Neutral Citation Number: [2024] EWCA Civ 1461

Case No: CA-2024-000594

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Jacobs
[2024] EWHC 494 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/11/2024

Before:

LADY JUSTICE KING
LORD JUSTICE MALES
and
LORD JUSTICE SNOWDEN

- -

Between:

CHRISTINE BANGS	**Respondent /Claimant**
- and -	
FM CONWAY LIMITED	**Appellant/ Defendant**

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- -

Elizabeth Boon (instructed by **DWF Law LLP**) for the **Appellant**
Caitlin Corrigan (instructed by **Athena Law**) for the **Respondent**

Hearing date: 6 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 28 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE MALES:

1. This is an appeal from the decision of Mr Justice Jacobs in which, applying the *Denton* principles for relief against sanctions (*Denton v T.H. White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926), he set aside an order striking out the claim on the ground that Particulars of Claim had not been served in time and extended the time for such service. The judge attached weight to an admission of liability previously made on behalf of the defendant which had since been withdrawn. He concluded that this, together with a combination of other factors, demonstrated that the claimant's case appeared, at least on the material available, to be very strong, so that striking out the claim would be a disproportionate sanction.

2. The issue on appeal is whether this is a conclusion which the judge was entitled to reach. I have concluded that it was not and that the appeal must therefore be allowed.

Background

3. The claimant in the proceedings and the respondent in the appeal is Ms Christine Bangs, who resides in a basement flat in Upper Wimpole Street, London W1. Her property has what are described as underground 'vaults'.

4. In early March 2020 the local highway authority, Westminster City Council ('Westminster'), appointed the defendant, FM Conway Ltd, the appellant in the appeal, to carry out road resurfacing work in Upper Wimpole Street and surrounding areas. A flyer was sent to local residents, including Ms Bangs, notifying them about this and warning that:

> 'The basement/vault to your property is a separate structure from the public highway and keeping it in a watertight condition is the responsibility of the owner or the freeholder. If the vault/basement has not been properly damp proofed and/or tanked it is not secure from water ingress. Please be advised that neither the service provider nor City Council will be responsible for any damage resulting from water ingress in such circumstance.'

5. Ms Bangs' vault had been tanked in or about 2016 to ensure that it was watertight. A 10-year warranty still had six years left to run. However, when she received the flyer, Ms Bangs sought assurance from Westminster that the vault in her property would remain secure from damage and water ingress. A gentleman called Papa Okoh visited her property on 5th March 2020. There is an issue, which does not matter for present purposes, whether he was acting for Westminster or FM Conway. In either event, he raised no concerns and, according to Ms Bangs, he advised her that her property was adequately waterproofed.

6. The works were then carried out. Ms Bangs' case is that there was severe vibration, noise and disturbance, and that on 12th March 2020, three days into the progress of the works, she discovered cracks forming, which had not been there before, in one of the two vaults in her property. She says also that on 19th March 2020, less than a week after completion of the works, further cracks appeared together with damage and blistering of the walls. It rained on that day and water penetrated into the vault.

7. As a result Ms Bangs made a claim against FM Conway, whose insurer instructed a loss adjuster to investigate and report on the damage. On 6th October 2020 the loss adjuster sent the following email to Ms Bangs:

> 'I have today returned from annual leave and confirm that I am the loss adjuster appointed by the insurer of FM Conway in relation to your claim for property damage. I note the email exchanges between yourself and Mr Harnett of FM Conway. We must advise that legal liability for the accidental damage caused to your property is conceded and this will not be raised in the future. The public liability policy held by FM Conway is underwritten on an indemnity basis. This means settlement will take account of any prior wear and tear and depreciation. It is not on a new for old basis.'

8. Ms Elizabeth Boon for the appellant emphasised the word 'accidental', but it is clear from the context and from other correspondence that this was, and was intended to be, an admission of breach of duty, that is to say that FM Conway had been negligent. The loss adjuster's authority to make this admission on behalf of FM Conway has never been denied.

9. At the time when this admission of liability was made, Ms Bangs had indicated that her claim would be of the order of £30,000.

10. Further correspondence followed in which the claim increased substantially, to about £200,000, while the insurers complained that Ms Bangs had failed to evidence her losses and was making unrealistic demands. On 19th April 2021 the loss adjuster wrote a detailed email to Ms Bangs' solicitors, addressing various aspects of the quantum of the claim. Under the heading 'Liability', he wrote:

> 'The admission of liability had been made in an effort to narrow the issues between the parties so that constructive dialogue could take place, with the parties cooperating to find a resolution. However, in order to progress the matter evidence was required from your client in support of the losses she is claiming. … In matters such as this, we would expect a prospective claimant to notify their home insurer of the damage and seek redress accordingly through complying with the relevant pre-action protocol and, if required, in subsequent court proceedings. Accordingly, in the light of your client's unjustified complaints and unwillingness to adequately evidence her claim, whilst our client remains willing to engage in pre-action correspondence in accordance with its obligations under the Civil Procedure rules, the admission of liability is hereby withdrawn.'

11. As the judge pointed out, it was not suggested that new facts had come to light to indicate that the admission had been wrongly made (i.e. that FM Conway had not been negligent after all, or that there was some mistake on the part of the loss adjuster in admitting liability in the first place). It appears from the email that the reason for

the withdrawal of the admission was frustration that, as the insurers saw it, Ms Bangs was behaving unreasonably in relation to the quantum of the claim.

12. It is now common ground (but was in dispute below) that, under the rules as they then stood, FM Conway was entitled to withdraw its admission of liability. This was not the kind of case in which the agreement of the other party to such a withdrawal was required. The position now would be different, as the current (October 2023) version of CPR 14.1 provides that *any* pre-action admission may only be withdrawn with the agreement of the other party or the permission of the court.

The litigation

13. The claim form in this action was issued on 24th May 2023 and was served on FM Conway's solicitors ('DWF') on 26th May. It was issued, without justification, in the Commercial Court. Two defendants were named, FM Conway and Westminster. However, it is unnecessary to consider further the position of Westminster, as the judge struck out the claim against Westminster and there is no appeal from that decision. As he pointed out, there are no circumstances in which the claim against Westminster could succeed if the claim against FM Conway were to fail, and as FM Conway is both solvent and insured there is no need for a claim against Westminster in any event.

14. Because the claim was issued in the Commercial Court, the usual rule requiring service of Particulars of Claim within 14 days after service of the claim form (CPR 7.4) did not apply. Instead, the claimant was required to serve Particulars of Claim within 28 days of the filing of an acknowledgement of service indicating an intention to defend (CPR 58.5). Such an acknowledgement was filed on behalf of FM Conway on 8th June 2023, which meant that Particulars of Claim were due by 6th July 2023.

15. However, no Particulars were served. Instead, on 7th July 2023, DWF told Ms Bangs' then solicitors (not Athena Law who have represented her on this appeal) that Particulars of Claim should have been served and had not been. There was no reaction. The solicitor with conduct of the matter has subsequently explained that later in July there was a family bereavement which affected her ability to work, and that she was out of the office between 17th and 24th July 2023, but that does not explain the failure to serve the Particulars of Claim on time. The only explanation which has been offered is that the solicitors were hoping, now that Ms Bangs had demonstrated her serious intent by issuing proceedings, that the claim would settle.

16. As no Particulars of Claim had been served, and there had been no response to explain why not, DWF decided to apply to strike out the claim. That application was made on 21st July 2023 and again there was no response from Ms Bangs' solicitors. The application came before Mr Justice Bright, who made an order on 27th July 2023 striking out the claim against FM Conway. As the order was made without a hearing, it provided that the claimant could apply to set aside or vary the order within seven days of the order being served upon her.

17. On 4th August 2023 Ms Bangs' solicitors applied to set aside Mr Justice Bright's order. On 15th August 2023 they sent an email to DWF attaching Particulars of Claim which had in the meanwhile been served on Westminster and filed with the court,

although they did not purport formally to serve the Particulars on DWF. That step was not taken until 22nd September 2023.

The judgment

18. The result was that, so far as FM Conway was concerned, two applications came before the judge, an application to set aside the order of Mr Justice Bright striking out the claim and an application for an extension of time to serve Particulars of Claim until 22nd September 2023.

19. It was common ground that the three stage test in *Denton* applied. As to the first two stages, the judge found that the failure to serve the Particulars on time was a serious breach of the rules, for which there was no good reason. There is no challenge to those conclusions.

20. As to the third stage, consideration of all the circumstances, the judge noted that striking out a claim can be a draconian sanction. Nevertheless he identified several factors pointing against the grant of relief. He considered that the delay (81 days from 6th July until 22nd September 2023) was a long one, albeit mitigated by the fact that FM Conway was fully aware of the content of the Particulars of Claim from 15th August 2023 when it had received them by email. He considered that it counted against Ms Bangs that her solicitors had not admitted their mistake, but had initially sought to argue that their service of the claim form had been invalid in some way, so that time for service of the Particulars of Claim had not started to run. He regarded it as significant that DWF had pointed out on 7th July 2023 that the Particulars should have been served, but there had been no reaction to this, or to the application made to Mr Justice Bright to strike out the claim. Finally, he referred to CPR 3.9, which sets out the need for litigation to be conducted efficiently, at proportionate cost, and in accordance with the rules.

21. Against this, the judge identified two factors in favour of granting relief against sanctions. The first was the admission which had previously been made and then withdrawn. He regarded this as significant in circumstances where there was no explanation of why the admission had been withdrawn or of what the defence to liability was. In circumstances where Ms Bangs' premises had been recognised to be in a sound condition before the work started and the cracking and water ingress had occurred straight after the work had taken place, combined with an admission of liability by an experienced loss adjuster and the absence of any explanation to suggest that it had been wrongly made, the judge concluded that 'this is a case where, at least on the present material, the claimant's case does appear to be very strong'. The fact that the quantum of the claim had increased very substantially did not provide a factual basis for the withdrawal of the admission.

22. The second factor which the judge identified was that the claim was not yet time-barred, so it would not be too late for Ms Bangs to commence a new action. He recognised that there might be an application to strike out the new action as an abuse of process, although he considered that such an application would be unlikely to succeed because the present action would not itself have been struck out for an abuse of process (see the cases collected at para 3.4.8 of the *White Book* (2024)).

23. In the judge's view, these two factors outweighed those which pointed against the grant of relief and justified the setting aside of Mr Justice Bright's order striking out the claim. The judge said, however, that the second factor alone would not have been sufficient, so that the admission and the merits of the claim on liability were ultimately decisive:

> '56. The second factor, namely the possibility of a fresh action being struck out, would not, on its own, be sufficient. But when taken in conjunction with the admission and that the present claim appears very strong on liability, it would in my view be unjust for the claimant to face the prospect of restarting and having to fight abuse arguments in due course.'

24. Accordingly the judge set aside the order of Mr Justice Bright and granted the necessary extension of time for service of the Particulars of Claim. However, he ordered Ms Bangs to pay the costs of FM Conway's application to strike out the claim and of her application to set aside the order doing so. The judge transferred the case to the Central London County Court.

25. We were told that the costs which Ms Bangs was ordered to pay were subsequently agreed in the sum of £30,000, and that her claim was stayed when she failed to pay them. Although the principal sum of £30,000 was paid on the day before the hearing in this court, interest on those costs was not paid, so the claim remains stayed.

Does the relief from sanctions regime apply?

26. Because neither CPR 7.4 nor CPR 58.5 provides a sanction for failure to serve Particulars of Claim within the time required, the court raised with the parties whether the basis on which the case had been argued below, i.e. that it was necessary for Ms Bangs to obtain relief from sanctions under CPR 3.9, was correct. In response, counsel were agreed that it was. They pointed out that the case falls within the third category identified in *FXF v English Karate Federation Ltd* [2023] EWCA Civ 891, [2024] 1 WLR 1097. These categories were explained by Sir Geoffrey Vos MR:

> '59. I hope that I have now dealt with all the truly relevant authorities. I have done so at some length, because they show a difference of approach that requires resolution by this court. As Birss LJ explained in argument, there are really three categories of case: (i) cases where the rule or order expressly provides for the sanction that will apply on non-compliance (e.g. failure to file witness statements on time), (ii) cases where the rule does not expressly state the sanction which applies for non-compliance, but permission of the court is needed to proceed (e.g. failure to file a notice of appeal on time), and (iii) cases where a further step is taken in consequence of the non-compliance, such as the entry of a default judgment (as in this case) or the striking out of a claim for non-attendance at trial.'

27. Here there was non-compliance with CPR 58.5, in consequence of which the claim was struck out. Thus the striking out was a sanction for the non-compliance and Ms Bangs needed to obtain relief.

Submissions on appeal

28. Ms Boon for the appellant made three submissions. First, she submitted that the judge had applied the wrong test to his assessment of the merits of Ms Bangs' claim, (a) because he had wrongly taken account of the admission of liability which had been withdrawn, and (b) because the test which he had applied was whether the claim was very strong and not whether it met the summary judgment test. Second, she submitted that it was unjust for the judge to have considered the merits at all, because the argument advanced on behalf of Ms Bangs in the court below had been that FM Conway was not entitled to withdraw the admission, with no suggestion that the merits of her claim met the summary judgment test or were very strong. Third, she submitted that in any event the judge had balanced the various factors unfairly and ought to have refused to grant relief from sanction.

Ground 2 – Injustice

29. I propose to deal first with the second of these arguments.

30. The courts have consistently insisted that when dealing with case management decisions, of which relief from sanctions is an example, it is not appropriate to investigate the merits of the claim in any depth. If the position were otherwise, there is a risk that every procedural application would turn into an expensive and laborious minitrial. The position was explained clearly by the Supreme Court in *Global Torch Ltd v Apex Global Management Ltd (No. 2)* [2014] UKSC 64, [2014] 1 WLR 4495 (also known as *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd*). Lord Neuberger said:

> '29. In my view, the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues of the sort which were the subject matter of the decisions of Vos J, Norris J and Mann J in these proceedings. The one possible exception could be where a party has a case whose strength would entitle him to summary judgment. Both the general rule and the exception appeared to be common ground between the parties, although Mr Fenwick seemed to be inclined at one stage to suggest that the exception might be a little wider. In my view, the general rule is justifiable on both principled and practical grounds.
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> 30. A trial involves directions and case management decisions, and it is hard to see why the strength of either party's case should, at least normally, affect the nature or the enforcement of those directions and decisions. While it may be a different way of making the same point, it is also hard to identify quite how a court, when giving directions or imposing a sanction, could satisfactorily take into account the ultimate prospects of success in a principled way. Further, it would be thoroughly undesirable if, every time the court was considering the imposition or enforcement of a sanction, it could be faced with the exercise of assessing the strength of the parties' respective cases: it would lead to such applications costing much more

> and taking up much more court time than they already do. It would thus be inherently undesirable and contrary to the aim of the Woolf and Jackson reforms.
>
> 31. In principle, where a person has a strong enough case to obtain summary judgment, he is not normally susceptible to the argument that he must face a trial. And, in practical terms, the risk involved in considering the ultimate merits would be much reduced: the merits would be relevant in relatively few cases, and, in those cases, unless the court could be quickly persuaded that the outcome was clear, it would refuse to consider the merits. Accordingly, there is force in the argument that a party who has a strong enough case to obtain summary judgment should, as an exception to the general rule, be entitled to rely on that fact in relation to case management decisions. For present purposes, I am prepared to assume in the Prince's favour that that is indeed correct.
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> 32. I should add that I do not think that it would be enough for a party to show that, while his arguments were not strong enough to justify summary judgment, his arguments were strong enough to justify the other party being required to bring the disputed sum into court if he was to be entitled to proceed with his case. For present purposes, as with an outright order for summary judgment, a claim or defence is either unanswerable or it is not. A conditional order, typically requiring a party to provide security if it wishes to proceed with its claim or defence, is granted in rather nuanced and case specific circumstances. Neither as a matter of principle nor as a matter of practicality would it be appropriate to extend the exception to such a case.'

31. The point was developed by Lord Justice Moore-Bick in *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, [2015] 1 WLR 2472:

> '46. If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them. Here too a robust exercise of the jurisdiction in relation to costs is appropriate in order to discourage those who would otherwise seek to impress the court with the strength of their cases.

> 47. Support for that conclusion can be found in the recent decision of the Supreme Court in *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd* [2014] UKSC 64, in which the court had to consider the extent to which the merits of a claim or defence were relevant to granting relief from the sanction of striking out in default of compliance with an "unless" order. Lord Neuberger, with whom Lord Sumption, Lord Hughes and Lord Hodge agreed, held that, even in a case of striking out, the merits of the claim or defence were relevant only when they were so strong that there was no real answer to them, in other words, in cases where an application for summary judgment could be expected to succeed. In Lord Neuberger's view (paragraph 30):
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> > " . . . it would be thoroughly undesirable if, every time the court was considering the imposition or enforcement of a sanction, it could be faced with the exercise of assessing the strength of the parties' respective cases: it would lead to such applications costing much more and taking up much more court time than they already do. It would thus be inherently undesirable and contrary to the aim of the Woolf and Jackson reforms."
>
> 48. In my view exactly the same considerations apply to applications for extensions of time for permission to appeal.'

32. Basic fairness requires that if a party is going to contend that the merits of the underlying claim are so strong (or so weak) that they should be taken into account for case management purposes, notice of this contention should be given in advance of the hearing so that the other party can consider what evidence it needs to deploy. As Lord Neuberger put it in *Global Torch*:

> '34. … If, at an interlocutory hearing which is not a summary judgment hearing, a party wishes to rely on the contention that he has an unanswerable claim or defence, it seems to me that he should spell out that contention very clearly in advance, as otherwise the raising of the contention at the hearing could wreak obvious unfairness on the other party.'

33. In the light of these authorities, I would summarise the position as follows.

34. First, although the court will want to know what the case is about (the nature of the claim and any defences), the general rule is that the merits of the underlying claim are irrelevant when the court has to make a case management decision such as whether to grant relief from sanction. It follows that it is unnecessary for the parties to deploy extensive evidence designed to show that they have a strong case on the merits and they should not seek to do so. Such evidence is likely to be a distraction from what the court needs to decide and is positively unhelpful.

35. Second, there is an exception to this general rule if a party wishes to contend that its case is so strong that it would be able to obtain summary judgment in its favour. It is

clear that in *Hysaj*, when Lord Justice Moore-Bick spoke of the grounds of appeal being very strong, he did not intend a less demanding test than would apply on an application for summary judgment. This is the only exception to the general rule which has so far been recognised. While I would not rule out the possibility that there may be others, if they do exist they will be genuinely exceptional.

36. Third, even when a party does wish to contend that it would be able to obtain summary judgment, the merits of the underlying claim should only be taken into account when this can be readily demonstrated, without detailed investigation. It is significant that Lord Justice Moore-Bick confined the exception to cases where 'the court can see *without much investigation* that the grounds of appeal are either very strong or very weak' (my emphasis).

37. Fourth, because a party responding to a procedural application, including an application for relief from sanctions, will not generally be required or expected to deploy its case on the merits of the underlying claim, a party who wishes to contend that the merits of its case satisfy the summary judgment test must give clear notice of that contention sufficiently in advance of the hearing to enable the other party to decide what evidence on the merits it wishes to deploy. In this regard notice given only a few days before the hearing, or in a skeleton argument, is likely to be too late. Judges who are invited to take account of the merits of the claim when making this kind of case management decision should investigate whether such notice has been given and, if it has not, should firmly decline the invitation.

38. Fifth, even when such notice is given, the other party will not be expected to deploy evidence to the full extent that it would do at trial. It may be, for example, that the issue arises at a stage before detailed factual evidence has been obtained or before experts have reported – or as in this case, before the time for service of a Defence. All that the other party is required to do is to show that there are sufficient matters in dispute that summary judgment is *likely* to be inappropriate. Hence Lord Justice Moore-Bick's reference in *Hysaj* to 'cases where an application for summary judgment could be expected to succeed'.

39. In the present case Ms Bangs' solicitors did not give any notice in advance of the hearing that it would be contended on her behalf that the merits of her claim were so strong that it was a suitable case for summary judgment. Nor did they suggest, if different (though in my view it is not), that she had a 'very strong' case on the merits, or that this was relevant to the application for relief from sanction. Nor was there any such suggestion in the witness statement from Ms Bangs' solicitor or the skeleton argument from counsel then appearing for Ms Bangs (not Ms Caitlin Corrigan, who represented her on this appeal). Instead, the only submission as to the merits made in counsel's skeleton argument was that:

> 'As D1 has admitted liability for the claim and has not applied to withdraw it, the outstanding matters in relation to D1 is the quantification of damage. If the strikeout is to be maintained, D1 obtains a significant windfall against a claim [sc.for] which it has admitted liability.'

40. As a result the submissions concerning the merits before the judge were confined to the issue whether FM Conway had been entitled to withdraw the admission. Counsel

for Ms Bangs submitted that it remained an extant admission on which Ms Bangs was entitled to rely. However, as the judge recorded, Ms Boon for FM Conway was able to demonstrate that, under the rules as they stood at the relevant time, it had been entitled to withdraw the admission without obtaining the agreement of Ms Bangs or the permission of the court.

41. Because it had not been suggested on behalf of Ms Bangs that the merits were relevant to the issue of relief against sanction, Ms Boon did not go on to address the merits of the claim. Nor did she submit that it would be unjust for the overall merits of the claim to be taken into account in circumstances where no notice of this point had been given. I have no doubt that such a submission would have been recorded and dealt with in the judgment, if it had been made. The fact that it was not is understandable in circumstances where counsel for Ms Bangs had not made any submission that the merits *were* relevant to the grant of relief again sanction going beyond the narrow and mistaken point made in her skeleton argument. The result, however, is that the judge was not alive to the potential injustice of forming a view about the merits of the claim.

42. In these circumstances, I consider that for the judge to go on, as he did, to consider the merits of the underlying claim, did unwittingly cause an injustice to FM Conway. It is, perhaps, understandable that he did so, but the result was that FM Conway did not have a fair opportunity to deploy its case, or to seek to show that the claim was not suitable for summary judgment. As it is, the case has moved on since the judge's decision. FM Conway has now pleaded a Defence and Ms Corrigan does not submit that it would now be possible for Ms Bangs to obtain summary judgment on liability.

43. As the judge's view that Ms Bangs had a very strong case on liability was decisive in his decision to grant relief from sanction, the appeal must be allowed. This means that it is unnecessary to consider grounds 1 and 3, but as they were both fully argued I will deal with them briefly.

Ground 1 – Merits

44. I have no doubt that if fair warning of the point had been given, and if the evidence had remained as it was in the court below, the judge's conclusion that Ms Bangs had a very strong claim on liability which met the requirement for summary judgment could not be faulted. If unanswered, the matters on which the judge relied, which I have summarised above, pointed firmly to that conclusion. Equally, however, I am sure that if fair warning had been given, the evidence would not have remained as it was. FM Conway would have been able to adduce at least some evidence sufficient to show that the court could not conclude, at any rate without more extensive investigation than would be appropriate on an application for relief from sanctions, that Ms Bangs was entitled to summary judgment.

Ground 3 – Discretion

45. Ms Boon submitted that in any event the judge balanced the various factors unfairly and ought to have refused to grant relief from sanction. I would unhesitatingly reject that submission. If proper notice of the point had been given, and if the evidence had remained as it was, the judge identified the relevant factors and the weight to be given

to each of them was a matter for him. This court would not interfere unless the judge's decision was plainly wrong, which it was not.

Disposal

46. For the reasons explained above in relation to ground 2, I would allow the appeal, set aside the order of Mr Justice Jacobs granting relief from sanction and restore the order of Mr Justice Bright striking out the claim against FM Conway.

LORD JUSTICE SNOWDEN:

47. I agree.

LADY JUSTICE KING:

48. I also agree.