Neutral Citation Number: [2021] EWHC 334 (Ch)

Case No: CH-2019-000204

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

7 Rolls Building
Fetter Lane
London EC4A 1L

Date: 18 February 2021

Before :

MR JUSTICE ZACAROLI

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Between :

Tyburn Film Productions Limited	**Appellant**
- and –	
British Telecommunications PLC	**Respondent**

Mr Stephen Innes instructed by **the Appellant**
Mr Ashley Serr (instructed by **DWF Law LLP**) for the **Respondents**

Hearing dates: 26 January 2021; further written submissions: 3 & 5 February 2021

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APPROVED JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10:30 pm on 18 February 2021.

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MR JUSTICE ZACAROLI

MR JUSTICE ZACAROLI :

1. On 13 August 2018 an appellant's notice from the appellant, Tyburn Film Productions Limited ("Tyburn"), came before HHJ Melissa Clarke sitting in the County Court at Oxford to deal with on the papers. There were no grounds of appeal accompanying the notice. In an order of that date (the "Unless Order") the judge ordered that unless Tyburn filed grounds of appeal by 28 August 2018, permission to appeal would be refused and the appeal dismissed without further order.

2. Due to a court error, the Unless Order was not sent to Tyburn. In fact Tyburn did not receive it until 20 March 2019. Tyburn applied on 28 March 2019 to set aside the Unless Order. That application came on before HHJ Melissa Clarke on 9 July 2019. At the judge's instigation, Tyburn's application was treated, in addition, as an application for relief from sanctions. By her order of the same date (the "July 2019 Order") the judge dismissed the application to set aside the August 2018 Order and refused to grant relief from sanctions.

3. Tyburn appeals the July 2019 Order with the permission of Trower J granted on 10 October 2019.

Background

4. There is a long and complicated background to this matter. Most of it is irrelevant to the issues that arise on this appeal. I need only refer to it briefly in order to explain the context of the application before HHJ Melissa Clarke.

5. The underlying litigation goes back to November 2012, when Far Ridge Limited, then called Tyburn Entertainment Ltd ("TEL"), issued a claim form against the respondent, British Telecommunications PLC ("BT"), alleging breach of contract and/or negligence in respect of telecommunication services provided by it.

6. TEL went into liquidation on 3 March 2014. According to Tyburn in about May 2014 the benefits and certain of the obligations of the claim were assigned to it by the liquidator. Tyburn later advised that the assignment had been annulled in May 2015.

7. The claim against BT was struck out on 5 May 2016. TEL was ordered to pay BT's costs. An appeal by TEL was dismissed on 18 November 2016, with costs.

8. Having failed to recover its costs from TEL, BT issued an application on 21 April 2017 for third-party costs orders against Tyburn and the liquidator of TEL. The application against the liquidator was settled on 15 June 2018. The application against Tyburn was listed for hearing before DJ Kanwar in the County Court at Milton Keynes on 19 June 2018.

9. Tyburn sought an adjournment on the basis that its counsel was unavailable. DJ Kanwar refused to adjourn the hearing. Present at the hearing on behalf of Tyburn (though not formally representing it) was a Mr Kevin Francis,

described as a senior executive who had worked for Tyburn (or associated companies) for over 40 years.

10. By his order of 19 June 2018 (the "Third-Party Costs Order") DJ Kanwar ordered that Tyburn be added to the proceedings for the purposes of costs and ordered that Tyburn be jointly and severally liable with TEL for the costs of the proceedings (save for any contribution received from the liquidator).

11. On 10 July 2018, Tyburn filed an appellant's notice seeking permission to appeal the Third-Party Costs order. CPR Rule 52.2 requires all parties to comply with Practice Directions 52A to 52E. Practice Direction 52B ("PD 52B") provides, by paragraph 4.2(d), that the appellant must file grounds of appeal with the appellant's notice. Tyburn failed to do that. Under section 10 of the appellant's notice ("other applications"), Tyburn sought permission to file its "grounds of appeal/statement of case", a skeleton argument and witness evidence "within 21 days of the receipt of the transcript of the 19th June hearing". At section 11 ("evidence in support"), Tyburn said the following:

> "The hearing took place after the Appellant's request for an adjournment had been refused, meaning the Appellant was not legally represented thereat. The Appellant has not yet been provided with a transcript of the hearing despite ordering such on an expedited basis. Without the transcript it is not possible for the Appellant and its counsel to prepare Grounds of Appeal/Statement of Case, a Skeleton Argument or Witness Statement evidence and any such documents if prepared in draft would in any event require to be substantially amended, updated or supplemented upon receipt of the transcript. The Appellant has been informed that the transcribers have now received the recording from the Court and the transcript should be available "by the middle of next week" (namely: week beginning 9th July 2018).
>
> In those circumstances it is in the interests of fairness and of the administration of justice that the Appellant be given a short extension of time, once the transcript is received, to prepare and file the Grounds of Appeal and other documents in support of the appeal. This will not lead to any substantial delay and will avoid the need for such documents to be amended, updated or supplemented subsequently if submitted on a provisional basis. The Appellant requests 21 days because (i) that is the time normally given to file an appeal and (ii) 14 days might not be enough in view of forthcoming summer holiday absences."

12. When the appellant's notice came before HHJ Melissa Clarke on 13 August 2018 on the papers, she noted as follows:

> "The appeal notice is devoid of grounds of appeal. It is insufficient to state, as the appellant does in section 11, that it cannot formulate grounds of appeal until it sees a transcript of the hearing. Either the appellant has a legitimate belief that

> there are grounds of appeal, in which case it should formulate them in the appeal notice, or it does not, in which case the appeal notice is an abuse of process. Unless the appellant files grounds of appeal by 4 pm on 28 August 2018 permission to appeal will be refused and the appeal notice dismissed without further order."

13. Tyburn had applied for the transcript of the hearing before DJ Kanwar on an expedited basis on 22 June 2018. The transcript of the hearing was received on 12 July 2018. There was some debate before me as to whether this included a transcript of that part of the hearing in which DJ Kanwar gave judgment. Mr Innes, who appeared for Tyburn, said on instructions that it did not. I think that is likely to be correct. I take judicial notice of the fact that in general transcribers will not send a transcript of a judgment to the parties until it has been approved by the judge. Thereafter, Tyburn chased the court and the transcription service for the transcript of the judgment. It was finally received by Tyburn on 22 October 2018.

14. There was then, however, a delay of over two months until 4 January 2019 when Tyburn filed, along with the original appeal bundles, grounds of appeal and a witness statement of Mr Francis in support of the appeal.

15. That delay was explained, in a witness statement dated 10 November 2018 of Ms Annette Pearse, the company secretary of Tyburn. Although this statement was dated 10 November 2018, it was not provided to the Court or BT until January 2019. She said:

> "Despite its best efforts, TFPL has been unable to lodge a complete Appellant's Notice with exhibits, et al within the 21 day period requested in its interim Appellant's Notice and application to lodge "out-of-time". This was due to replacement Direct Access Counsel being overseas for a short period and, although the Judgement transcripts were reviewed and appeal documents drafted within 21 days, they could not then be approved, finalised and lodged due to the critical illness and hospitalisation of the person within TFPL who has the principal care and attention of this matter and from whom a Witness Statement is required - said person having been present at the Hearing and, therefore, being possessed of full knowledge of the circumstances of and events at the Hearing. Said individual is a disabled person and, separately from his disability, suffered a major kidney problem, together with associated diabetic problems and a virulent viral infection."

16. It appears that the court mistook the re-filed bundles for a fresh appeal which was once again sent to HHJ Melissa Clark to deal with on the papers. The judge, upon calling for the whole file, realised that it related to the Unless Order. She also noticed, however, that it was unclear from the file whether the Unless Order had ever been sent to Tyburn. Accordingly, she notified the parties of this, inviting Tyburn, if the Unless Order had not been sent to it, to apply for relief from sanctions. The judge accepted for the purposes of the

application that the Unless Order was only received by Tyburn on 20 March 2019.

17. It was this which prompted Tyburn's application dated 28 March 2019 to set aside the Unless Order. In her order of 26 April 2019, listing the application for hearing, HHJ Melissa Clarke recited that the application should properly be considered as an application for relief from sanctions.

Judgment dated 9 July 2019

18. At the hearing of its application before the judge on 9 July 2019, Tyburn pursued its application to set aside the Unless Order. In the alternative, it applied for relief from sanctions.

19. The judge concluded, in relation to the set-aside application, as follows:

(1) Since the Unless Order had been made on the papers, without hearing from the parties, the application to set it aside should be dealt with by way of re-hearing, citing *Haley v Siddiqui* [2014] EWHC 835 (Ch) per HHJ Hodge QC at [14]-[15]. This principle was reflected in the normal wording added to the Unless Order to the effect that Tyburn could apply within 7 days of receiving the order to vary it or set it aside.

(2) The application to set aside the order was made one day late (being made 8 days after receipt of the Unless Order). No application for relief from sanctions was made in respect of that failure. For that reason alone, the application would be refused.

(3) Even if the application was made in time, she would not have set the Unless Order aside, as it was nevertheless properly made. The appellant's notice was defective in failing to identify any grounds of appeal. If she accepted the submission that it was open to a party to file an "effectively blank appeal notice" within the time-limit prescribed by the rules, on the basis that this stopped the clock running until such time as grounds of appeal could be formulated, that would "drive a coach and horses" through the very clear time period. That time period was important in order to ensure finality in litigation. The Unless Order was a final opportunity to file grounds of appeal, and was the most favourable order she could have made, the alternative being to dismiss the appeal as showing no discernible ground for appeal.

20. In relation to the application for relief from sanctions, the judge concluded as follows, by reference to the three-part test from *Denton v TH White Ltd* [2014] EWCA Civ 906:

(1) The breach, consisting of a failure to comply with an unless order and involving over four months delay, was serious and significant.

(2) There was nevertheless a good reason for not complying, namely the fact that the Unless Order was not received by Tyburn until March 2019, some two months after it had filed grounds of appeal.

(3) In all the circumstances, giving particular weight (a) to the need to conduct litigation efficiently and proportionately and (b) to enforce compliance with rules, practice directions and orders, it was not appropriate to grant relief from sanctions. The judge relied, in this respect, on the following:

a. Although it was unusual to refuse relief from sanctions in relation to an order that was not received by a party, this was an unusual case.

b. The court must give consideration to the need for parties to comply with rules and practice directions and to deal with matters proportionately. As to which: there had been an extraordinary delay in filing grounds of appeal, well beyond the 21 days provided for in the rules, and well beyond the additional 21 days that Tyburn requested in the appellant's notice; Tyburn never returned to court to find out the response to their request for an extension, nor to extend the period of 21 days originally requested; had it done so, it would have discovered the existence of the Unless Order much earlier.

c. Mr Francis, who had been at the hearing before DJ Kanwar, was (as described by the judge) an experienced litigator with legal training, and could have taken a note of the hearing and formulated grounds of appeal, perhaps seeking permission to amend once the transcript was available.

d. The significant delay once the transcript of judgment was obtained was not adequately explained. If reliance was placed on Mr Francis' health, then that should have been supported by medical evidence. There was in any event no adequate explanation of the delay during the period Mr Francis was not suffering ill-health.

e. The balance of prejudice fell upon BT if relief from sanctions was granted. The litigation had been going on a long time and BT was entitled to consider it had been concluded. Although refusing relief from sanctions meant that Tyburn could not appeal DJ Kanwar's order, to grant relief would "sanction the manipulation of the rules by the filing of an appeal notice silent as to the grounds of appeal with the result being an extension of the 21 day time for filing to over six months."

<u>The set-aside application</u>

21. Tyburn advances the following grounds of appeal against the judge's decision to refuse to set aside the Unless Order:

(1) The judge erred in failing to take account of the fact that Tyburn had not been aware of the existence of the Unless Order within the time specified for compliance;

(2) The judge erred in making and confirming the Unless Order which could not be complied with;

(3) The judge erred in taking into account the evidence put forward by Tyburn as to the reasons for delay in filing the grounds of appeal.

22. It was common ground that in considering whether to set aside the Unless Order the judge was required to conduct a rehearing, not a review.

23. BT's principal contention was that in conducting a rehearing the court was nevertheless required to consider whether it had been appropriate to make the Unless Order at the time it was made. On that basis, all of Tyburn's grounds of appeal on this point fell away, because they all relied on subsequent events.

24. Tyburn contended, however, that on the application to set aside the Unless Order the court was required to consider whether the order should be made as at the date of the *re*hearing (i.e. the hearing on 9 July 2019). Mr Innes did not cite any authority in support of that proposition. He submitted that the court ought not to make an order which it knows cannot be complied with (citing *Yorke Motors v Edwards* [1982] 1 WLR 444), but that was precisely the effect of the Unless Order in this case (due to the failure to send it to Tyburn) and of the judge declining to set aside the Unless Order, since by then the date for compliance had passed.

25. I do not accept Tyburn's contention. As Mr Serr, who appeared for BT, pointed out, *Haley v Siddiqui* (above), which the judge relied on for concluding that she was required to undertake a rehearing, not a review, supports the view that on a rehearing the judge is required to consider whether the order should have been made at the time that it was made: see [14] and [15] of the judgment of HHJ Hodge QC, which poses the relevant question as whether it had been appropriate to make the order "in the first place". Moreover, as Mr Serr pointed out, that is supported by the rationale for permitting parties to apply to set aside, vary or stay an order made without hearing from the parties: the purpose is so that they can make such arguments as they would have made had they been present when the court made the order.

26. As I have pointed out, Tyburn does not advance any argument that the judge was wrong to make the Unless Order *as at the time it was made*. It was right not to do so. The judge was entitled to conclude that Tyburn was in breach of paragraph 4.2(d) of PD 52B. She was also entitled to provide Tyburn with a last chance to comply with that requirement, by extending time for doing so but on terms that non-compliance would automatically result in the dismissal of the appeal.

27. For these reasons, I dismiss the appeal insofar as it relates to the judge's refusal to set aside the Unless Order.

28. Mr Innes relied on the fact that the terms of the Unless Order permitted Tyburn to apply to *vary* the Unless Order as well as to set it aside or stay it. He submitted that on an application to vary the Unless Order, the court would be bound to consider whether it was appropriate to maintain it in the circumstances then existing.

29. I consider that the language permitting an application to vary an order which has been made on the papers without submissions from the parties is directed to the situation where the court concludes that it was appropriate to make *an* order, but on different terms. The fact that the permission to apply is time-limited (to seven days from receipt of the order) indicates that the focus is still intended to be on whether it was appropriate to have made the order (whether in its original or in a varied form) as at the date it was made.

30. I address below the complication that the Unless Order was not sent to Tyburn until after the time limit in it had expired, having considered the application for relief from sanctions.

31. Tyburn also contended that it would be a breach of natural justice to prevent it pursuing the appeal against DJ Kanwar's order. I reject this contention, which to a large extent relied on the merits of the underlying appeal. The judge was prepared to assume that the appeal had merit. Even an appeal with undoubted merit must be pursued in accordance with the rules of court, however, and it is not a breach of natural justice to dismiss an appeal if those rules are not complied with.

Relief from sanctions

32. In relation to the appeal against the refusal to grant relief from sanctions, Tyburn's ground of appeal is that the judge, having accepted that there were good reasons for non-compliance with the Unless Order, erred in concluding that it would not be just to grant relief.

33. Mr Serr relied on the well-established proposition that an appeal court will rarely interfere in a case management decision. It will do so only if the judge has failed to apply the correct principles, taken into account matters which should not be taken into account, left out of account matters which are relevant or reached a decision that is so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the judge (see, for example, *Walbrook Trustee (Jersey) Limited v Fattal* [2008] EWCA Civ 427 at [33]). It is plainly insufficient that the appeal court, had the decision been its, would have come to a different conclusion.

34. Mr Innes developed the ground of appeal in three ways: (1) the judge failed to apply the correct principles in that, having decided that there was a good reason for non-compliance, she ought not to have gone on to consider the third stage in the *Denton* test at all; (2) the judge had failed to apply the correct principles because she had taken into account, at the third stage of the *Denton* test, the underlying breach of PD 52B, which was a factor relevant only to the first stage; and (3) assuming the judge was permitted to take into account the underlying breach of PD 52B, it was nevertheless necessary to take into

account the existence and nature of the good reason for non-compliance, and the judge failed to do so.

35. I do not accept the first or second of Mr Innes' points in so far as they address the manner in which the *Denton* test is to be applied generally.

36. As to his first point, it is true that the authorities show that if the court finds a good reason for non-compliance it would usually grant relief from sanctions: see the cases cited in the White Book at paragraph 3.9.5, in particular *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795, per Lord Dyson MR at [41], in a passage approved in *Denton* at [24]:

> "If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted."

37. The overriding requirement in CPR Rule 3.9(1) is that the court considers all the circumstances of the case. That is what the Court of Appeal in *Denton* described as the third stage. In *Denton*, Lord Dyson MR and Vos LJ said (at [32] and again at [81]) that this was a requirement that applied "in every case." Many reasons for non-compliance could qualify as "good" reasons and, no doubt, some can be more "good" than others. It is common sense, therefore, that the extent to which the reason qualifies as "good" is a factor to consider along with all the circumstances at the third stage.

38. As to Mr Innes' second point, I consider, in agreement with Mr Serr's submission, that the last stage in the *Denton* test requires the court to take into account all the circumstances, including the continuing underlying breach of a rule, practice direction or order which gave rise to the unless order. Mr Serr referred to *British Gas Trading Ltd v Oak Cash & Carry Ltd* [2016] EWCA Civ 153. That case determined that although, on an application for relief from sanctions, earlier breaches of orders committed during the course of the litigation are normally to be disregarded in determining the seriousness or significance of the breach in respect of which the sanction was imposed, where the breach is of a requirement contained in an "unless" order it is necessary, when assessing the seriousness or significance of that breach, to consider also the failure to carry out the obligation which was imposed by the original order or rule and extended by the "unless" order.

39. Although the Court of Appeal in *British Gas Trading* was concerned with the extent to which the underlying breach could be taken into account at the first stage of the *Denton* test, I agree with Mr Serr that it must follow that it is equally pertinent to take the underlying breach into account at the third stage. That is because the Court of Appeal recognised that any past breaches of rules or orders could be relevant at the third stage. There is no good reason for the very breach which gave rise to the Unless Order being excluded from consideration at the third stage.

40. While I reject, therefore, Mr Innes' first two arguments as to the manner in which the test for granting relief from sanctions is to be applied, by the end of the argument I was concerned that this case raised a broader question, as to whether it was right to apply that test at all in circumstances where the Unless Order was not sent to Tyburn until March 2019.

41. It seemed to me that it is inherently unjust for a court to (i) order a party to do something, stipulating an automatic sanction for not doing it, (ii) not send the order to the party or even make it aware that an order has been made, and (iii) nevertheless refuse relief from the sanction *contained in the order*. In such circumstances, the party concerned does not merely have a good reason for not complying with the order, but it was *impossible* for it to do so.

42. The injustice is compounded in this case by the following:

(1) Tyburn had not simply ignored PD 52B. It had recognised in its appellant's notice that it had not filed grounds of appeal but made an application for an extension of time in which to do so. It contended that it was reasonable to do so given that its (then) barrister had been unable to attend the hearing before DJ Kanwar, so it ought to be allowed to see the transcript of the judgment before filing the grounds of appeal.

(2) By her order of 13 August 2018, the judge did four things: (a) she concluded that the appellant's notice was defective because it was not accompanied by grounds of appeal; (b) implicitly, she refused Tyburn's application to extend time for filing the grounds of appeal until after it had received a transcript of the judgment; (c) she nevertheless decided to afford Tyburn an opportunity to remedy the defect; and (d) she ordered that unless the defect was remedied by 28 August 2018 the appeal would stand dismissed.

(3) The problem was, however, that in failing to send the Unless Order to Tyburn, Tyburn never knew (until March 2019) that the court had: (a) concluded that the appellant's notice was defective (rejecting its argument that there was sufficient compliance with PD 52B by stating the grounds of appeal would follow later); (b) refused its application to extend time for filing the grounds of appeal; and (c) nevertheless given Tyburn a further period of time within which to do so, or face the automatic consequence that the appeal would be dismissed.

43. My concern as to the application of the *Denton* test as regards an order that was not sent to the defaulting party was reflected in the development of the third of Mr Innes' points. He submitted that the judge failed, at the third stage of the *Denton* test, to take into account that Tyburn had never received the Unless Order. He pointed out that the factors relied on by the judge at [31] of her judgment (which contained her reasons for declining relief from sanctions) all relate to Tyburn's underlying failure to comply with PD 52B.

44. For example, the judge found that Mr Francis could have taken a note of the hearing, obtained legal advice and formulated grounds of appeal on the basis that they could be refined or amended once the transcript of the judgment was obtained. Mr Innes submitted that this ignores the fact that the judge had made the Unless Order but failed to send it to Tyburn. Had Tyburn been aware of the fact that the judge had refused its application for the extension of time sought, but nevertheless given it a final extension on an unless basis until 28 August 2018, then it would not only have had the opportunity to prevent the appeal being dismissed by filing grounds of appeal, but would no doubt have taken that opportunity.

45. Where the sanction is contained in an unless order, the failure to send that order to the party does not, of course, prevent it from complying with the underlying order, rule or practice direction, the breach of which gave rise to the unless order. I accept that in some circumstances, a defaulting party may require relief from sanctions even ignoring the making of a subsequent unless order. In such a case, it may be appropriate to refuse relief from sanctions attaching to the underlying breach.

46. Whether or not it is appropriate to do so depends, however, on the nature of the underlying breach and whether sanctions attached to it. In reflecting on the case following the hearing, it seemed to me that the parties' arguments had not addressed this point.

47. Accordingly, I drew the parties' attention to a passage in the White Book, at paragraph 3.9.15, and two authorities there referred to: *R. (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633; and *Mark v Universal Castings & Services Ltd* [2018] EWHC 3206 (QB). The parties were given the opportunity to submit further written submissions on the question whether – in light of those authorities – the "relief from sanctions" test was to be applied at all and, if not, what other test was applicable and what order the court should make under that other test, having regard to the findings of fact made by the judge at [31] of her judgment. Both parties took the opportunity to file further written submissions. Neither requested an oral hearing on this further point.

48. In the *Hysaj* case, the Court of Appeal held that a failure to file an appellant's notice in the time required by the rules carried with it the implied sanction that unless the court were to extend time retrospectively the order of the court below would stand and could not be appealed. Since a person who was out of time for filing a notice of appeal was subject to that implied sanction, an application for extension of time was to be regarded as analogous to an application under CPR rule 3.9 for relief from a sanction. The stringent approach under CPR rule 3.9, including the *Denton* test, therefore applied. This was only, however, in the case of an "out of time" application for an extension of time, that is one made after the time for compliance had expired.

49. In the *Universal Castings* case, Martin Spencer J held that the word "must", wherever used in the CPR, did not necessarily imply the need to apply for relief from sanctions for non-compliance. At [52], he said that:

> "…the principle behind the reason why those rules carry with them an implied need to apply for relief from sanction when breached can be discerned by reference to the default position if the application is refused. In the case of a litigant who fails to serve and file a notice of appeal in time, without an extension of time the litigant is unable to appeal as any notice of appeal would be invalid as having been served out of time and the judgment in the court below will stand. This is so significant for the purposes of the litigation that the need to apply for relief from sanction is implied."

50. That did not apply, however, to the failure to serve a medical report and/or a schedule of loss with particulars of claim as required by paragraphs 4.2 and 4.3 of the Practice Direction supplementing Part 16 of the CPR. Often this could be "quite a trivial breach" because compliance could be achieved by service of the documents which were, in the end, relatively uninformative. At [49] he noted that an alternative to serving "an anodyne and relatively uninformative schedule of loss and medical report with the particulars of claim is to do what was done in the present case and state in the covering letter when the particulars of claim are served that these will follow and then leave it to the court to case manage the claim and make provision for service of these documents in due course."

51. In his supplemental submissions, Mr Innes contended that the requirement in PD 52B to file grounds of appeal with an appellant's notice fell into the same category as the practice direction in the *Universal Castings* case. I disagree. The grounds of appeal are an essential element in any appeal and, as HHJ Melissa Clarke noted in this case, to permit appellants to stop the clock running on an appeal by filing an appellant's notice without grounds of appeal would drive a coach and horses through the clear time period prescribed for filing an application for permission to appeal.

52. I agree, however, with Mr Innes' further contention in his supplemental submissions, that this is not a case where Tyburn was subject to any implied sanction for failing to comply with PD 52B. Tyburn's application for an extension of time to file grounds of appeal was made "in-time" in its appellant's notice.

53. Mr Serr, in his supplemental submissions, contended that while the appellant's notice did contain an application for an extension of time to serve the grounds of appeal, the extension sought was only for a further 21 days. That is not correct. The application sought an extension of time of 21 days after receipt of the transcript of the judgment of DJ Kanwar. While the appellant's notice indicated, in section 11, that this would not lead to any substantial delay, Tyburn was not to know that it would take some four months from the date of the hearing for the approved transcript to become available.

54. Mr Serr also relied on the comments of HHJ Melissa Clarke that I have referred to above, to the effect that to allow an appellant to serve an effectively blank form would drive a coach and horses through the time period prescribed by the rules. That, however, misses the point that the application for an extension of time to file grounds of appeal was made before the expiry of the deadline.

55. It follows, in my judgment, that the stringent approach under Rule 3.9, including the *Denton* test, was not applicable to the underlying failure to comply with PD 52B in this case. As it would be wrong to refuse relief from the sanction set out in the Unless Order itself, given it was never sent to Tyburn (see above), on the special facts of this case I do not think that the *Denton* test was applicable at all. Accordingly, although understandable in light of the fact that the cases to which I have referred above were not cited to the judge, I consider that the judge erred in applying that test, and it falls to me to consider afresh the consequences of the fact that Tyburn failed to file grounds of appeal until January 2019.

56. Essentially, the question is whether the court should retrospectively grant an extension of time for filing the grounds of appeal to 4 January 2019, the date they were in fact filed. This is not merely a matter of considering again Tyburn's application contained in its appellant's notice. Tyburn did not file the grounds of appeal within the time period it then asked for, so on any view it requires a further extension of time.

57. The parties, in their supplemental submissions, were in agreement that if the relief from sanctions test did not apply, then the court was required to exercise its general case management power in CPR 3.1(2)(a), to "extend or shorten time for compliance with any rule, practice direction or court order (even if an application is made after the time for compliance has expired)." In doing so, the court must have regard to the overriding objective.

58. I have set out above the findings of fact made by the judge at [31] of her judgment.

59. Mr Serr, for BT, submitted that:

    (1) It would be disproportionate to grant an extension since it would amount to a second extension;

    (2) This is particularly so given the long history of the litigation and the lack of compliance by Tyburn to pay existing costs orders;

    (3) Tyburn was late in serving its grounds of appeal (even in relation to its own application to extend time, made in the appellant's notice) and did not seek a further extension from the court;

    (4) It would be unfair to BT, who had every right to consider the matter completed when Tyburn failed to serve their grounds of appeal within the 21 day extension;

(5) No explanation has been given for the failure to draft the grounds of appeal between receipt of the transcript of the judgment and Mr Francis becoming ill; and

(6) Due deference should be given to the judge's findings, which are damning against Tyburn.

60. In considering the exercise of discretion overall, I do not think that the period of delay until the receipt of the approved transcript of DJ Kanwar, or the failure of Tyburn to do the things it could have done in that period (as the judge relied on at [31] of her judgment) ought to count against Tyburn. Although the court had made an order dismissing Tyburn's application for such an extension of time, it had not sent that order to Tyburn. It is true that Tyburn, not having heard from the court, could have enquired what had happened to its application. I take into account that Tyburn was an unrepresented litigant. Although that does not provide a good reason for failing to comply with rules (see, for example, the *Hysaj* case, per Moore-Bick LJ at [44]) the failure to make enquiries of the court is not a failure to comply with a rule.

61. Long delays in receiving an approved transcript of a judgment are not unusual. In this case, as the judge noted, Tyburn acted appropriately in chasing up the transcript. Even if Tyburn had filed the grounds of appeal by the deadline contained in the Unless Order, it is unlikely that the court would have been able to deal with the application for permission to appeal until the transcript of the judgment had been obtained. Accordingly, the delay in filing the grounds of appeal prior to 22 October 2018 did not cause any delay in the progress of the appeal itself.

62. Moreover, notwithstanding that it is now two and a half years since the order of DJ Kanwar, it is important to put out of mind the very substantial periods of delay that occurred *after* Tyburn filed its grounds of appeal, which occurred for reasons other than Tyburn's default. Those reasons include the court taking time to appreciate the link between the grounds of appeal filed in January 2019 and the Unless Order, the inevitable delay between Tyburn making its application, once the court had contacted it, and the hearing being listed, and the length of time to list this appeal for hearing, including the consequences of Covid-19, which led to an agreed adjournment of the hearing originally listed for May 2020.

63. The period of delay which can properly be laid at Tyburn's door is thus limited to the period between receipt of the transcript in late October 2018 and the filing of the grounds of appeal in early January 2019.

64. I accept Mr Serr's submissions that once the 21 day period after receipt of the transcript, which Tyburn had originally asked for, had expired, in substance a *second* extension of time was required and that Tyburn ought to have made that further application in November 2018.

65. The oddity is that Tyburn did take the step of preparing evidence at that time (in the form of Ms Pearse's witness statement dated 10 November 2018) which asked the court to allow its application for permission to appeal out of time, but did not file that document until 4 January 2019.

66. In her statement, after explaining that the delay up to that point had been caused by the delay in the transcript being obtained and direct access counsel being away for a short period when the transcript was available, Ms Pearse indicated that there would be further delay. That was because, although the grounds of appeal had now been prepared with the assistance of counsel, they needed to be reviewed by Mr Francis (who was the only representative of Tyburn who had been at the hearing before DJ Kanwar), but they could not be because he was critically ill and hospitalised. In light of Ms Pearse's statement, I do not accept that Tyburn failed to provide evidence to explain the delay between the receipt of the transcript of judgment and Mr Francis becoming ill or that it failed to request any extension of time (albeit that it only made that request on filing the statement in January 2019, rather than in November 2018). In Mr Francis's second witness statement, he provided further detail: that he was hospitalised on 11th November 2018 and unable to return to work until 20 December 2018, at which point he prepared his witness statement in support of the appeal which was filed, along with the grounds of appeal, after the Christmas and New Year break on 4 January 2019.

67. It is true that Tyburn did not produce evidence from a doctor or hospital corroborating Mr Francis's evidence. I have no reason to doubt, however, the evidence of Mr Francis and Ms Pearse that Mr Francis was indeed critically ill, hospitalised and convalescing from the time of Ms Pearse's statement. It is clear from Ms Pearse's evidence of 10 November 2018 that the work on the grounds of appeal had been all but done by that time, with the assistance of direct access counsel. It would have made no sense to go to the trouble of preparing her witness statement then, rather than simply filing the grounds of appeal, unless Mr Francis was genuinely indisposed.

68. So far as Mr Serr's complaint as to the long history of the litigation is concerned, that counts for little as against Tyburn without prejudging the outcome of the appeal against the order of DJ Kanwar, since it was only joined to the proceedings, for the purposes of costs, on 19 June 2018. As for Mr Serr's submission that there had already been lack of compliance by Tyburn with existing costs orders, this is strongly disputed by Mr Innes, who said in his supplemental written submissions that all but one of the prior costs orders had required detailed assessment, which had not begun, and in relation to the other costs order, Tyburn had provided a cheque which had not been presented for payment. This was not addressed by the judge and the relevant material is not in evidence. It is therefore not a factor I can fairly take into account.

69. I take into account the prejudice to BT from the further delay following receipt of the transcript and the importance of finality in litigation and thus the need for appeals to be conducted timeously. Balanced against that is the important factor that if no extension is granted, Tyburn loses the ability to pursue a challenge (which for the purposes of this application is assumed to have a real

prospect of success) to a judgment requiring it to pay a substantial sum of money.

70. I also take into account that the court's approach, when it determined that Tyburn had failed to comply with PD 52B had *not* been to dismiss the appeal immediately, but to do so only in the event that Tyburn failed to comply with a final opportunity to file grounds of appeal. I consider that to have been the just response, and would have been the just response had Tyburn returned to court in November 2018 with the benefit of Ms Pearse's statement. Given that the grounds of appeal had been prepared, I consider that Tyburn could and would have complied with that order had it known of the consequences of non-compliance.

71. Taking into account the above matters, and also the fact that Tyburn had filed the grounds of appeal before it had received any response from the court on the application that it had made to extend time, on balance I exercise my discretion in favour of extending time for the filing of the grounds of appeal retrospectively to 4 January 2019.