Neutral Citation Number: [2024] EWHC 164 (KB)

Appeal Refs: QB-2022-000186
And
KA-2023-000037

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31st January 2024

**Before**:

**MR JUSTICE RITCHIE**

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**BETWEEN**

**BOIDUN JAIYESIMI**
**(Personal representative of the estate of OLUDOLPANO JAIYESIMI)**
**Claimant/Respondent**

**- and -**

**SUNDAY ADEYEMI KUKOYI**
**Defendant/Appellant**

**Angela Delbourgo** of counsel (instructed by **Alomo Law**) for the **Appellant/Defendant**.
**Rebecca Farrell** of counsel (instructed by **Tees Law**) for the **Respondent/Claimant**.

Hearing date: 23rd January 2024

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# Approved Judgment

This judgment was handed down remotely at 11.00am on Wednesday 31st January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

**Mr Justice Ritchie:**

**The appeals**

1. This judgment determines two appeals. The first in time (Appeal 186) is from a decision of HHJ Lethem (the Judge) made at the County Court sitting at Central London on 30.8.2022. The Judge ruled that the Defendant's application to amend the defence and counterclaim (the Amendment Application) was not filed properly nor was there service of an issued Amendment Application and hence refused to determine it. By notice of appeal dated 14.9.2022 the Appellant seeks, on 3 grounds, to overturn that decision. Permission to appeal was granted on the papers by Martin Spencer J. on 17.2.2023 on some of the grounds but not all.

2. The second in time (Appeal 37) is from another decision of the Judge made at the same Court on 20.1.2023. The Judge ordered that the Defendant's application for relief from sanctions (the Relief Application), imposed for failing to serve any witness statements on time in accordance with an unless Order, was dismissed with costs and hence the defence was struck out and judgment was entered for the Claimant. By notice of appeal issued on 23.1.2023 the Appellant seeks, on 12 grounds, to overturn that decision. Permission to appeal was granted on the papers by Stewart J on 19.9.2023. By an Order made at the same time that the appeals were listed to be heard together.

**Bundles and evidence**

3. The Court was provided with: (1) an appeal bundle for Appeal 37, (2) a bundle for Appeal 186, (3) a supplementary appeal bundle, (4) an authorities bundle and skeleton arguments. The Appellant relied on 3 skeletons: dated 16.1.2024, 15.7.2023 and 11.9.2022. It would have been more help if there was only one complete skeleton. The Respondent relied on one dated 16.1.2024. It would have helped the Court more if the digital bundles had been bookmarked and hyperlinked.

**The issues**

4. Appeal 186 concerns procedure and the Judge's rulings and findings that the Defendant failed to comply with an order to file and serve his application for permission to amend his defence and counterclaim on time and properly.

5. In Appeal 186 the issues are:

   (1) Did the Defendant file the notice of the Amendment Application properly in accordance with the Court's Order and on time? This concerns consideration of whether the Defendant complied with the rules on paying the fee for the Amendment Application.
   (2) Did the Judge misinterpret the law relating to filing, paying the fee and serving?
   (3) Did the Judge wrongly exercise his discretion in his case management of the Amendment Application?

6. In Appeal 37 the issue is: did the Judge wrongly exercise his discretion when case managing the Relief Application?

**Appeals - CPR 52**

**Review of the decision**

7. I also take into account that under CPR r. 52.21 every appeal is a review of the decision of the lower Court and will only be granted if the decision below was wrong or unjust due to a serious procedural or other irregularity.

**Fresh Evidence**

8. This appeal is restricted to the evidence before the lower Court unless, under CPR r. 52.21(2) and the three grounds in *Ladd v Marshall* [1954] 1 W.L.R. 1489 (CA), so in summary, new evidence is allowed in if it was: (1) not obtainable with reasonable diligence before the lower Court, (2) would have an important influence on the result and (3) is apparently credible, though not incontrovertible. No new evidence was put forward.

**Findings of fact**

9. I take into account the decisions in *Henderson v Foxworth* [2014] UKSC 41, per Lord Reed at para. 67; *Grizzly Business v Stena Drilling* [2017] EWCA Civ. 94, per Longmore LJ at paras. 39-40 and *Deutsche Bank AG v Sebastian Holdings* [2023] EWCA Civ. 191, by Lord Justice Males at paras. 48 – 55, that any challenges to findings of fact in the Court below have to pass a high threshold test. At a trial, the Judge has the benefit of hearing and seeing the witnesses which the appellate Court does not. In an interlocutory hearing this last principle has no application because no witnesses are called live.

**Appeals against case management decisions**

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

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

> the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the Judge."

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

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

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

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

**Chronology of the first action**

**Claim 893 – the Loan**

13. I hope I will be forgiven for using initials for the parties. It will assist in understanding this judgment because there were two actions with the claimant and defendant being reversed. Oludolapo Jaiyesimi (OJ), the wife of Biodun Jaiyesimi (BJ), issued a claim form on the 10th of July 2019 seeking £98,082.74 plus contractual interest at a rate of 12% per annum from Sunday Kukoyi (SK). In the particulars of claim, which were undated, OJ asserted the claim concerned a property at 7 Rainbow Court, London N15 [the Property] of which she was the leasehold owner. She asserted that before 2018 SK was the leasehold owner. However, SK lived in Nigeria and in 2008 wanted to raise a loan and so approached BJ. An odd arrangement was entered into whereby SK agreed to transfer legal title in the Property to BJ with a trust deed back to SK showing that he owned the equity in the Property. This would permit BJ to raise a loan by way of mortgage with Birmingham Midshires Building Society which would be applied for "the Defendant's purposes", that means SK's purposes. The transfer took place on the 7th of October 2008, the mortgage was obtained and the loan was spent, according the the pleading, in accordance with the "Defendant's instructions". The trust deed was entered between BJ and SK. Throughout this time the Property was let out and the agents collected rent and paid it

over to SK. It was asserted that SK later asked OJ (the Claimant) to pay the mortgage repayments (this implied that before the request SK had paid them) and she agreed to do so as a loan, with a contractual interest rate of 12%, repayable on demand. OJ asserted that she paid the payments until December 2018, which totalled just over £98,000. She made a demand for repayment of the loan which was not satisfied and then made the claim for repayment of the loan. Hence the proceedings.

14. There is no copy of the original defence in the appeal bundles, however there is a copy of a proposed draft amended defence and counterclaim which I have used to discern the original defence by ignoring the alterations. The date of the original defence has not been repeated on the draft amended defence. In the defence SK admitted the first two paragraphs of the particulars of claim (including that he owned the Property as a leaseholder only up to 2008) and asserted that it was BJ who approached SK in 2006 for a cash injection into BJ's business. For a reason which is not explained in the defence SK agreed to provide a "reference and letter of comfort". SK signed various documents not being aware that any of them was a mortgage secured on his Property or that the Property was being transferred BJ. Then in December 2014 the Claimant or BJ informed SK that BJ was filing for bankruptcy. SK admitted in the pleading that his Property was transferred to BJ in October 2008 but denied having any knowledge of signing the transfer. SK denied any knowledge of the mortgage advance and asserted that the documents he signed in 2008 were not a mortgage or a transfer. SK denied asking OJ to make the payments under the mortgage because he asserted he was not aware of the existence of the mortgage. The Defendant denied the contractual interest rate or any interest. No counter claim was made.

15. I stop here to refer to the law on pleading. Pursuant to *Henderson v Henderson* [1843] All E.R. Rep 378, the Courts expect all parties to plead out their whole case at the start.

**Claim 733 – the Frauds**

16. Two years later SK and his son issued a different action (number 733) out of Central London County Court on the 28th of August 2021 against BJ. The original particulars of claim in that action are not in the appeal bundles but the amended version is, from which I can discern the original pleading. SK pleaded that BJ was married to SK's cousin. SK pleaded he was close to BJ as a family member. SK asserted he had purchased the Property in October 1986, to enable his son to have a place to live whilst studying in the UK. The Property was transferred into the names of SK and his son. The Property was rented out from approximately 1989 when SK's son moved out and the mortgage was fully paid off by 2006. After that it was pleaded that BJ approached SK for money for his business and, after initial refusals, SK agreed to be a guarantor for BJ to raise money. No explanation was pleaded as to why he would have done that. He went to BJ's solicitor's office in Camden and signed a document the nature of which he could not remember. The second Claimant, SK's son, did

likewise. SK met BJ's then solicitor (not the solicitor handling the litigation) again, later in 2008 in Nigeria, and signed another document, the nature of which he did not identify in the claim. Then in late 2009 or January 2010 SK was asked to sign a one page document the nature of which SK does not know. In 2014 BJ informed SK that he was in financial trouble and SK asserted he found out that BJ had "somehow used the Property for the purpose of obtaining a mortgage". BJ mentioned potential criminal proceedings and bankruptcy but at the same time offered to pay the mortgage payments into the account of a Mrs Awodipe to be transferred on to the wife of SK. Those payments soon stopped and SK then agreed to make the mortgage payments out of his own account despite having alleged that BJ had fraudulently created the transfer of the Property and the mortgage upon it. So, it was pleaded that SK agreed to pay the payments under the allegedly fraudulently obtained mortgage. This continued from January 2015 onwards. SK alleged that BJ managed to "change the payment mandate to his own bank account" without SK's personal involvement or knowledge. SK asserted that BJ had not made any mortgage repayments since 2015 save for £1000. Many other matters were set out in the long and chaotic pleading, particularly allegations of fraud. SK sought an order declaring that the beneficial interest in the Property belonged to SK and his son; that the Property be transferred to SK and his son; that the Land Registry should register SK and his son as the registered proprietors; that BJ be declared liable for the mortgage in favour of the Bank of Scotland (no explanation was given about what happened to the Birmingham Midshires mortgage) and an order requiring BJ to reimburse SK and his son for all of the mortgage payments made since January 2014 (not 2015 as pleaded earlier in the body of the pleading).

17. It is tolerably clear from a reading of the claim brought by SK and his son in action 733 that it conflicted with the defence he had filed in action 893 in some respects.

**Orders and applications in the two actions**

18. At a time which is not set out on the draft order, a consent order was sent to Central London County Court in which BJ was substituted as Claimant in claim 893, his wife OJ having died and he being her personal representative.

19. On 5th August 2020 claim 733 was consolidated with claim 893, but a copy of that order is not in the appeal bundle.

20. On the 2nd of August 2021 HHJ Backhouse noted that SK and his son had issued an application for an indefinite extension of time to serve their witness statements and also three applications dated March, April and July 2021 for third party disclosure. SK and his son had failed to produce an agreed bundle for the hearing and failed to provide a case summary. In the recitals the Judge noted that both parties agreed that SK and his son were entitled to the entire beneficial interest in the Property and noted that transfer of the legal title to the Property from BJ to SK and his son was *not disputed* but that the mortgagor objected to the transfer without the mortgage being

paid off. The Judge noted the mortgagor was not a party and the Court had no jurisdiction to make the orders sought by SK without the mortgagor being a party. The case was listed for a later case management hearing and at that hearing SK and his son were ordered to explain how the Court could make the orders they sought in claim 733. In addition, it was ordered that any application by SK and his son to amend the pleadings in claim 733 had to be issued by 27.8.2021 accompanied by the draft amended pleading.

21. On the 10th of December 2021 Mr Recorder Robertson struck out claim 733 (I have not seen any judgment from the Recorder so do not know why) and ordered SK and his son to pay BJ's costs on an indemnity basis to be assessed later. The CCMC was adjourned, alongside SKs applications for extension of time to file and serve witness statements and SK and his son were ordered to serve evidence in support of their applications for 3rd party disclosure by 20th December 2021, otherwise the applications would be dismissed without further order. If evidence was filed on time, they would be heard with the adjourned CCMC. In addition, due to SK and his son's failure to serve a precedent H cost budget the Judge ordered that any application for relief from sanctions had to be served 21 days before the CCMC. This Order was not appealed.

22. On the 17th of June 2022 HHJ Lethem managed the next hearing in the remaining action (893). In the recitals he recorded that: (1) SK and his son had failed to comply with the order of Mr Recorder Robertson requiring filing and serving evidence in support of the three disclosure applications by the 20th of December 2021; (2) SK and his son had failed to file and serve the president H cost budget on time; (3) SK and his son had failed to apply for relief from sanctions more than 21 days before the hearing, having done so a mere two days before the hearing; (4) that two days before the hearing SK and his son had applied for permission to amend their defence and counterclaim; (5) at 5:05 pm on the day before the hearing SK and his son had applied for relief from sanctions in relation to the president H costs budget a second time; (6) SK and his son applied for an adjournment due to their late applications. He noted that all of the applications were made using the wrong claim number (733 which for the claim which had been struck out). HHJ Lethem ordered that the third party disclosure applications were to be dismissed and marked them totally without merit. He ordered SK and his son to pay the costs of those on an indemnity basis to be assessed at the next hearing. He dismissed SK's application for relief from sanctions and dismissed SK's application to amend his pleadings. He ordered SK and his son to pay the Claimant’s costs of both on an indemnity basis to be assessed at the next hearing. He adjourned the application for delayed service of SK's witness statement. He dismissed SK's application for relief from sanctions on the costs budget and approved only the Court fees element of SK's costs budget. He approved the cost budget of BJ. He ordered SK and his son to pay BJ's costs of the costs sanction application on an indemnity basis to be assessed at the next hearing. He reserved all further hearings to

himself. At paragraph 15 he ordered that any further application by SK for permission to amend the defence and counter claim:

> "must be filed and served by 8th July, in default of which no such application may be made without first obtaining the permission of the Court."

He went on to order that if an amendment application was filed and served on time then it was to be listed with certain listing directions. If no amendment application was filed and served on time then the Judge made directions for trial including listing the application to delay service of the witness statements on the 1st open date after 11th July 2022, dates to avoid, pretrial checklists and a trial to be listed between the 3rd of January and 28th of February 2022. This Order was not appealed. From then on Messrs. Alomo Law knew that they were not being paid for the defence by anyone other than SK and his son.

**The application to amend**

23. An application to amend the defence and counterclaim was made and "filed" by email at around 2pm on 8th July with the draft pleading attached. This was copied to BJ's solicitors by way of purported service. As a fact HHJ Lethem later found that no fee was offered or paid on that day. On Monday 11th SK's solicitor asserted in his witness statement that he tried to call the Court to pay the fee but could not get through so on that day he sent a letter with a cheque for the fee. That day a letter was sent to the Court with a cheque for the fee.

24. The amended defence and counterclaim is dated 7.7.2022. It is signed by SK's solicitor. In that draft pleading SK alleged that the transfer in 2008 by him to BJ was obtained by fraud and undue influence. He denied that he had received the loan sum of £140,000 or directed the investment of the sum, asserting he did not know it had been obtained. He asserted that the loan sum was paid to BJ's business: Bromwell Asset Management which it was asserted went bust in 2008 due to the financial crash. He asserted that the trust deed was also a fraud. He particularised the fraud as follows: he refused to invest in BJ's business but agreed partially to act a guarantor by providing a "reference or letter of comfort". He was misled by BJ's solicitor into signing the last pages of the transfer and trust deed without seeing the rest of the documents which he thought were the reference or letter of comfort. His son was likewise misled. He asserted the family relationship constituted undue influence. In so far as it was part of an investment he asserted it was in breach of the prohibition under s.19 of the Financial Services and Markets Act 2000 rendering it unenforceable against SK. SK and his son counterclaimed for paying the mortgage payments since 2014 of £28,508.84 and the outstanding mortgage loan sum of £147,390; or claimed £140,000 paid to Bromwell Asset Management and interest and costs.

25. Central London County Court is alleged to have failed to call SK's solicitors to take the fee from a credit or debit card over the phone, never cashed the cheque sent and

never issued the application. It was an agreed fact that the Court did list a hearing for the application on 30.8.2022. So, both parties proceeded and prepared for the hearing.

26. On the 30th of August 2022, before HHJ Lethem, the hearing was attended by counsel for both parties. Dealing with SKs application to amend his defence and counterclaim, in the recital to the order the Judge recorded that he had made a finding that SK's solicitors had sent an electronic application to the Court on the 8th of June 2022 (this was a typing error for 8th July 2022 ) indicating that they would pay the fee on the 11th of June 2022 (this was a typing error for 11th July 2022 ) and made a finding that the application was not properly filed and that a sealed copy was not served by SK on BJ. The Judge noted there was no application for relief from sanctions. The Judge did not deal with the substance of the Amendment Application because it had not been issued. The Judge also ordered SK to file and serve any witness statements to be relied upon at trial by 4:00pm on the 11th of October 2022 and in the event of failing to do so the defence was struck out without further order and the Defendant (SK) was debarred from defending and Judgment would be entered automatically for the sum claimed with interest at the Judgment rate (not the pleaded contact rate) to the date of Judgment and the Defendant was ordered to pay the costs of the action to be assessed if not agreed. The Judge also ordered SK to pay the Claimant's costs of the various dismissed applications in assessed sums totalling over £20,000. All of the costs awarded were to be paid within 14 days. Permission to appeal was refused.

**Appeal 186**

27. By a notice of appeal, which was undated, but issued on the 14th of September 2022, SK appealed the 5 costs orders made. In the wrong box in the notice of appeal, SK also appealed the finding of HHJ Lethem that SK's application to amend was not filed properly and on time. I note here that the appeal did not include an appeal against the finding that SK's application to amend was not served on time.

28. In support of this appeal SK relied on a witness statement from Samuel Alomo, his lawyer. There were three grounds of appeal drafted by counsel. The first ground was that the Judge was wrong to declare that SK had not complied with the order of 17th June 2022 to file and serve the Amendment Application by the 8th of July 2022. It was asserted that the application was emailed to the Court at 2:05pm on the 8th July and copied to BJ's solicitors. The Appellant alleged that the Judge erred in law in finding that the fee had not been properly offered. It was submitted that in any event, non-payment of the fee did not invalidate the filing or service. In ground 2 it was submitted that SK had complied with the Civil Procedure Rules for electronic filing and service and had tendered the fee for the application and that the parties had being given a hearing for the application by the Court and had prepared for the hearing. It was asserted that the Judge's decision to fail to hear the application was irrational. In ground 3 it was asserted the Judge wrongly declined to exercise his discretion to postpone payment of the costs awarded to the Claimant until the end of the trial. It was asserted the Judge failed to consider the rival merits of the claim and defence and

counterclaim and this invalidated his conclusion. The third ground was not given permission by Martin Spencer J.

29. SK then failed to file and serve his witness statements on time by 11th October 2022. He applied for relief at the end of October 2022.

30. On the 20th January 2023 HHJ Lethem had before him SK's application for relief from sanctions for failing to file and serve witness statements on time. He dismissed the application and ordered SK to pay BJ's costs assessed in the sum of £42,896 (this may have been a typing error because it seems unlikely to me that the costs of that application could have been over £40,000, but no appeal was made on the point).

31. Permission was given in Appeal 186 by Martin Spencer J on 17.2.2023 but only in relation to the decision on failure to file and serve the Amendment Application not on the costs orders.

**Appeal 37**

32. By a notice of appeal dated 8.2.2023, SK appealed the decision to dismiss his application for relief from sanctions. The grounds, drafted by counsel, were 12 in number. In summary they were as follows:
    (1) the Judge failed to consider that there was no prejudice to the "Defendant" (I think this is a typing error and should read no prejudice to the Claimant).
    (2) The Judge failed to consider "the plausible explanation for the failure" to file witness statements.
    (3) The application for relief was made quickly.
    (4) The Judge failed to understand that as a result of Appeal 186 the delay in serving witness statements would not cause any further delay in the case because the trial had to await that appeal.
    (5) The Judge's reasoning was wrong in holding that SK's solicitor should not have run up to the deadline or left it late to comply.
    (6) The Judge was wrong to find that the locum solicitor was not aware of the importance of compliance with Court orders and to refuse to grant relief as a result.
    (7) The Judge was wrong to refuse relief as a result of SK's solicitors failing to make an application for relief.
    (8) The Judge failed to consider correctly the lack of seriousness of the default in view of there being no trial date put at risk or any other prejudice caused.
    (9) The Judge failed to consider the reason for the default in the context and punished SK's solicitor for the manner in which his practice was run wrongfully.
    (10) The Judge was wrong in failing to consider that imposing the sanction would be wholly "diproportionate" which I think means disproportionate.
    (11) The Judge was wrong to ensure compliance with rules should take priority over the interests of justice.

(12) The Judge was wrong due to failing to consider whether the breach had a substantive effect on the conduct of the litigation.

33. Permission was given in Appeal 37 by Stewart J on 19.9.2023.

**The judgment on the Amendment Application**

34. HHJ Lethem (the Judge) gave judgment on the 30th August 2022 ex-tempore. He found as facts that the amendment application was sent to the Court on 8.7.2022 with a covering letter stating that:

> "In addition to the above, we enclose our client's application to amend our client's previous defence to now include a counterclaim in compliance with the order of his Honour Judge Lethem dated 17 June 2022. We will contact your office on Monday 11 July 2022 with regard to the Court payment."

35. He accepted that they did call on the 11th and failed to get through. He accepted that SK's solicitor sent a cheque which was never cashed. He found the application was never issued and the cheque was never cashed. He relied on *El-Huseini v GMC* [2016] EWHC 2326, in which HHJ Cooke, sitting as a deputy High Court Judge, ruled that an appeal notice under the statutory right to appeal from a regulatory decision was not sent with the fee required under CPR r.52.12 so was not a validly "filed" appeal and so was out of time. HHJ Lethem ruled that SK had not filed his application because "filed" does not mean received. The payment of the fee was necessary for the document to be filed. He ruled as follows:

> 7. The next issue is whether the document was filed. "Filed" does not mean received. As the decision in *El-Huseini* makes clear, what is required is more than simple receipt, and the payment of the fee is also an integral part of filing a document at Court. As I have indicated, I am bound by that authority, and I apply that authority. Ms Delbourgo's fall-back position was that her solicitors had done all they could and that the duty was on the Court to contact the solicitors. I am afraid I do not accept that submission. What was contained in the letter was not an anticipation or expectation that the solicitors would be called that afternoon but, rather, that they would contact the office on Monday 11 July. In short, they knew that they were not going to be paying the fee until l1 July and that the onus rested on them to take that step. So when Ms Delbourgo submitted to me that her solicitors have done all that they could, that is plainly wrong. They said to the Court: "We will contact you and it will not be on the due date, it will be several days thereafter". So, accordingly, even if it were the case (which it

> is not) that taking the last step available to you would be sufficient to constitute filing, the solicitors did not do that on this occasion.
> 8. The second aspect of' the order is that of course the application had to be served. Ms Delbourgo has pointed out that the Claimant's solicitors were copied in to the email sent at about two o'clock on 8 July 2022, and thus *would* have received an unsealed copy of the application form. Mr Perrin, on behalf of the Claimant (Respondent to the application) argues that that is not service of the application, and in that respect refers me to two aspects of CPR 23. The first is that under rule 23(7) service of the copy of the application form must be served as soon as practicable after it is filed. That injunction is picked up at PD 23A al para.4.1, where the practice direction says this:
>
> > "Unless the Court otherwise directs or paragraph 3 or paragraph 4.1 of this practice direction applies the application notice must be served as soon as practicable after it has been issued."
>
> 9. Ms Delbourgo has rather approached the matter on the basis that a draft copy of an application is as good as the application. I am against her in that respect. A Respondent to an application is entitled to know that they have received an application that has been issued and that demands a response. On occasions parties may send drafts of applications or prospective or contemplated applications, and of course they are for information only. It is only when the application is issued that it calls for a response from the Respondent. There can be no clearer indication of that, than the calamitous state of affairs which has occurred today. There is no hiding the fact that Mr Perrin has come to Court with his instructing solicitors, having filed witness evidence, in response to an application which is not issued and not before the Court today. In short, considerable time and money has been wasted and expended in the belief that an application had been issued when in fact it had not. That clearly underlines the importance of solicitors understanding that an application has been issued, that the rules arc engaged, that the response to the application should be made in accordance with the rules and that work is required. This demands service of a sealed application.
> 10. ln those circumstances, I am satisfied that there was not service of an issued application or indeed a filed application when the draft was sent at two o'clock on 8 July."

**The arguments on appeal in the Amendment Application**

36. The Appellant argued that the Judge fell into error in law by relying on *El-Huseini* because it related to the provisions of CPR Part 52, which at practice direction 52B,

paragraph 4.1, specifically required the Appellant's notice to be accompanied by the appropriate fee or fee remission certificate. In contrast, notices of application during proceedings under Part 23 have different provisions. CPR rule 5, practice direction 5B, provides at paragraph 2.3(a) that if a fee is payable a party must, when emailing the Court, either authorise the Court to debit their fee account, if they have one, or indicate the preferred method of payment and provide the Court with a contact number to take payment over the telephone. The Appellant pointed out that CPR rule 23 had no requirement to pay the fee at the same time as filing the application. The Appellant relied on *Hayes v Butters* [2021] EWCA Civ. 252, in which Peter Jackson LJ, at paragraph 9 dealt with CPR part 17 and practice direction 17 paragraphs 1.3 and 1.5. In that case the fee for an amendment was less than that which should have been paid. He ruled that because the CPR did not require payment for the document to be filed the document was filed despite the lack of payment required under schedule 1 to the Fees Order. Accordingly, the Appellant submitted, in the absence of a specific provision in the CPR, payment of a fee was not a precondition of filing. In addition, the Appellant submitted that service of the application did not require service of a sealed copy. The Appellant relied on CPR part 23 r.23.7 (1)(a), which required service of a copy of the application as soon as practicable after it is filed.

37. The Respondent submitted that this Court can only overturn case management decisions of the Judge if they were outside any reasonable scope for disagreement, irrational or wrong in law, otherwise the decisions were not to be interfered with. The Respondent submitted that case management allows the Judge a generous ambit of discretion. The Respondent submitted that there was no irrationality in the decisions and the Judge did not take into account irrelevant matters or fail to take into account relevant matters. The Respondent also relied upon *Azam v University Hospital Birmingham* [2020] EWHC 3384, in which Saini J. ruled, at paragraph 50, that an Appellate Court will only interfere with a discretionary evaluation where an Appellant can identify one or more of the following errors: (1) a misdirection of law; (2) some procedural unfairness or irregularity; (3) that the Judge took into account irrelevant matters; (4) that the Judge failed to take into account relevant matters; (5) that the Judge made a decision which was plainly wrong. The Respondent also relied on the decision in *Holmes v SGB* [2001] EWCA Civ. 354, in which at paragraph 24 Lady Justice Arden stated:

> "in my Judgment the starting point is to remember that the Judge was exercising a discretion and was making a case management decision. The Defendants, therefore, have to show that the Judge erred in principle, not simply that he could have reached some other decision."

The Respondent submitted that the covering letter and e-mail sent with the Amendment Application breached paragraph 2.3 of practice direction 5B because it did not outline the preferred method of payment (credit or debit card) and provide the

Court with a contact number to take payment over the telephone. The Respondent pointed out that paragraph 2.4 of the practice direction allowed the Court to refuse to accept any application including any attachment emailed to the Court, where the sender had not complied with paragraph 2.3(a). The Respondent also relied upon the Appellant's failure to pay the relevant fee and to serve an issued copy of the application and submitted that the Judge was entitled to rely on *El-Huseini*.

**The CPR**

**Filing a notice of application**

38. Applications within current proceedings are generally made under CPR Part 23 on Form N244. Every application should be made as soon as possible after it becomes apparent that one is needed. Rule. 23.1 states that an application notice means a document in which the applicant states his intention to seek a Court Order. Rule 23.2 requires the application to be made to the Court seized of the claim. Application notices must state what order the applicant is seeking and why (see r.23.6).

**Filing the notice**

39. Rule 23.3 sets out the general rule that an applicant must "file" an application notice. It makes no mention of fees. This ties in with PD23A para. 2.2 which states that on receipt the Court will notify the applicant of the time and date for the hearing. I note this is unrelated to the payment of any fee. No definition of the word "file" is provided.

**Time of filing**

40. As to the time when an application is made, r.23.5 states that the time an application is made is when it is received by the Court. So, it is not made when it is issued by the Court, it is made when it is received: see *Hallam Estates v Baker* [2014] EWCA Civ. 661, per Jackson LJ at para. 25.

**Serving a copy of the notice of application**

41. Service of a copy of the notice of application is required by r.23.4 which sets out the general rule that "a copy of the application notice" must be served on the respondent. It does not state the *issued* application notice. Methods of service of documents is covered by CPR Part 6. That has provisions in part III dealing with service of documents which are not originating processes. It provides methods of service which include electronic service (r.6.20(1)(d)). That ties in with PD6A para 4.1 which allows email service if the recipient has indicated earlier that email service is acceptable. No such issue arises in this appeal. The method of service was satisfactory.

**Service of the issued notice of application**

42. The applicant must serve a copy of the notice on the respondent as soon as is practicable "after it is filed" and in any event at least 3 days before the hearing and any evidence in support with it and a draft order: see r.23.7. This rule does not say

that the "issued" application notice must be served, however, PD23A at para 4.1 does. So, the PD states that:

> "the application notice must be served as soon as practicable after it has been **issued**" (my emboldening).

Therefore, whilst serving a draft copy of the notice of application as soon as practicable after it is filed is required and is polite, it does not satisfy PD23A which requires the issued notice to be served too.

43. Successive or repeated applications for the same relief are not looked upon favourably: see *Henderson v Henderson* [1843] All E.R. Rep 378 and the notes to the White Book at para 23.0.17.

**Fees for applications**

44. The *Civil Proceedings Fees Order 2008* sets out the fees payable on a Part 23 application in S.2 by reference to column 2 of Schedule 1. That states: "2.4(a) On an application on notice where no other fee is specified, …: £275"

**Payment of fees**

45. CPR PD5B states:

> "2.3 In the County Court—
> (a) if a fee is payable **in order for an e-mailed application or other document to be filed with the court,** a **party must,** when e-mailing the court—
> (i) both—
> (aa) provide a Fee Account number which the party has authority to charge for the applicable fee; and
> (bb) authorise the court to charge the applicable fee to that Account; **or**
> **(ii) outline the preferred method of payment (credit or debit card) and provide the court with a contact number to take payment over the telephone.**
> (Further information about using the Fee Account service may be found at: https://www.justice.gov.uk/courts/fees/payment-by-account)
> (b) when printed out on both sides of A4 paper, the following documents, together, must not exceed 25 sheets of paper in total—
> (i) the e-mail;
> (ii) any attachments, including any e-mail or document embedded in any attachment; and

(iii) copies of the documents in paragraphs (i) and (ii) that the court will serve where service is requested or required under the rules;

(c) only one e-mail, including any attachments, may be sent to the court to take any step in the proceedings and a party may not send another e-mail or a hard copy of any additional document as part of that step; and

(d) the total size of an e-mail, including any attachments, must not exceed 10.0 megabytes.

**2.4 The court may refuse to accept any application or other document, including any attachment, e-mailed to the court where—**

**(a) the sender has not complied with paragraph 2.2;**

**(b) a fee is payable pursuant to paragraph 2.3(a) and—**

**(i) the sender has not complied with paragraph 2.3(a);** or

(ii) the sender has complied with paragraph 2.3(a) but the court has not been able to charge or take the fee; or

(c) the sender has not complied with paragraph 2.3(b) to (d).” (my emboldening).

46. Pulling all these provisions together, and filling in the logical gaps, in my judgment, when the Court ordered SK to file and serve any Amendment Application by 8th July 2022, the Order and the CPR required SK to:

(1) Send the notice of application, with accompanying evidence, before close of business on 8th July 2022 to Central London County Court (Order of HHJ Lethem 17.6.2022);

(2) Because the notice was sent by email: outline the preferred method of payment (credit or debit card) and provide the court with a contact number to take payment over the telephone (CPR PD5B para 2.3(a)(ii));

(3) Serve the Respondent with a copy of the notice of application (CPR r.23.4) as soon as reasonably practicable but in any event by close of business on 8.7.2022 ((Order of HHJ Lethem 17.6.2022);

(4) Get the application issued and pay the fee due;

(5) Obtain a hearing date from the Court;

(6) Serve the Respondent with the issued application and evidence in support at least 3 days before the hearing (CPR r.23.7).

**Applying the law to Appeal 186**

47. There is no appeal as to the findings of fact. The facts were as follows:

(1) Requirement: send the notice of application, with accompanying evidence, before close of business on 8th July 2022 to Central London County Court (Order of HHJ Lethem 17.6.2022). Performance: this was fulfilled by the Appellant.

(2) Requirement: outline the preferred method of payment (credit or debit card) and provide the court with a contact number to take payment over the telephone (CPR PD5B para 2.3(a)(ii)). Performance: this was breached by the Appellant.

(3) Requirement: serve the Respondent with a copy of the notice of application (CPR r.23.4) as soon as reasonably practicable and in any event by close of business on 8.7.2022. Performance: this was fulfilled by the Appellant.

(4) Requirement: get the application issued and pay the fee due. Performance: this was breached by the Appellant.

(5) Requirement: obtain a hearing date from the Court. Performance: this was achieved.

(6) Requirement: serve the Respondent with the issued application and evidence in support at least 3 days before the hearing (CPR r.23.7). Performance: this was breached by the Appellant.

48. The e-mail and the covering letter sent by the Appellant to the Court in the afternoon of the very last day permitted for filing the application, did not comply with CPR part 5 practice direction 5B paragraph 2.3(a). Thus, although the notice was sent to the Court it was not properly "filed". Para 23(a)(ii) states "must" and requires compliance for a document to be "filed". Non-compliance therefore prevents filing occurring as the Judge found. The Appellant offered to call the Court on the 11th of July. That was too late. It is not sufficient just to rely on the telephone number on the header or footer under the Rules. The contact phone number for the Court to call should be provided with the indication of payment method by debit or credit card as required by the practice direction. The Appellant did not provide the intended method of payment by saying that the Appellant intended to pay by debit or credit-card and inviting the Court to call the telephone number of the Appellant's solicitors. As to the relevant powers of the Court in such circumstances practice direction 5B at paragraph 2.4 empowered the Court to refused to accept the application because it had not been made in accordance with paragraph 2.3(a). The Judge found that, because the Appellant had failed to comply with the fee payment provisions in relation to the application, it was not properly filed. I do not consider that any of the grounds of appeal in relation to this finding of fact and the ruling on the law can succeed. I consider the finding was justified and the ruling on the Rules was correct.

49. As to the Judge's finding about whether the Amendment Application was served on the 8th of July, I do not consider that it was wrong overall. There is a difference between sending a draft notice of application to the opposing party and sending the issued notice of application to the opposing party. The importance of having an application issued is that it shows that the Court has accepted it was properly filed, is seized of the application and that it can therefore be progressed. Whilst service of the draft notice of application and evidence in support on 8.7.2022 was good professional practice and was required under CPR r.23.4, it cannot take the place of the need to

serve the issued application required under CPR r.23.7. This was never done. So, my analysis of the law differs slightly from the Judge's but the effect is the same.

50. I understand the Appellant's frustration over the following facts. Firstly, the Court did not call the Appellant's solicitors to take payment at any time after the 8th of July. Secondly, the Court did not cash the cheque sent in satisfaction. Thirdly, the Court listed the hearing of the application despite the fact that the notice of application had not been issued. But it must be noted that the PD requires the court to list a hearing on receipt of the notice, not on payment of a fee. Furthermore the Court was entitled to refuse to issue the application because the fee was not properly offered. The parties believed that the hearing was to take place to determine the application. But professionally SK's lawyers should have chased up the application to ensure it was issued. They failed to do so. It was only on the day of the hearing that the Judge raised the procedural defect points. Reading the transcript shows how this took the Appellant by surprise and allowed the Respondent to jump onto the bandwagon which was being pulled by the Judge. I also understand how the Appellant and litigants more generally would wish for a perfectly efficient Civil Justice System to the operated out of Central London County Court. However, in my judgment, the responsibility for the procedural defects in this Appeal lay with SK's solicitors. Taking into account the long history of the two actions set out above it was wholly inappropriate to wait until the afternoon of the final day permitted for filing and serving the application to amend the pleading, particularly in the light of the strict order made on the 17th of June 2022. The provisions of r. 23.7, which required service of a notice of application as soon as practicable after it is issued, and in any event no less than three days before the hearing, were not complied with at all by the Appellant because the application was never issued and they never chased issuing. SK's solicitor should have known of the need to file the application and pay the fee and then make sure it is issued and then serve it well before the deadline. However, SK did not do so and created his own risk as a result. He then fell foul of that very risk.

51. Whilst in isolation, or in another well run case, the Judge's ruling on filing and service of the notice of application could seem harsh and probably would not prevent a waiver of the defaults by the Judge, in the context of the two claims and the conduct of the litigation by SK's lawyers and himself as a team set out above, I consider it was well within the ambit of the Judge's discretion, having put a strict time limit on any further application to amend the defence or to add a counterclaim to require strict adherence to it. That June 2022 order was not complied with. In so far as the Judge had discretion to waive the breach, no written application was made or issued and I do not consider in the context of the conduct of SK's team that the Court's inherent discretion was exercised wrongly.

52. I make no comment here on whether the Amendment Application would ever have failed or succeeded substantively in the light of it containing matters which were previously struck out in action 733. The Judge did not descend into any analysis of

those matters despite the fact that the prospects of success of the amendments may well have been a further relevant consideration which might have weighed against the Appellant because the amended pleading covered many struck out matters from Action 733.

**The grounds of appeal in Appeal 186**

53. Ground 1: the Appellant asserts that the Judge was wrong to declare that SK had not complied with the order of 17th June 2022 to file and serve the application to amend by the 8th of July 2022. In my judgment this ground is not made out for the reasons set out above. The letter and email covering the application did not comply with the Order.

54. Ground 2: SK had complied with the Civil Procedure Rules for electronic filing and service and had tendered the fee for the application and that the parties had being given a hearing for the application by the Court and had prepared for the hearing so the judge should have exercised his power to overlook any procedural irregularity. In my judgment the Judge's decision was not irrational and was not wrong in law. This ground is not made out. The CPR were not complied with by the Appellant.

55. Ground 3: This ground was not given permission.

**The judgment relating to the Relief Application**

56. HHJ Lethem set out the background to the relief application which he described as "deplorable". Further, the Judge pointed out that:
    (1) the relief application was unsigned and no time estimate for the hearing was given up on it, therefore the N244 was found to be defective.
    (2) SK and his son issued the second action using the wrong CPR claim form, under Part 8 rather than under Part 7.
    (3) The third party disclosure applications issued by SK against the Solicitors Regulatory Authority and the Trustee in Bankruptcy of BJ and others were "strange".
    (4) SK failed to arrange a listing conference as requested by a Judge.
    (5) The multiple third party disclosure applications as "erroneous".
    (6) The failure by SK to file his precedent H cost budget on time.
    (7) The second action (733) brought by SK was struck out by Recorder Robertson "because it disclosed no cause of action".
    (8) SK's failure to apply for relief from sanctions within the time limit provided namely 21 days before the next hearing.
    (9) SK making the application in the last few days before the hearing in breach of the Court's order.
    (10) The marking of SK's relief application from sanctions for failing to file the cost budget on time as having been totally without merit.
    (11) The failure by SK to apply within time for permission to amend the defence.

(12) SK failed to comply with the substantive costs orders which should have been satisfied on 13th September 2022.

He noted that the trial was set for a window between 3rd January and 28th February 2023. He recorded the Order to file witness statements and serve them by 11th October 2022 and a draconian unless sanction attached to it should SK fail to do comply, namely being debarred from defending and Judgment being entered together with interest at the Judgment Rate.

57. The Judge then dealt with the evidence from SK's solicitor and considered it deserving of sympathy and commiseration. However, he noted that SK had instructed a one man firm which was run by Samuel Alomo with a trainee and a secretary. The cancer of the solicitor's brother-in-law and suicide of his secretary were accepted factually and the Judge accepted the solicitor had been right to take some time away from work and considered it reasonable for him to have employed a locum. The Judge accepted that on 4th October the firm's computer system crashed. The Judge found as a fact (and this is not appealed) that between 16th September and 28th October work was being done on the relevant file. This was in relation to the Appeal 186. The Judge accepted that on return from compassionate leave on 28th October 2022 SK's solicitor had worked quickly to issue the application for relief and to serve the witness statement.

58. The Judge then studiously applied the factors set out by the Court of Appeal in *Denton v White* 2014 EWCA Civ. 906. He applied the three stage test. He found that the failure to serve witness statements was a significant and serious breach and noted the parties agreed. This was in the context of the Order being an unless order and hence one which he described as a "draconian". He considered, at stage two, the reason for the default. He found it was reasonable for Mr Alomo to take compassionate leave and to hire a locum. He also accepted that the computer system crashed. However, he set against these reasons other facts which he found. Firstly, that the witness statement of SK was nearly complete long before these events. Secondly, that it was inappropriate for a solicitor to run up to deadlines and then seek relief when deadlines are missed. Thirdly, the Judge found that the solicitor should have realised that the unless order was very serious and that he should not have left things to the last minute. The Judge found that he should have completed the work before he left for compassionate leave. If he was unable to do so, he should have alerted the locum to the unless order. It was not sufficient simply to leave it as a diary entry. Fourthly, the Judge found the file was actively being worked upon so the unless order should have been apparent to the locum. Finally, the Judge commented that SK could have made a prospective application for extension of time, which he did not. Therefore, the Judge found that the reasons put forwards for the breach were not "good" reasons. In relation to the third stage of the test in *Denton* encompassing all the circumstances including the two factors set out in the Civil Procedure Rules, the Judge ruled that the two express factors were not paramount considerations, but were particular considerations. He took into account the lamentable history of SK's eight

previous breaches of Rules, Practice Directions and Orders and the defective nature of the relief application itself. He noted the failure to serve the witness statement of Mr Modupe, the locum, on time and the failure to exhibit documents which appeared in the bundle for the relief application. The Judge allowed latitude for those to go into evidence, despite those failures. He also took into account the fact that costs orders had been left unpaid. The Judge concluded that the breaches were "egregious failures". The Judge considered that the trial should have taken place by early 2023 and the reality was that the trial had not been listed because of the relief application, therefore the trial had been delayed. He held that the weight of the matters under consideration at stage 3 was against the relief application and dismissed the application.

**The Appellant's submissions**

59. The Appellant submitted that the Respondent was not prejudiced by the failure to serve the witness statements in accordance with the Order. The rationale for that submission was that the Appellant had appealed the refusal to consider the Appellant's Amendment Application. It was submitted that the appeal would necessarily have put back the trial because, if granted, it would have permitted the Defendant to expand the matters in issue and to make the desired counterclaim. Further, the Appellant submitted that the reasons given for breaching the unless order were plausible and that the Judge should not have considered that the locum should have noted the unless order just because the locum was working on the file. The Appellant asserted that the locum was working on the appeal not on the other matters on the file, so that the locum might have been unfamiliar with those matters. The Appellant relied on the promptness of the application for relief. The Appellant submitted that the Judge's criticism of SK's solicitors leaving matters to the last minute was unfair. It was submitted that solicitors might have to await being put in funds by their clients so be forced to leave things late. It was submitted that the deficiencies in the relief application were explicable due to the haste in which the application was made and were not material. It was submitted that punishing SK's solicitors for not running their practice well was not the right approach and the Judge should have focused on the breach which was described as "inadvertent and immaterial". It was submitted that the sanction was disproportionate to the breach and that in the interests of justice relief should have been granted. The Appellant relied on *Depp v News Group Newspapers* [2020] EWHC 1237, in the judgment of Mr Justice Nicol at paragraphs 8 and 10, which contains a ruling that the trial date in that case was not endangered by the breach and that the Court should consider the circumstances at the time when the Judge was hearing the relief application.

**The Respondent's submissions**

60. The Respondent submitted that the grounds of appeal did not engage with the relevant test set out in the case law which I have summarised above. There was no error of law or irrational finding or material misdirection relied upon. It was submitted overall that the Judge was exercising his case management discretion and did so in a way which

was well within the boundaries permitted by the evidence before him. The focus of the Respondent's submissions was on stages 2 and 3 because stage 1 of the test in *Denton* was admitted. The Respondent relied on the Judge's findings that: (1) SK's solicitor should have made better arrangements; or (2) completed the relevant work before he took compassionate leave; or (3) should have warned the locum; or (4) that the locum should have picked up the unless order himself despite the computer crash. The Respondent relied on *Training v T/A Data* [2001] CP Rep. 46, at paragraph 66, in which Lord Justice Peter Gibson made it clear that it matters not what input the party himself has made into what the legal representatives had done or had not done, the other party is affected in the same way whoever was to blame and that the Court's time should not be taken up in considering separately the conduct of the lawyers and the party represented. I have not summarised all of the Respondent's submissions but I take all of them into account.

**Analysis and applying the law to the appeals**

61. The 12 grounds can be categorised into two groups. The first relates to stage 2 of the test in *Denton* which asks whether there is a good reason for the breach. The second group relates to stage 3, in which the Court considers all of the circumstances of the case and, pursuant to CPR rule 3.9(1), considers the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules practice directions and orders, so as to deal with the application justly overall.

62. Looking first at the reasons given. The Judge set out in a clear, chronological and balanced way his factual findings as a result of the evidence put before the Court. None of those factual findings is appealed. The criticisms the Judge made of SK and his lawyers in relation to the reasons for default were plain. In my judgment SK and his solicitors should have been preparing, filing and serving the lay witness evidence on which he relied for the forthcoming trial, which was listed in a window in January or February 2023, for a long time. Instead of preparing and completing these early and serving them, the Appellant did not do so early. Then the solicitor was forced to go off on compassionate leave. The Appellant's solicitor failed to warn the locum of the urgent need to comply with the unless order by a note, conversation, e-mail, letter or "to do" list. The Appellant then sought to rely on the locum's difficulties with the computer system which only started on the 4th of October. Thus, between the 16th of September and the 4th of October, a period of 18 days, the computer system was working properly for the locum. The Judge made findings about the locum carrying out work on the file. In summary the Judge found that family ill health and the secretarial tragedy were not good reasons, even when combined with a later computer crash, for ignoring a draconian unless order in the circumstances of this case and in the time scale permitted. The case concerned events from 2008 through to 2018 and the claim had been issued in 2019, so was four years old. In my judgment the various pleadings and amended pleadings were, or should have been, carried out in accordance with the client's instructions and so there should have been file notes or proofs of evidence or draft witness statements. Once the Order of HHJ Lethem was

made on the 30th of August the Appellant knew he only had 41 days. Of those 41 days, 16 were available whilst the solicitor was at work. 18 were available to the locum with the computer system fully operational. Only 7 were affected by the computer crash. However, once again matters were left to the last minute. For the reasons expressed by the Judge I do not consider that it was wrong to find that there was no good reason for the breach. There was a plausible reason, but it was not a good reason.

63. Turning to the circumstances of the case and stage 3. Wisely, no attempt was made during the appeal to defend the unimpressive history of the way the litigation had been handled by SK. The Judge's use of the words "deplorable" in relation to this history of SK's conduct (including his legal team) was not inappropriate. The litigation had been made disproportionately costly by multiple failed applications by SK. The litigation had not been conducted efficiently as a result of the late compliance or non-compliance with orders by SK and the effect of the multiple failed applications. As for factor (b) in CPR r.3.9(1), the need to enforce compliance with rules. practice directions and orders, the overwhelming weight of that factor lies in favour of refusing relief from sanctions in the circumstances.

64. That brings me to the root of the appeal which is the assertion that the breach did not cause prejudice to the Respondent. The argument, elegantly put by Miss Delbourgo, was constructed on various assumptions. The first was that the Judge was wrong to refuse to hear the Amendment Application. The second was that the appeal from that decision had reasonable prospects of success such that the trial should have been put back. The third was that where such an appeal from a case management decision has been made there is less need to comply with future Court Orders relating to service of evidence. The fourth was that the trial window would have been vacated because of the Amendment Appeal in any event. Logical though that argument might appear at each stage it is, in my judgment, faulted. Firstly, I have found that the decision of the Judge to refuse to hear the Amendment Application is unassailable. Secondly, the appeal against that decision had not been granted permission at the time of the hearing before the Judge. Even if permission had been granted at that time I note that no stay was requested or imposed when it finally was granted. Thirdly, it is not right in principle to say that entering a notice of appeal against a case management decision entitles any party to ignore future case management directions or stays the course of the case. A stay is not automatic under the CPR. No stay was granted. In addition the grounds for a stay may never have been made out. Fourthly, if the witness statements had been served on time there would have been no need for an application for relief and the trial could have been listed in the trial window despite the existence of the Amendment Appeal. I do not need here to analyse the various arguments which could have been made for the trial going ahead or not going ahead. They are many and varied. Suffice to say that one is that the pleaded issues related to the asserted loan by the Claimant to SK and the defence that the mortgage deed and trust deed were not knowingly signed by SK. Those limited issues could have been tried and determined.

If the appeal on the Amendments had later succeeded and further issues were later permitted to be pleaded out or counterclaimed (which I doubt would have been permitted, they having been struck out in Action 733), they could have been heard at a second trial later on. I take into account that there is a public interest in finality in litigation.

65. Overall, in my Judgment, none of the grounds of appeal satisfy the threshold test in the cases set out above. The Judge's reasoning for rejecting the application for relief was not irrational. The Judge did not fail to take into account relevant matters or take into account irrelevant matters and the discretion the Judge exercised was within the reasonable ambit he was permitted.

**Analysis of each Ground**

66. Grounds 1, 4, 8 and 12: The appeal from the Amendment Application is analysed above in the analysis section. I do not accept that the Respondent suffered no prejudice as a result of the Appellant's breach of the unless order. It led to a relief application and a hearing and cost consequences from both. None of the previous costs orders have been paid by the Appellant, despite multiple failed applications, one of which was marked totally without merit. Failure to pay costs orders is a prejudice because it causes the Respondent to suffer financial disadvantage. In addition, in my judgment, the breach of the Order put the trial at risk because the relief application was heard in late January 2023. I do not consider that the Appellant has made out the submission that the Respondent faced no risk of prejudice as a result of the Appellant's failure to file lay witness statements of fact in accordance with the Court's order. In any event there are other weighty factors which go into the balance of the overall decision.

67. Ground 2: the Judge's decision at stage two of the test in *Denton* was that the Appellant's explanation was plausible however it was not a good reason. This "plausibility" ground of appeal does not constitute a valid ground in my judgment.

68. Ground 3: I accept the assertion in this ground that the relief application was made as quickly as possible and the Judge did too and took that into account, but that was just one of the factors in the overall decision. It is not a ground of appeal.

69. Ground 5: there is no merit in this ground in my judgment. To suggest on appeal that solicitors should not run up to deadlines and leave matters late for compliance and that there should be some statement of principle that leaving matters to the last minute in litigation is appropriate is not an attractive argument and I reject it.

70. Ground 6: this ground, which is based on the assertion that the locum solicitor was not aware of the importance of complying with Court orders, is perhaps the most unimpressive. I reject it.

71. Ground 7: I do not really understand this ground. It may be that it means that the application for relief was unsigned and did not state the time estimate for the hearing but that should not matter. In so far as those failures were found as facts by the Judge I do not consider that such findings were immaterial and so find that this ground is not a valid ground of appeal.

72. Ground 9: the Judge took into account the context of the reason for the default and set it out in extenso so in his Judgment. There is no expression in the Judgment of a desire to punish the Appellant's solicitor, but there was reasonable and fully justified criticism of the many failures to carry out work in good time and proper criticism of the practice of leaving matters to the last minute. I do not consider this ground of appeal has any validity.

73. Grounds 10 and 11: taking these grounds together I do not consider that the decision of the Judge was outside the reasonable ambit of discretion afforded to the Judge when case managing this case. Nor was it disproportionate or unjust for the reasons set out above. SK's conduct of the defence to the claim and the second action he brought has been characterised by leaving important matters to the last minute or breaching Court orders or making unmeritorious applications. This has hugely increased the costs, delayed the trial and left the Respondent with unpaid costs orders.

**Conclusions**

74. For the reasons set out above I dismiss both appeals. I have carefully considered whether I should make a totally without merit order but do not do so due to the substance and elegance of the submissions of counsel for SK.

END