IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)
[2022] EWHC 3534 (Ch)

No. CH-2020-000026

Rolls Building
Fetter Lane
London EC4A 1NL

Wednesday, 23 November 2022

Before:

MR JUSTICE EDWIN JOHNSON

B E T W E E N :

FRANCIS LAWRENCE LITTLE — Claimant

- and -

BLOOMSBURY LAW SOLICITORS — Defendant

MR A HEYLIN (instructed by Howard Kennedy LLP) appeared on behalf of the Claimant.

MR C ADAMS (instructed by Bloomsbury Law Solicitors) appeared on behalf of the Defendant.

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MR JUSTICE EDWIN JOHNSON:

Introduction

1 This is the hearing of an application of the claimant in this action for an order under CPR 3.1(7) setting aside an earlier order of this court and reinstating the claimant's appeal/application for permission to appeal in this action. The application ("**the Application**") is made by application notice dated 4 February 2022 but issued on 11 February 2022. When I refer to "**Issue**" I am referring to the date of the court stamp which appears on the application notice. So far as the date is concerned, the date of 4 February 2022 appears in the box marked, "Date" on the application notice.

2 In order to avoid confusion between the parties, who have both made appeals/applications for permission to appeal, I will refer to the claimant, Francis Lawrence Little, as "**the Claimant**". I will refer to the defendant, Bloomsbury Law Solicitors, as "**the Defendant**". An oral hearing of the Application was directed by Bacon J by an order made on 2 March 2022. References to the appeal court in this judgment mean this court, namely the High Court in the Business and Property Courts.

3 At this hearing the Claimant was represented by Alexander Heylin of counsel, and the Defendant was represented by Christopher Adams, also of counsel. I am most grateful to both counsel for the assistance they have given me in relation to the Application, both in their written submissions and in their oral submissions at the hearing itself.

Evidence

4 The evidence in support of the Application is contained in a witness statement of Timothy Bignell, a solicitor and partner in the firm of Howard Kennedy LLP, who are the Claimant's solicitors. The witness statement is dated 26 September 2022. The evidence in response to the Application, and in response to the witness statement of Mr Bignell, is contained in a witness statement of Jamil Ahmud, a solicitor and partner in the Defendant, which is a firm of solicitors. The witness statement is dated 11 November 2022.

Relevant background

5 The background to this dispute is fully set out in the judgment of Master Teverson which was handed down on 16 December 2019. The following short summary of the background relevant to the Application is taken from the opening section of that judgment.

6 The Claimant commenced this action by a Part 8 claim form issued, I believe, on 20 March 2019. By the claim form, the Claimant sought the following relief:

(1) A declaration that:

(i) Francis Lawrence Little was known as Frank Turner;

(ii) The Claimant was the registered owner of property known as 61 South Park Crescent, Catford, London SE6 1JJ ("**the Property**");

(iii) Upon the sale of the Property the Claimant was rightfully entitled to the proceeds of sale, being the sum of £349,995;

(iv) The Defendant, being solicitors instructed by the Claimant to manage the sale of the Property had wrongfully, unjustifiably and unreasonably withheld such proceeds of sale.

(2) An order that the Defendant do pay the proceeds of sale of the Property to the Claimant.

(3) An order that the Defendant do pay interest on the proceeds of sale at 8 per cent, the sum being due as a commercial debt from 15 June 2015 until 3 March 2019, being £104,020.56, and continuing at the daily rate of £76.71 until judgment or, alternatively, at such rate and for such period as the court thinks fit.

(4) An order that the Defendant pay the costs of the action.

(5) Such further or other orders as might be just.

7 The Defendant (a firm) acted as solicitors for the Claimant on the sale of the Property. The sale completed on or about 12 June 2015. Since that date, and prior to the commencement of the action, the balance of the proceeds of sale, after redemption of the mortgage and costs of sale, was retained by the Defendant in its client account. The Defendant's case was, and is, that it had good reason for retaining that money in its client account.

8 Following the commencement of the action and the service of the claim form, the Defendant, under cover of a letter dated 1 April 2019, transferred a sum, which I believe was £258,351.27, to the client account of the Claimant's solicitors, who were then, as now, Howard Kennedy LLP. On 3 June 2019, the Defendant accounted to the Claimant for a further sum, which I believe was £1,153.61, representing the interest that had accrued on the money in its client account from the date of sale to 1 April 2019.

9 By its acknowledgement of service in the action, which was dated 5 April 2019, the Defendant stated that it intended to contest the action, save for the first three declarations sought in the claim form, in respect of which the Defendant adopted a neutral stance. By way of recap, the first three declarations sought were declarations:

(i) that Francis Lawrence Little was known as Frank Turner;

(ii) that the Claimant was the registered owner of the Property; and

(iii) that upon the sale of the Property, the Claimant was rightfully entitled to the proceeds of sale, being the sum of £349,995.

10 The principal area of dispute between the parties, as I understand the position, following the transfer of the sum of £258,351.27 on 1 April 2019, and apart from the specific issues relating to disputed deductions in interest, was whether the Defendant had acted reasonably or unreasonably in withholding from the Claimant the balance of the proceeds of sale in the period between completion of the sale in June 2015 and 1 April 2019, being the date of transfer referred to above.

11 This is the second set of proceedings between the parties. The first set of proceedings involved the presentation of a petition by the Claimant to wind up the Defendant. That petition was, as I understand the position, dismissed on 15 August 2016. It was ordered that the Claimant pay the Defendant's costs of those first proceedings on the indemnity basis.

The order of Master Teverson

12 The action came before Master Teverson for a hearing, I believe, on 30 September 2019, and on 16 December 2019, Master Teverson handed down a fairly lengthy judgment on the

matters in dispute between the parties. On the same day, Master Teverson made an order reflecting the outcome of the action and reflecting the decisions made in his judgment. Running briefly through the terms of that order, which I shall refer to as "**the Teverson Order**", Master Teverson ordered as follows.

(1) By paragraph 1 he ordered that the Defendant should, by 4.00 p.m. on 30 December 2019, pay the Claimant the sum of £21,317.38.

(2) By paragraph 2 of the order, he ordered that the Defendant should pay the Claimant's costs, to be subject to detailed assessment on the standard basis, if not agreed, as follows:

(i) by subparagraph (a), the costs to be paid were 50 per cent of the Claimant's costs incurred in the period 1 December 2018 to 1 April 2019; and

(ii) by subparagraph (b), 50 per cent of the Claimant's costs from 2 April 2019 onwards.

(3) Master Teverson also extended the time for the parties to file appellant's notices seeking permission to appeal, if so advised, to 4.00 p.m. on 20 January 2020.

The appeals

13 Both parties have sought to appeal against the Teverson Order. The Claimant has sought to appeal, by an appellant's notice which was filed on 20 January 2020. I believe that the appellant's notice was filed before 4.00 p.m. on that day, and I therefore proceed on the footing that the Claimant's appellant's notice was filed within the extended deadline stipulated in paragraph 3 of the Teverson Order. The Defendant also filed an appellant's notice but that appellant's notice was not filed until, I believe, 23 January 2020. It follows that it was filed outside (albeit only a few days outside) the extended time limit in the Teverson Order.

14 I will refer to the Claimant's appeal, which has the number CH-2020-000023 as "**the Claimant's Appeal**", and I will refer to the Defendant's appeal, which has the number CH-2020-000026, as "**the Defendant's Appeal**". In both cases, this is not strictly accurate. No permission to appeal has been granted for either appeal. Permission to appeal is required for both appeals and, as I understand the position, was not sought from Master Teverson. Permission to appeal is sought from this court, the appeal court, in each appellant's notice.

The Unless Order

15 The original deadline for the filing of the appeal bundle required by paragraph 6.3 of CPR PD52 was, in the case of the Claimant's Appeal, 24 February 2020. I have derived that deadline from adding 35 days to the date on which the Claimant/Appellant's notice was filed on 20 January 2020. The Claimant did not, however, comply with the deadline of 24 February 2020. The Claimant also, as I understand the position, made no application for an extension of this deadline. A point to be noted in this context is that on 6 February 2020, the Defendant's solicitors wrote to the Claimant's solicitors with the following enquiry,

> "*We refer to our previous correspondence on the above matter. We enclose by way of service our client's skeleton argument in support of our client's appeal, which we trust is self-explanatory. Please confirm whether you have filed a bundle with your client's appeal*

and, if so, it would be otiose for us to file a second bundle which includes precisely the same documents".

16 So far as I can see, there was no specific response to that letter from the Claimant's solicitors, Howard Kennedy. Instead, they wrote to the court on 18 February 2020, referring to the appellant's notice which they had filed on behalf of the Claimant and indicating that the Claimant's intention was to put in the skeleton argument in support of the appeal/application for permission to appeal, which was going to be E-filed no later than close of business on 24 February 2020.

17 The next event which occurred was on 17 March 2020. By that date the appeal bundle, which was required in the Claimant's Appeal, had still not been filed. In the usual way in the appeal court (at least in the Chancery Division where an appeal bundle is not filed), the matter was placed before a judge to consider the matter on the papers and to make an appropriate order. That is what Morgan J did on 17 March 2020. On that date he made an order. I will start by quoting the recitals to the order. They were as follows,

> "*Upon perusing the appeal file hearing, and upon noting that the time for filing an appeal bundle (to include transcript of the judgment of the lower court) has expired*".

18 The order then went on to provide, in paragraph 1, that the Claimant's Appeal should be case managed with the Defendant's Appeal. Then in paragraph 2, the order provided as follows,

> "*Unless the appellant do, by no later than 4.00 p.m. on 27 April 2020, file an appeal bundle containing the documents specified in PD52B (paragraph 6.4.1) and, if relevant, any documents specified in PD52B (paragraph 6.4.2) (to include a transcript of the judgment of the lower court), this appeal shall stand struck out as from midday on the second working day after 17 April 2020*".

So by paragraph 2, Morgan J made an unless order. Unless an appeal bundle was filed by 17 April 2020, the appeal would stand struck out as from midday on the second working day after 17 April 2020.

19 Moving on to paragraph 3 of this order, that paragraph contained a note to the appellant that if the appellant (that is to say the Claimant) could not comply by 17 April 2020, and he wanted to apply for a further extension, he must apply to the court to make a formal application before 17 April 2020 so that his application could be listed before a judge for an explanation as to why he did not comply with the order.

20 Then finally, paragraph 4 of the order was in the following terms,

> "*This order is made without notice and of the court's own motion, and the parties, or either/any of them, may apply within seven days of service of this order on them to set aside or vary all or any part of this order. Any such application must be served on all other parties*".

I will refer to the order of 17 March 2020 as "**the Unless Order**".

21 It will be noted that the Unless Order lacks the usual provision for service of the order by one of the parties. It contains no provisions specifying which of the parties was to be

responsible for service of the Unless Order on the other party and no provision for the sealed version of the Unless Order to be provided to such serving party. Instead, my understanding is that the sealed version of the Unless Order was filed on the CE filing system.

22 The Claimant did not file the required appeal bundle by the deadline in the Unless Order of 4.00 p.m. on 17 April 2020, nor did the Claimant make an application for a further extension of time before that date. The Claimant's case is that he did not do so because he and his solicitors were unaware of the Unless Order. The Claimant's case is that the Unless Order was not served on him. The evidence of Mr Bignell is that the Claimant only became aware of the existence of the Unless Order when Mr Bignell's firm (that is to say, Howard Kennedy) reviewed the CE file on 28 January 2022, whereupon the Application was made. By way of reminder, the application notice by which the Application was made is dated 4 February 2022 but there is a stamp which shows the Issue date as 11 February 2022. I was told that the application notice is shown as having been uploaded to the CE filing system on 11 February 2022. The discrepancy in these dates is not important in the particular circumstances of this Application but it seems to me I should proceed on the basis that the Application was actually made on 11 February 2022 rather than before, but, as I say, I do not believe anything turns on that.

23 In terms of the missing appeal bundle, I understand that the Claimant did file the missing appeal bundle on 4 February 2022. What I have just said needs a little bit of elaboration, because in his witness statement, at paragraph 10, Mr Bignell explains that an appeal bundle was sought to be filed on 4 February 2022 but, as he explains, it was then realised that the appeal bundle needed to be filed electronically via CE file. That created problems because the appeal bundle exceeded the file size limit for CE filing. That meant the appeal bundle had to be split into smaller parts, and ultimately, as I understand the position, the appeal bundle was filed by email in two parts on 11 February 2022, and it appears that, even after that, it still had not reached its proper destination on 11 February 2022. So it seems to me that when I refer to the date of 4 February 2022, that is the date on which the Claimant commenced the process of seeking to file the appeal bundle with the appeal court, but in terms of when successful filing took place, it appears that that was either on 11 February 2022 or on a subsequent date. Again, I do not think a great deal turns on the precise date on which the appeal bundle was filed, but it appears to have been at some point in February 2022. In any event, the relevant point for present purposes is that the missing appeal bundle was only filed well outside the extended deadline of 17 April 2020 specified in the Unless Order and, even further, outside the original deadline of 24 February 2020.

24 Assuming that the Unless Order stands, and subject to the argument of the Claimant that there was no breach of the Unless Order, the current status of the Claimant's Appeal is that it has been struck out with effect from midday on the second working day after 17 April 2020. The 17 April 2020 was a Friday, so I calculate that the time from which the strike-out took effect was midday on 21 April 2020.

The issues to be resolved in the Application

25 There was, as it seems to me, and if I may respectfully say so, some confusion in the arguments of counsel as to the issues engaged by the Application, at least as those arguments were formulated in the skeleton arguments filed by counsel, and in saying that, I appreciate, at least on the Defendant's side, that the Defendant was responding to the case it believed that it had to meet as brought by the Claimant. By reference to the skeleton arguments, the primary argument of the Claimant was that the terms of the Unless Order had not been breached. If that was wrong, on the Claimant's case, the issue then became one as

to whether the Claimant should be granted relief from sanction. It will be noted that these arguments did not engage with the relief which was actually sought in the application notice, which was a setting aside of the Unless Order pursuant to CPR 3.1(7). In response to all of this, the Defendant argued that the Unless Order should not be set aside pursuant to CPR 3.1(7) and that relief from sanction should not be granted. The position seems to me to be as follows, in terms of the issues engaged by the Application and as matters developed in the course of counsel's helpful submissions.

26 The first question does, indeed, seem to me to be whether it is the case that the Claimant was not in fact in breach of the Unless Order. If the Claimant was not in breach of the Unless Order, then the Application is unnecessary, because the appeal bundle was filed in time. If the days on which the time for compliance with the Unless Order began to run was the date of service of the Unless Order, then time had still not begun to run if the Unless Order had still not been served on the Claimant, and, in any event, an appeal bundle has now been filed. The situation is the same if one regards time as running from 28 January 2022, the date when, according to Mr Bignell's evidence, the Claimant became aware of the Unless Order, and if that time for compliance comprised a period of one month from that date, then it looks as though the appeal bundle was filed within time.

27 If not, however (by which I mean if the Claimant was in breach of the Unless Order), then a number of questions arise, which seem to me to be as follows:

(1) The first question on this hypothesis concerns the appropriate jurisdiction pursuant to which the Application should be made. The Application is expressed to be made under CPR 3.1(7), namely the jurisdiction to vary or revoke an order. It seems to me, however, that a question arises here as to whether the Unless Order falls within the terms of CPR 3.3(4) as an order made by the court of its own initiative without hearing the parties or giving them the opportunity to make representations. As such, it seems to me that the Application could have been made under CPR 3.3(5), which gives a party the right to apply for such an order to be set aside, or varied, or stayed, provided that the Application is made within the time limit specified in the relevant order or, if no such time limit is specified, within seven days of the relevant order being made.

Shortly in advance of the hearing, I asked counsel to address this question in their oral submissions, which counsel duly did. I also had the benefit of a short written supplemental skeleton argument from Mr Heylin and an additional authority, both of which I was able to read before the hearing.

(2) If the jurisdiction in CPR 3.3(5) is available, and if the Unless Order can be set aside pursuant to this jurisdiction, the position changes. On this hypothesis, the Claimant's Appeal is no longer struck out and instead the question becomes whether the time for filing the appeal bundle should be extended to the actual date of filing of the appeal bundle, which, as I have said, I understand to have been some date in February 2022.

(3) The same is true if the appropriate jurisdiction is CPR 3.1(7) and if the Unless Order can be set aside pursuant to this jurisdiction.

(4) If, however, the Unless Order cannot be set aside, the Claimant's Appeal remains struck out. On this hypothesis, it seems to me that there are two possibilities:

(i) The first possibility is that the Claimant requires relief from the sanction of striking out in the Unless Order, which can only be obtained by application

under CPR 3.8(1), applying the test in CPR 3.9(1) as that test has now been explained by the Court of Appeal in *Denton v TH White Limited* [2014] EWCA Civ 906, [2014] 1 WLR 3926.

(ii) The second possibility is that the *Denton* test should not apply to the Application, or relief from the sanction in the Unless Order, given that the Unless Order was not served on the Claimant. On this hypothesis, the Claimant's application should be treated as an application for an extension of time for filing the appeal bundle to the relevant date in February 2022.

28 There are then two further possibilities. The first is that the question of whether such an extension of time should be granted depends upon the court's general case management powers to extend or shorten time limits in compliance with a Practice Direction or court order as contained in CPR 3.1(2)(a). The second is that even leaving aside the sanction in the Unless Order, the Claimant still requires relief from sanction because he did not comply with the time limit for filing an appeal bundle, either as originally constituted or as extended by the Unless Order, and he made no application for an extension of time prior to the expiration of that time limit.

29 I will take my discussion of these various issues in turn but, before I do so, I should deal with one factual question, which is the evidential position in relation to the question of whether the Unless Order was served on the Claimant, which also engages a question of law.

What is the evidential position in relation to the question of whether the Unless Order was served on the Claimant?

30 I accept the submission of Mr Adams that the burden is generally upon the Claimant to prove those facts that he needs to prove in support of the Application, including that part of his case which is that the Unless Order was never served on him. In the context of service or non-service of the Unless Order, the relevant evidence is principally to be found in paragraph 8 of Mr Bignell's witness statement, where Mr Bignell says this,

> "*The Unless Order was made without notice and, significantly, was not served upon the Claimant/Appellant by the court at any time. The Claimant/Appellant being unaware of the order, the appeal was struck out on or around 17 April 2020. The Claimant/Appellant only became aware of the Unless Order when Howard Kennedy reviewed the court's CE file on Friday, 28 January 2022*".

So that is clear evidence from Mr Bignell that the Unless Order was not served on the Claimant either directly or at Howard Kennedy.

31 I have also already noted that if one looks at the Unless Order itself, it does not contain the usual provision for service by one of the parties on the other party, or indeed a provision that service was going to be effected by the court, although that is not the normal practice in the Chancery Division; it is normally for one party to serve an order on the other. One can draw the inference from the absence of service provisions in the Unless Order that the Unless Order was not served on the Claimant.

32 Mr Adams did make the point that this was a matter which did not appear to have been investigated by Mr Bignell within Howard Kennedy. I understood his point to be not that he was doubting the evidence of Mr Bignell, but rather that he was doubting the extent of the

investigations which were made. His point was, as I take it, that there was no evidence (the burden being on the Claimant in this respect) demonstrating that enquiries had been made around the offices of Howard Kennedy in order to ascertain whether the order might perhaps have been sent by some means or other to Howard Kennedy and had been overlooked, in the way that can sometimes happen in an office. It is true that Mr Bignell does not give any evidence on investigations which he had made into the matter, but it does not seem to me that the absence of evidence of investigations is sufficient to cast serious doubt on the evidence of Mr Bignell (which is not challenged), which I accept for the purposes of the Application, that the Unless Order was not served on the Claimant and was not sent to Howard Kennedy.

33 That is not necessarily the end of the matter, because what is known is that the Unless Order was uploaded to the CE filing system and was uploaded on 17 March 2020. I know that, because, in the course of oral submissions, Mr Adams' instructing solicitor pulled up the relevant screenshot from the CE filing system, that was circulated to myself and to the Claimant's representatives by email, and that screenshot does indeed show that the Unless Order was uploaded to the CE file on 17 March 2020, and I proceed on the basis that that is the date (17 March 2020) when the Unless Order was uploaded. It was not, however, argued by Mr Adams (correctly, in my view) that the uploading of the Unless Order to the CE file could constitute service of the Unless Order on the Claimant, either on that date, or 17 March 2020, or on any subsequent date. I therefore approached the Application on the basis:

(i) that the Unless Order was uploaded to the CE file on 17 March 2020, where it was available to view by anyone checking the case on the CE file, but

(ii) that the Unless Order was not served on the Claimant.

34 I also approach the Application on the basis that although, of course, the Claimant is now very well aware of the Unless Order, it appears still to be the case that there has not been formal service of the Unless Order on the Claimant.

Was there a breach of the Unless Order?

35 As I understood the submissions of Mr Heylin, he advanced two points in support of his case that the Claimant was not in fact in breach of the Unless Order. The first argument I understood to be an argument based on the construction of the Unless Order. Essentially, it was an argument that in the absence of service of the Unless Order, the deadline specified in the Unless Order either did not apply or could be construed as a deadline which expired after the date when the appeal bundle was in fact actually filed in February 2022. It seems to me that that argument cannot possibly be correct. The Unless Order was perfectly clear in saying that the appeal bundle has to be filed by no later than 4.00 p.m. on 17 April 2020. That is a specific date (it leaves no room for ambiguity) and it seems to me the question of whether the Unless Order was or was not served, and the fact, which I take to be a fact for the purposes of this Application, that the Unless Order was not actually served on the Claimant, are both beside the point. The point is that the Unless Order specified a specific deadline.

36 In this context, I was referred to a decision of the Court of Appeal in *Poule Securities Limited v Howe & Ors* [2021] EWCA Civ 1373, which concerned the construction of an Unless Order, but I do not think it is necessary to go further into that case, because in that case the Court of Appeal were considering an order which might have been said, on its terms, to have left some scope for an argument that the relevant deadline ran from the date

of service of the order rather than from the date of the order. In the present case, there is no such potential ambiguity. The deadline in the Unless Order, as I have said, is perfectly clear.

37 The second argument was a human rights argument based on Article 6, which was explained by Mr Heylin in his oral submissions. Here, essentially the argument was that in circumstances where an Unless Order was made, but was not served on the Claimant, that was a breach of the Claimant's rights to a fair trial and, so Mr Heylin submitted, it was no answer to that to say, "Well, there's no problem, because the Claimant can make his application now to try to set aside this order, or obtain relief from sanction", because the position of the Claimant, so it is asserted, is now worse than it would have been if the order had been served on the Claimant at the time when it was made, and the Claimant would then much more easily have been able to remedy the position, either by filing an appeal bundle or by making an application for a further extension of time, if that had been required.

38 It seems to me, however, that the position in the present case is not one that can fall within the terms of Article 6. As I have said (and I do not say this by way of any criticism), I have only been addressed by reference to Article 6, I have not been shown any case law to assist me on this particular point, but I cannot see that the making of the Unless Order was in itself a breach of the Claimant's Article 6 rights. Orders of this kind, without notice to the parties, and of the court's own initiative, are frequently made by the courts, and the protection for the parties, when the court makes orders of this kind, is that the parties have a right, under the CPR, and it is normally recited in the order itself, to apply to set aside the order, and that time for setting aside the order normally runs from the date of service of the order. So in the present case, the Claimant is not left without remedy; there is that right, all other things being equal, to apply to set aside the order, and that is not a right, it seems to me, that the Claimant necessarily lost in the present case.

39 So far as the absence of service of the order on the Claimant is concerned, it seems to me that that is a separate matter to the making of the order itself. That is an administrative error which, it seems to me, has followed the making of the order, and that administrative error, depending on the circumstances of this case, may be a highly significant factor (it is plainly a relevant factor) in considering questions which go to the exercise of my discretion and, in particular, which go to the question of whether relief from sanction should be granted, if it is the case that the Claimant requires relief from sanction. So, for all those reasons, I cannot see that the making of the Unless Order has engaged any breach of the Claimant's Article 6 rights, nor can I see that the subsequent administrative error of the court has engaged the Claimant's Article 6 rights, given the ability of the Claimant to apply to set aside the Unless Order. So, for all of those reasons, I come to the conclusion that the Claimant's position is that he did breach the terms of the Unless Order by failing to file an appeal bundle by 4.00 p.m. on 17 April 2020.

<u>What is the appropriate jurisdiction in terms of seeking to set aside or vary the Unless Order</u>?

40 It was common ground between counsel, after I raised this point with counsel yesterday, that the appropriate jurisdiction is CPR 3.3(5), that being the ability of a party to apply to set aside an order which has been made by the court, of its initiative, and without notice to the parties. It may be as well if I just read the terms of CPR 3.3(5):

> "*Where the court has made an order under paragraph (4):*

> *(a) a party affected by the order may apply to have it set aside, varied or stayed, and*
>
> *(b) the order must contain a statement of the right to make such an application*."

Subparagraph (6) says that that application should be made within such a period as may be specified by the court, or if the court does not specify such a period, not more than seven days after the date of service of the order. By way of recap, in the case of the Unless Order, the period for applying to set aside the order, or varying the Unless Order, was seven days after service of the order on the parties.

41 It is the case that the application notice, by which the Application has been made, does not claim relief pursuant to CPR 3.3(5), but Mr Adams (sensibly and realistically, if I may say so) did not take any point on the drafting of the application notice and accepted that the Application could be made today as an application under CPR 3.3(5). The only other point I add in this context is that my conclusion, which is also common ground between counsel, is that the appropriate jurisdiction in this case is in fact CPR 3.3(5). It does not seem to me to mean, for what it is worth, that the jurisdiction in CPR 3.1(7) is not available. That is also a jurisdiction to set aside an order, and it seems to me it is a parallel jurisdiction, and so it is, in theory, also available to the Claimant in the present case.

Should the Unless Order be set aside pursuant to CPR 3.3(5)?

42 In considering the Application as an application under CPR 3.3(5), guidance on how to approach such an application can be found in the case of *R (On the Application of Kuznetsov) v London Borough of Camden* [2019] EWHC 3910 (Admin). This was a decision of Mostyn J, where the judge had to consider an application of this kind to set aside, and in paragraphs 20 to 24, the judge considered the nature of this jurisdiction and, in particular, whether it fell to be exercised in the same way as the jurisdiction under CPR rule 3.1(7), and I will quote from what Mostyn J said in his judgment at paragraphs 23 and 24:

> "*23. I agree with Mr Burkitt that the test cannot be so high as that which applies on an application to set aside under rule 3.1(7). I agree with him that if one aligned the test, then rule 3.3(4) becomes entirely otiose. So, the test must be lower. Is the test that the court should be satisfied that the decision was wrong, that is to say appealably wrong? Again, Mr Burkitt says that would be to set the standard much too high. If it is appealably wrong, then there is no point in having the rule because you would of course inevitably be able to succeed on an appeal. So, I agree that one has set the test a little lower. Having considered the matter carefully, I have drawn some inspiration from the well-known decision given long ago by the President of the Family Division, Sir Jocelyn Simon, in Samson v Samson [1966] P52 when he identified the standard that was needed for an appeal to succeed from a decision of a registrar to a judge. He emphasised that the decision was primarily that of the judge, but the judge should give due weight to the decision of the registrar. He should be slow to disturb a decision on a mere question of quantum and he*

concluded by saying that the court should be able to identify a reason for disagreeing with the order of the registrar.

24. In my judgment, I would formulate the test as follows, that the court should give due weight to the decision of the judge who dealt with the matter without a hearing and should be able to identify a good reason for disagreeing with his or her decision. That is the standard I shall apply in judging this application."

43 It therefore follows that in the present case what I have to do is to look at the decision which was made by Morgan J, in the terms of the Unless Order, and see whether there is any good reason for disagreeing with his decision to make the Unless Order. It seems absolutely clear to me that there is no good reason for disagreeing with the decision of Morgan J to make the Unless Order.

44 Orders of this kind, regrettably, are routinely made in the High Court when acting as an appeal court. It is, unfortunately, often the case that an appeal bundle is not filed in time. That causes immense problems for the appeal process, which I will come back to later in this judgment, but for present purposes, it is sufficient to note that judges can, and frequently do, make Unless Orders in relation to missing appeal bundles, normally in circumstances where the time for filing the appeal bundle has expired and nothing has been heard from the appellant party and there is no sign of an appeal bundle. In those circumstances, the appeal gets stuck in the system, it cannot move forward, a decision cannot be made on whether permission to appeal should be granted, if it is required, nor can decisions be made on other matters which may arise in relation to the appeal, and in those circumstances the court is often driven as a means of galvanising the relevant party to produce the appeal bundle, to making an Unless Order.

45 That is what Morgan J decided to do in the present case, and I can see no conceivable ground for disagreeing with his decision to make that Unless Order. It seems to me that the order was entirely appropriate in the circumstances of the case as they existed on that date and, as I understand the decision of Mostyn J, what I should be doing is to look at matters as they stood at the date when the order was made.

46 The only possible qualification to that is this. I have noted that the Unless Order did not contain a provision for service on the parties, but I cannot see that that would justify exercising the jurisdiction under CPR 3.3(5). As I have already said, it seems to me that that is a matter that may well be relevant, indeed highly relevant, to the question of whether relief from sanction should be granted, if it is required, and indeed to any matter going to my discretion in relation to the Application, but in terms of the Application to set aside, it seems to me that the absence of this provision is not correctly characterised as part of the decision which was made by Morgan J to make the Unless Order. It was, essentially, a subsequent administrative error in relation to the Unless Order. So, in those circumstances, it does not seem to me that that can justify setting aside this order, applying the test as it has been helpfully formulated by Mostyn J in the *Kuznetsov* case. So, for those reasons, it seems to me that what has become the Application to set aside the Unless Order, pursuant to CPR 3.3(5), must be refused, and I do refuse that Application.

Should the Unless Order be set aside pursuant to CPR 3.1(7)?

47 In theory, there is also the jurisdiction to set aside, or revoke, the Unless Order pursuant to CPR 3.1(7) and, indeed, that was the provision of the CPR which was relied upon in the application notice by which the Application has been made, but, in his submissions, Mr Heylin conceded (realistically and sensibly, in my view) that if he was unable to persuade me to set aside the order under CPR 3.3(5) - and as matters have turned out, he was unable to persuade me of that - he would not be able to persuade me to set aside the Unless Order pursuant to CPR 3.1(7). As I have said, it seems to me that was a sensible and realistic stance. It is well-known that the jurisdiction to vary or revoke under CPR 3.1(7) is a narrow jurisdiction which can only be exercised in certain relatively exceptional circumstances. It is not necessary to go into the case law but it was, and is, quite clear to me that this would not be an appropriate case for the setting aside of the Unless Order pursuant to CPR 3.1(7). It therefore follows, from my analysis thus far, that the Unless Order stands. Where does that leave the Claimant?

Does the Claimant require relief from sanction in the Unless Order?

48 If the Unless Order stands, as it does, it might be thought obvious that relief from the sanction in the Unless Order is required. The original deadline for the filing of the appeal bundle was 24 February 2020, the extended deadline was 17 April 2020, and no application was made, or indeed has since been made, either in time or otherwise, to extend either the original time limit or the extended time limit, so in those circumstances, as I have said, it might be thought obvious that relief from the sanction in the Unless Order is required.

49 The position is not, however, quite a simple as this, by reason of the decision of Zacaroli J in *Tyburn Film Productions Limited v British Telecommunications Plc* [2021] EWHC 334 (Ch). What happened in *Tyburn* was that it was a case where an Unless Order was made in relation to the failure to file grounds of appeal, and that Unless Order was not complied with, but the Unless Order had not in fact been served upon the appellant. The appellant appealed to the High Court against the refusal of the lower court to grant relief from sanction in relation to that failure to comply with the Unless Order which had not been served on the appellant. For present purposes, what is relevant in the *Tyburn* decision is that at paragraph 41 of his judgment, Zacaroli J said this:

> "*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*."

50 The upshot of the reasoning of Zacaroli J in *Tyburn* which I have just quoted was that the relevant application in that case should not actually be treated as an application for relief from sanction in the relevant Unless Order, because of the injustice that created, but rather should be treated as an application relating to the underlying breach, which had been a failure to file grounds of appeal, and in those circumstances, Zacaroli J reasoned in the following terms, at paragraphs 45 and 46:

> "*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 sanction even ignoring the making of a subsequent unless order. In such a case, it may be appropriate to refuse relief from sanction 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 sanction attached to it. In reflecting on the case following the hearing, it seemed to me that the parties' arguments had not addressed this point."

51 In *Tyburn*, Zacaroli J went on to decide that the failure to provide grounds of appeal was a failure to which an implied sanction attached so that, in theory, relief from sanction could have been required, but the judge decided that relief from sanction was not required, because there had been an in-time application for an extension of time. Indeed, in that case, there were problems with obtaining a transcript of the decision of the lower court and the appellant had been assiduous both in trying to obtain a copy of the relevant transcript and in engaging with the court in relation to the failure to file grounds of appeal. So in those circumstances, the ultimate conclusion of Zacaroli J was that the matter should not be dealt with as one involving an application for relief from sanction, and the judge exercised his discretion in favour of extending the time for filing the grounds of appeal.

52 If the approach of Zacaroli J was to be applied in the present case, the Application would fall to be treated not as engaging an application for relief from sanction but rather an application relating to the underlying failure to file an appeal bundle, which might or might not, if the sanction in the Unless Order was disregarded, amount to a failure which engaged the sanction from which the Claimant required relief. If there was no such sanction, then, on this hypothesis, the question of whether time should be extended for the filing of the appeal bundle would become one for the general case management powers of the court to extend or shorten time. I am, however, persuaded by Mr Adams that the *Tyburn* case, and the reasoning of Zacaroli J, can be distinguished in the present case.

53 Returning to paragraph 41 of the judgment in *Tyburn*, it will be recalled that the judge identified three factors which rendered the position inherently unjust. The first factor was the ordering of a party to do something stipulating an automatic sanction for not doing it. The second factor was then not sending the order to the party or even making it aware that an order had been made, and the third factor was then refusing relief from the sanction contained in the order when compliance with the order was actually impossible because the party was unaware of the order. As Mr Adams pointed out, if one concentrates on the second of those factors, while it is the case that the Unless Order was not sent to the Claimant, it certainly is not the case that the Claimant had no means of discovering that the order had been made.

54 As I have already noted, the Unless Order was uploaded to the CE file on 17 March 2020. It was, therefore, available to be seen by anyone who was inspecting the relevant part of the CE file. It seems to me perfectly reasonable to expect a represented party, by his or her solicitors, to check the CE file on a regular basis, particularly in circumstances where that party has not done something (in this case the filing of an appeal bundle) which it should have done. So I accept the submission of Mr Adams that the present case is not on all fours

with *Tyburn*. I accept that *Tyburn* can be distinguished and that the approach of Zacaroli J in *Tyburn* does not fall to be applied in the present case. So having come to the conclusion that the decision in *Tyburn* can be distinguished, I conclude that in the present case, the Claimant does require relief from the sanction in the Unless Order.

If the Claimant does require relief from sanction in the Unless Order, what is the position?

(1) Should the Application for relief from sanction be entertained at all?

55 There is a threshold (or preliminary) issue to be considered here, which is whether the Application for relief from sanction should be entertained at all. The submission of Mr Adams was that I should not entertain the Application at all. His reason for making this submission was that there has not been any application made for relief from sanction. Such an application does not appear in the application notice by which the Application is being made. There is no other such formal application made. Instead, the Application has been made informally to me by Mr Heylin the course of his oral submissions, although in fairness to Mr Heylin, and although this does not make much difference, it is fair to say that his skeleton argument also addresses that issue, but, in any event, this is an informally made application.

56 My attention in this context was drawn to the decision of the Court of Appeal in *Park v Hadi* [2022] EWCA Civ 581. In this case, at paragraph 49, the Court of Appeal, in a combined judgment, set out the approach that should be adopted in relation to informal applications for relief from sanction:

> "*49. The principles applicable to this case, which we extract from the rules and case law referred to earlier in this judgment, can be shortly stated. An application for relief from sanction should be made (and usually is made) by a Part 23 application notice supported by a witness statement. It is, however, clear that the court has a discretion to grant relief from sanction in two situations: where (as in the present case) no formal application notice has been issued, but an application is made informally at a hearing; or where no application is made, even informally, but the court acts of its own initiative. The discretion must of course be exercised consistently with the overriding objective. The court, therefore, should initially consider why there has been no formal application notice, or no application at all; whether the ability of another party to oppose the granting of relief (including, if appropriate, by the adducing of evidence in response) has been impaired by the absence of notice; and whether it has sufficient evidence to justify the granting of relief from sanction (though the general rule in CPR r32.6 does not impose an inflexible requirement that the evidence be in the form of a witness statement). It follows, from the need for those initial considerations, that the discretion will be exercised sparingly. That is particularly so where there has been no application at all, and the court is contemplating acting of its own initiative, because in such a situation there may well be prejudice to an opposing party and/or an absence of relevant evidence. If, however, the initial consideration*

> *lead[s] to the conclusion that relief might justly be granted, the court will then go on to follow the Denton three-stage approach. It will, no doubt, very often be the case that factors relevant to the initial considerations are also relevant to the Denton stages*."

57 The particular point here is that the factors which the court should consider in determining whether to entertain such an informal application involve the following considerations. The court should first consider why there has been no formal application notice, or no application at all. The court should also consider whether the ability of another party to oppose the granting of relief, including, if appropriate, by the adducing of evidence in response, has been impaired by the absence of notice. The court should also consider whether it has sufficient evidence to justify the granting of relief from sanction, which I understand to raise the question of whether the court has sufficient evidence to make a decision on whether to grant relief from sanction. The Court of Appeal also said that, given the need for those initial considerations, the discretion to entertain an informal application for relief from sanction was one which should be exercised sparingly.

58 I, of course, take on board that this is a discretion which should be exercised sparingly, but applying the factors which the Court of Appeal has said one should consider, the position seems to me to be as follows. It is true that there is no satisfactory explanation of why a formal application for relief from sanction has not been made - I assume that this is a matter that was simply overlooked - but in terms of the ability of the other party to oppose the granting of relief, including, if appropriate, by the adducing of evidence in response, the position is rather different. The reality is that if one reads the witness statement of Mr Bignell, although it does not, in terms, address the *Denton* test, which, of course, governs the granting of relief from sanction, it does seem to me that that witness statement covers the matters which are relevant to the question of whether relief from sanction should be granted. That witness statement is dated 26 September 2022. That was, of course, quite some time after the Application was made, but equally, a reasonable period of time has elapsed since that date and the date of this hearing. There is also the point that Mr Ahmud of the Defendant has had the opportunity to respond to that witness statement in his own witness statement and it seems to me that Mr Ahmud's witness statement also covers the matters that need to be dealt with in considering an application for relief from sanction.

59 Beyond that, as I have already pointed out, Mr Heylin's skeleton argument for this hearing does address the *Denton* test and the question of whether relief from sanction should be granted, as does Mr Adams' skeleton argument. It therefore seems to me that this is not a case where it can be said that the ability for the Defendant to oppose the Application for relief from sanction has been impaired by the absence of a formal application.

60 In terms of the position of the court, it does seem to me that I have sufficient evidence before me to make a decision on the Application for relief from sanction, so although, as I have said, this is a discretion to be exercised sparingly, it seems to me that it would be an injustice to the Claimant in the present case to refuse to entertain the Application for relief from sanction. Both of the parties appear to have appreciated in their arguments that the Application engaged the question of relief from sanction. The matter has been argued on that basis and I do not think there is any prejudice to the Defendant or that the court is at any disadvantage in entertaining the Application as including an application for relief from sanction. I therefore decide that I should entertain the informal application which has been made by Mr Heylin for relief from sanction.

61 That brings me on to the question of whether the relief from sanction should be granted in all the circumstances of the present case, and that engages three questions. The first is whether the breach of the Unless Order was a serious breach. The second question is what is the explanation for the breach of the Unless Order, and the third question is a consideration of all the circumstances of this case, as it were, standing back and looking at matters in the round.

(2) Was the breach of the Unless Order a serious one?

62 I can take the question of the seriousness of the breach of the Unless Order very shortly. It was conceded (realistically and sensibly, in my view) by Mr Heylin that the breach of the Unless Order was a serious one. Indeed, the same point was conceded by Mr Bignell in his witness statement. So I start my analysis on the basis that the breach of the Unless Order, with which I am concerned in this case, was both a serious and a significant one.

(3) What is the explanation for the breach?

63 The starting point here is that it may be thought that there was, and is, an excellent explanation for the failure to comply with the Unless Order, namely that the Claimant was not served with the Unless Order and was not aware of the Unless Order until it was discovered by his solicitors on the CE file on 28 January 2022. As I have already accepted, I do not think it can be said that the Unless Order can be regarded as having been served on the Claimant simply by reason of being CE filed; indeed, that has not been argued before me. It is accepted, and it seems to me to be correct to say, that the process of CE filing cannot itself qualify as service upon a party of an order of the court. So far so good for the Claimant.

64 What I have just said, however, is, in the particular circumstances of this case, a factor which seems to me to have far less weight than it would have in another case. I say that because the fact is that the Unless Order was uploaded to the CE file on 17 March 2022 and it was available to be viewed by anyone accessing the CE file. It seems to me, as I have already said in this judgment, reasonable to expect a party who is represented, as the Claimant was, to inspect the CE file (by his solicitors) on a regular basis. In the present case, however, nothing happened for a period of almost two years after the Unless Order was made. The Claimant's Appeal was effectively left to stagnate while nothing was done by the Claimant to address the missing appeal bundle. The date of the Application, whether it is taken from the 4th or 11 February 2022, speaks for itself.

65 The position, therefore, is that one has a very lengthy period of delay (almost two years) during which it seems to me that it was perfectly possible for the Claimant, by his solicitors, to discover the existence of the Unless Order. So the question then becomes, "Well, what is the explanation for this delay, and what is the explanation for the Claimant's solicitors having done nothing, even to check the CE file, or indeed to address themselves to the failure to file an appeal bundle with the court?". One can hardly say that this was not a matter which was in the minds of the Claimant's solicitors at the time when the appeal was made, because I have already quoted the letter of 6 February 2020 which was sent by the Defendant to the Claimant's solicitors and made specific reference to the appeal bundle.

66 So, as I have said, what is the explanation for this delay, what is the explanation for this failure, and the answer to that question seems to me to be that there is no explanation, or at least no good explanation. Reading the witness statement of Mr Bignell, I do not find any satisfactory explanation of the failures which occurred in this case, beyond what is

realistically conceded by Mr Heylin, namely that the Claimant's Appeal did not receive the attention that it should have received during the relevant period.

67 An attempt has been made by Mr Bignell in his witness statement to say that all this was the result of the Covid pandemic. I do accept that the provisions of the CPR were subject to some revisions during the period of the Covid pandemic and that, in appropriate circumstances, the courts were directed to grant more indulgence to parties than would otherwise have been the case, because of difficulties which could be created by the pandemic, but all that is appropriate in circumstances where it can be demonstrated that some specific problem was created by reason of the Covid pandemic or its consequences. That is not so in the present case. All I have in the present case are vague and general references to the effect of the pandemic, but, as I understand the position, the Unless Order was received by the CE filing system and the CE filing system remained available for use during the pandemic, and the actions which were required of the Claimant by his solicitors, it seems to me, in order to remedy the position (or address the position) were not actions which were in any way prevented by the Covid pandemic, either during the periods of lockdown, which were itemised by Mr Ahmud in his witness statement, or outside the periods of lockdown.

68 Ultimately, and looking at all the evidence which has been put in front of me, and considering all the submissions that have been made to me in this context on both sides of the court, I come to the clear conclusion that in this case there is no good explanation for the breach of the Unless Order.

(4) Consideration of all the circumstances of the case

69 I now reach the stage of the analysis where one stands back and considers all of the circumstances of the case. I accept that there is a wide range of matters which can be considered in this context, but the relevant points seem to me to be these. First, and as Mr Adams pointed out, this is an application which cannot possibly be said to have been made promptly. The Application has effectively been made orally or (putting it at its most generous) in the skeleton argument of Mr Heylin for this hearing. That is long after the breach occurred, so this is not just a case of an out of time application for relief from sanction, it is a case where the Application for relief from sanction has been made very much at the last minute.

70 The second point repeats the matters which I have referred to in considering the question of whether there is a good explanation for the breach of the Unless Order. This case seems to me to have engaged a serious failure to comply with an order of the court in circumstances where there is no good explanation for that failure. As a result, the Claimant's Appeal has not moved forward for a substantial period of time. By reference to the period elapsing between the Unless Order and the making of the Application, one has a period of almost two years in which nothing has happened. That is a very serious matter, which it seems to me the court should be reluctant to excuse.

71 A related point in this context is the importance of filing appeal bundles on time. In this context I make specific reference to something which is said by Mr Ahmud in his witness statement at paragraph 23. At paragraph 23, Mr Ahmud says this,

> "*It is the filing of an appeal bundle that triggers the court to progress the appeal to the single judge in order to decide whether permission to appeal should be given, and failure to do so leaves a bottleneck of*

cases in the appeal courts, slowing down the court system and the administration of justice for the parties and other court users".

72 It seems to me that Mr Ahmud is correct in what he says in this part of his witness statement. The expeditious filing of appeal bundles is critical to the appeal process. If appeal bundles are not filed on time, this causes serious problems for the appeal court, because essentially it means that the appeal cannot move forward, the appeal cannot proceed to a decision, which is normally made on paper in the first instance, as to whether permission to appeal should be granted where it is required. It also creates problems if there are other applications in the relevant appeal which have to be considered. It also creates a problem in the sense that judicial time has to be devoted to making orders to galvanise the relevant party to providing an appeal bundle. It is fair to say, and should be recorded, that in some cases there are difficulties in obtaining the relevant transcript (normally a transcript of the judgment) from the lower court, and in those circumstances the appeal court is willing to be flexible in relation to the time which it is prepared to allow for the appeal bundle to be produced, but in circumstances where that difficulty does not arise - and it did not arise in the present case, because Master Teverson handed down his judgment separately - then there is really no excuse for not getting the appeal bundle in on time. The present case provides an excellent example of what has to happen where that does not happen. The time of Morgan J had to be devoted to considering the matter when it came before him on the papers on 17 March 2020, and Morgan J made an order, which is the usual form of order, in such circumstances.

73 So these are the difficulties which are created if appeal bundles are not filed on time, and that seems to me only to go to strengthen the point that this is a case of serious failure, without a satisfactory explanation, where the court should be slow, in the absence of some serious countervailing point, to grant relief from sanction.

74 There is also the question of prejudice. It was contended by Mr Adams for the Defendant that there was prejudice to the Defendant in this situation, and Mr Ahmud also deals with this question in his witness statement. I am doubtful that the present case can be described as one where there is serious prejudice to the Defendant. Very sadly, the Defendant's previous counsel has died, but although that is a very sad event, it does not seem to me that that necessarily creates serious prejudice to the Defendant in terms of finding alternative counsel were the Claimant's Appeal to be allowed to proceed. It is also said by Mr Ahmud that he is looking to retire and cannot do so because of this case. Again, I have every sympathy for Mr Ahmud's situation but that, it seems to me, is an occupational hazard of dealing with long-running cases; there may have to be changes of personnel dealing with the case for any number of reasons, including retirement.

75 I do, however, accept that there is some prejudice, in the sense that I accept that the Defendant might legitimately have thought that the Claimant's Appeal had been abandoned and was not going to be proceeded with, and it is now over two years later and the Claimant is endeavouring to resuscitate its appeal and pursue that appeal. I can see that there is some prejudice to the Defendant caused by that delay, but in that context it does seem to me to be very important to keep in mind that the Defendant does, of course, have its own appeal/application for permission to appeal made by its appellant's notice which was filed on 23 January 2020. So, in summary, in terms of prejudice, I accept there is some prejudice. I do not accept that that prejudice is as serious as has been submitted by the Defendant.

76 Reference to the Defendant's Appeal brings me on to the one point which has been given me pause for thought in considering all the circumstances of the case, and that is the fact that the

Defendant's Appeal is still in existence. The point has been emphasised to me, both in Mr Ahmud's witness statement and by Mr Adams in his written and oral submissions, that the Defendant had not originally intended to try to appeal against the Teverson Order but only did so after learning that the Claimant was intending to launch the Claimant's Appeal which the Defendant says it only discovered when it became aware of the appellant's notice, and it may be, I do not know, that the Defendant would not be minded to pursue its own appeal if the Claimant's Appeal is not to be pursued, but be that as it may, the fact is that the Defendant's Appeal is still in existence and, if it is pursued, and I cannot assume that it will be abandoned, then the Defendant will be seeking permission to appeal and, if it gets permission to appeal, may elect to pursue its appeal to a hearing. That might be said to create an injustice to the Claimant if the Claimant is prevented from pursuing the Claimant's Appeal and it might also be said to be a rather odd result where the Defendant is allowed to pursue its appeal, and pursue it to a hearing if appropriate, while the Claimant's Appeal is not permitted to go to a hearing.

77 As I have said, that is a point which has given me pause for thought, but ultimately, given the seriousness of the breach which has occurred in this case, and given the seriousness of the failure that has occurred in the present case, I am not persuaded that that particular point is sufficient to tip the scales in favour of the Claimant and in favour of granting relief from sanction. So considering all the circumstances of the case, it seems to me that the scales come down firmly in favour of refusing to grant relief from sanction. So my overall conclusion on the Application for relief from sanction, taking into account all the arguments that I have heard, and all the evidence which I have received, and all other relevant factors into account, and in the exercise of my discretion, is that relief from the sanction in the Unless Order should not be granted.

If the Claimant does not require relief from sanction in the Unless Order, what is the position?

78 This is a question which does not arise, because I have already concluded that the Claimant's position is that he does require relief from sanction. If, however, the question had arisen, and if this had been a matter of the exercise of the court's general case management powers, I should make it clear that I would not have been willing to grant an extension of time under those general case management powers. Essentially applying similar reasoning to that which I have applied in considering the seriousness of the breach in the present case, and considering all the circumstances of the case, I am bound to say that I would not have regarded this case as an appropriate case in which to exercise my case management powers to extend the time for filing the missing appeal bundle. So if that had been the position, I would have refused to extend time, and in those circumstances, I agree with Mr Heylin's analysis that the Claimant would still be left with the sanction on that hypothesis contained in the Unless Order and thus the Claimant's Appeal would remain struck out.

Conclusion

79 For all the reasons which I have set out in this judgment, I come to the conclusion that the Application falls to be dismissed. For the sake of good order, it seems to me I should make it clear that what I am dismissing is both the specific Application for relief which is made in the application notice, that is to say the Application under CPR 3.1(7). I am also dismissing the Application which has informally been made under CPR 3.3(5), and I am also refusing the informal Application for relief from sanction which has been made by Mr Heylin.

80 The consequence of that, as it seems to me, is that the sanction contained in the Unless Order remains in place and the status of the Claimant's Appeal is that it remains struck out pursuant to the terms of the Unless Order as from (if my calculations are correct) 21 April 2020. That concludes my judgment.

CERTIFICATE

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