approaching these, I bear in mind the general principle that the function of the appellate court is not to substitute its own view for those of a first instance judge. It is to determine whether the court below has gone wrong and it is not sufficient to argue that the court at first instance gave too much weight or too little weight to particular factors unless the decision was one no reasonable tribunal could reach.

44 The first complaint under this head arises under the third ground of appeal: that the Deputy Master wrongly considered under the first stage of the *Denton* test that the failure to file particulars of claim by one day was serious and significant and that he should have concluded that it was not serious or significant. As to this, the concept of whether a breach is serious or significant is a matter that was referred to in the *Denton* case. It is not a statutory term or a term of art. In [26] of *Denton*, the Court of Appeal explained that it was not a hard-edged concept, that there are degrees of seriousness and significant, and that cases turn on their own facts. Another way of putting this is that it is an evaluative concept and where a court below reaches a decision on such a point, the appellate court will be slow to interfere.

45 Against this background, it seems to me that there was no error in the approach of the Deputy Master of a kind which would enable this court to interfere. In the first place, I did not accept that the failure was a failure of only one day. As I have said, I consider that the Deputy Master was right to consider the position in the light of the circumstances in March when he was deciding the matter. By March, the particulars of claim were well overdue and it was only on the day of the hearing that it was confirmed that the second claimant had confirmed the contents of the particulars of claim. In the run-up to the hearing, the position was that the second claimant had not been able to do that.

46 I also consider that the Deputy Master was entitled to conclude that the failure to provide particulars of claim in a case of some complexity, like this one, is a failure to comply with an important requirement of the rules. It would have been impossible, on the basis of the claim form alone, for the defendant to understand the case against it. Although a number of agreements were referred to, none of the terms were specified. Although defects were referred to, none of the defects were identified. It would have been impossible for the defendant to put in a defence to the claim form and, in any event, the rules make clear that it is only once the particulars of claim had been served that a defence is appropriate. I do not think that the Deputy Master can be faulted for concluding that the breach in this case was serious.

47 I turn to ground 4(c): that the Deputy Master wrongly concluded that the application by the defendant was not opportunistic. It is said that he should have decided that the defendant acted opportunistically by applying to strike out the claim form without having notified the claimants of its intention to do so. The concept of opportunism is taken from a passage in *Denton* at [39] - [45] where the Court of Appeal deprecated opportunistic behaviour. It is particularly important to bear in mind [41] which perhaps gives the clearest description of what might count as opportunistic behaviour. The Court of Appeal said that it would be wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied. The Court of Appeal then explained that in a case where (a) failure could be seen to be neither seriously nor significant; (b) where a good reason is demonstrated; or (c) where it is otherwise that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation.

48 Here, it seems to me that the defendant was entitled to view the failure as a serious one and the case is one where no good reason for the breach had been demonstrated, and that it was not obvious that relief from sanctions was appropriate. Again, it seems to me that there is a timing point here. The question for the Deputy Master was essentially to be tested as at the date of the hearing before him. Although the application in form was to set aside the order of Deputy Master Arkush, the question whether the claimants should be given an extension of time for the service of the particulars of claim was to be tested as at the date of the March hearing. It seems to me that the Deputy Master was entitled to conclude that the stance taken by the defendant in relation to the March hearing was not opportunistic.

49 I also note that by the date of the application to Deputy Master Arkush, no explanation had been given for the failure to provide the particulars of claim. Nor had the claimants sought agreement to an extension of time for service of the particulars of claim. They did not do so either in the period immediately following the order of Deputy Master Arkush. So I consider, for all of these reasons, that there is nothing in this ground of appeal.

50 Ground 4(a) is that the Deputy Master failed to take into account that the breach by the claimants had not caused any prejudice to the defendant. As to that, first *Denton* at [26] shows that prejudice to the defendant is no longer a requirement for the court to refuse relief from sanctions. It was one of the important sea-changes brought about by *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and *Denton* itself that it was no longer necessary for a party opposing relief from sanctions to show prejudice.

51 Second, the lack of prejudice to the defendant was a major theme of the submissions made by the claimants' counsel and, in my view, it is reasonable to suppose that they were very much in the mind of the Deputy Master. It is not particularly surprising, given the nature of the hearing and the *ex tempore* nature of the judgment, that he did not refer to it. In any event, it seems to me that this is a matter quintessentially of weight rather than one of principle. So I dismiss that ground of appeal.

52 The next ground of appeal, 4(b), is that the Deputy Master failed into account that striking out the claimants' claim might result in the claimants' being unable to pursue a valid claim because the risk that a second claim could also be struck out. I can deal with this quickly. As the Deputy Master expressly dealt with this point in his judgment at paragraph 29, it is clear that he had this risk in mind. Again, therefore, this is only a matter going to weight and I see no reason to think that it has led to an unreasonable or perverse exercise of discretion. So this ground of appeal is dismissed.

53 Ground 4(d) is that the Deputy Master failed to consider whether the defendant not notifying the claimants of its intention to apply to strike out affected the court's assessment of the claimants' conduct. It is said here that this should have led the Deputy Master to conclude that it reduced the seriousness of the claimants' conduct. This is, even in the way it is expressed, a point going only to weight. At any rate, I do not think that the defendant was under an obligation to notify the claimant of its apply to strike out. I also think, for the same reasons I have given earlier, that the question to be determined by the Deputy Master was to be determined as at the 13 March date when he heard the application rather than as at the February date when the order of Deputy Master Arkush was made. It seems to me this adds nothing of substance to the arguments about opportunism which I have already referred to.

54 The final ground of appeal is 4(e) which is that the Deputy Master wrongly categorised the failure by the claimants to pay the costs order made by Trower J on 24 January 2020 as serious. It is said that he should have decided that the failure to pay this costs order was not serious in circumstances where the defendant held, by solicitors, money returnable to the claimants but exceeded this sum. In dealing with this ground there are two limbs. First, to consider it on the basis of the evidence as it stood before the Deputy Master and, secondly, whether the court should now admit further evidence on this appeal.

55 As to the first of those points, I think the Deputy Master was clearly entitled to suppose that the non-payment of the costs order was an important matter. It was a breach of the order of the court and I do not think he can be criticised for reaching that conclusion.

56 Hence, this point turns on the claimants' application to admit further evidence. As to that, the general rule is that unless the appeal court orders otherwise, it will not receive evidence which was not before the lower court (see CPR 52.21(2)). The principles on which the power to order otherwise are not spelled out in the rule or any practice direction. Before the CPR came into force, the matter was covered by the decision in *Ladd v Marshall* [1954] 1 WLR 1489. Those grounds are:

> "...the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence most be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

57 In a number of decisions since the CPR, the Court of Appeal has made clear that the principles in *Ladd v Marshall*, though not binding on the Court of Appeal, are generally applied by the Court of Appeal in the exercise of its discretion whether to admit new evidence. The court must, of course, seek to give effect to the overriding objective of doing justice but, nonetheless, *Ladd v Marshall* remains of powerful persuasive authority.

58 A recent example of such a case is *Zipvit Ltd v Revenue And Customs* [2018] EWCA Civ 1515. At [41], Henderson LJ explained that:

> "...In short, the old *Ladd v Marshall* conditions, although no longer primary rules, have been said to still occupy the whole field of relevant considerations to which the appeal court must have regard; but they do not place the court in a straitjacket, and the court must always seek to give effect to the overriding objective of doing justice in the individual case..."

59 On the facts of the present case, applying those principles, in my judgment it is clear that the court should not admit this evidence. It is now accepted by the claimants that the first limb of *Ladd v Marshall* would not be satisfied. In other words, the evidence could, with reasonable diligence, have been obtained for use at the hearing below. Indeed, this seems self-evident. The evidence that is sought to be advanced is that whatever the outcome of the current dispute, the defendant was obliged to return to the claimants' sums in excess of the amount of the costs order of Trower J. The claimants and their lawyers could clearly have worked that out for themselves. It is a simple and rudimentary consequence of the terms of the contracts and the fact that payments had been made by the claimants to the defendant in respect of construction costs. If the claimants failed to adduce that evidence and explain the position to the court of first instance, it was their own doing and it seems to me that the basic principle of finality of litigation compels the court in this case to conclude that it would be inappropriate to admit this evidence on appeal. That is the position in relation to the way that the court has traditionally looked at its power under Rule 52.21(2).

60 Counsel for the claimants contended that the court should nonetheless allow the admission of this evidence on a different basis, namely by analogy with Rule 3.1(7) of the CPR. He argued that though there is no application under this rule, the court should be guided by analogy by the principles set out in the case of *Tibbles v SIG Plc (t/a Asphaltic Roofing Supplies)* [2012] EWCA Civ 518, in particular, as summarised by Rix LJ at [39]. He said that:

> "...where the facts on which the original decision was made were (innocently or otherwise) misstated."

61 In my judgment, there is no basis for applying that different rule by analogy. First, the approach of the courts to the admission of evidence on appeal is governed by the discussion summarised in paragraph 52.21.3 of the White Book. There is no suggestion there that the concepts relating to the different Rule 3.1(7) have any application. Second, the circumstances of such an application may well be different from an appeal but, in any case, as Rix LJ explained in [39(v)], questions may arise as to whether the misstatement (or omission) was, amongst other things, knowable or unknowable. This would be a matter going to the exercise of discretion. He said that:

> "...where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited..."

62 He also said in subparagraph (vii) that:

> "The cases considered above suggest that the successful invocation of the rule is rare."

He pointed out the interests of justice in the finality of the court's order, which means that it will normally take something out of the ordinary to lead to a variation or revocation of the order. Here, there is nothing unusual or extraordinary in the circumstances. The information which is now sought to be relied upon was known or ought reasonably to have been known to the claimants and if they failed to bring it before the court, they are responsible for that.

63 I have concluded that the appeal must be dismissed.

CERTIFICATE

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