Neutral Citation Number: [2023] EWHC 1556 (Ch)

Case No: CH-2021-000152

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
CHANCERY APPEALS

ON APPEAL FROM THE ORDER OF DEPUTY MASTER MARSH DATED 16 JUNE 2021

Rolls Building
Royal Courts of Justice
London

Date: 27/06/2023

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

Raymond Clewer	**Appellant**
- and -	
Higgs & Sons (A Firm)	**Respondent**

- -
- -

Clive Wolman (instructed by **H&C Associates Limited**) for the **Appellant**
Francis Bacon (instructed by **Kennedys LLP**) for the **Respondents**

Hearing dates: 8 March 2023; further written submissions on 9, 10, 12 and 29 March 2023

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Approved Judgment

This judgment was handed down at 10am on Tuesday 27 June 2023 and released to the National Archives.

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Mr Justice Adam Johnson:

Introduction

1. The Appellant, Mr Clewer, seeks to appeal a decision of Deputy Master Marsh dated 16 June 2021.

2. By means of that decision, Deputy Master Marsh made a declaration affirming that Mr Clewer's negligence claim against the Respondents had been automatically struck out, after his failure to comply with an unless Order made some months before, on 23 October 2020, by Deputy Master Hansen.

3. The Order made by Deputy Master Hansen was in fact directed both to Mr Clewer and his wife, Mrs Clewer, but the present appeal has been pursued only by Mr Clewer. At any rate, para. 4 of the Order of Deputy Master Hansen provided as follows:

> " *... unless the Claimants do by 4pm on 1 November 2020:*
>
> *(a) serve the Claim Form and Particulars of Claim; and*
>
> *(b) pay the balance of the Court fee of £7,500*
>
> *the Claim will be automatically struck out ...*"

4. I will need to come back shortly to describe what actually happened on or before 1 November 2020, which Mr Clewer says amounted to sufficient compliance with that Order. The nub of the decision by Deputy Master Marsh, however, was that there had been no compliance. His reasoning was as follows, as expressed in his Judgment at [20]:

> "*Three steps were required to be taken by 1 November. They [i.e. the Claimants] have not undertaken any of them. They have not served a claim form, because the document they provided was not sealed ... Particulars of claim were provided but, of course, if the claim form has not been served, they existed only in the ether. The claimants did not, and this is not in dispute, pay as required the further £7,500 by way of court fees*."

5. Mr Clewer now seeks to challenge that reasoning by way of appeal. He relies on two Grounds. I will summarise the Grounds below, at [55]. Before doing so, however, it is convenient to set out a little more of the background.

Background

<u>The Claim Form is Issued</u>

6. Mr Clewer's underlying claim relates to the sale of his business, which took place as long ago as 2014. He was unhappy with the service provided by his then solicitors, the Respondents, Higgs & Sons.

7. There were delays in pursuing a claim, and limitation was becoming a problem, but in February 2020 Freeths, solicitors, instructed by both Mr and Mrs Clewer, sent a letter of claim to Higgs & Sons. The letter claimed damages of £7 million.

8. In early March 2020, the parties negotiated a standstill agreement which suspended the limitation period for 4 months, to allow Higgs & Sons time to respond to the letter of claim. They responded on 22 May 2020, via their solicitors, Kennedys. They rejected the claim and were not prepared to extend the standstill period any further.

9. In response, a Claim Form naming both Mr and Mrs Clewer as Claimants was issued in the High Court on 1 July 2020. This had an interesting feature. Although the letter of claim had claimed damages of £7m, the Claim Form stated that the claim value was a maximum of £50,000 (in fact, below the value for claims in the High Court), and in consequence a Court fee of only £2,500 was paid. I also note here, since the point has relevance later on, that in the box on the Claim Form headed "*Fee Account no*.", Freeths had included their Court Fee Account number.

Higgs & Co Apply to Compel Service

10. Although issued, the Claim Form was not served, and so on 7 July 2020 Higgs & Co. served notice under CPR 7.7(1) to compel service. They asked for service to be effected by 21 July 2021. Mr and Mrs Clewer did not comply.

11. Thereafter, a number of applications were made, both by Higgs & Co and by Mr and Mrs Clewer:

    i) Higgs & Co applied to strike out the Clewers' claim pursuant to CPR 7.7(3).

    ii) Mr and Mrs Clewer applied: (a) for permission to amend the Claim Form, to reflect the true value of the claim; and (b) to stay the proceedings until 20 October 2020, to allow further time for investigation and discussion – including in light of the then pandemic restrictions in place, and in light of Mr Clewer's health.

12. Mr and Mr Clewer recognised, in their evidence in support of the applications at (ii) above, that an additional Court fee would be needed. There is evidence that accordingly, on about 24 July 2020, the Clewers paid Freeths £7,500, so that they would be in funds to pay the additional fee when the time came.

13. The various applications did not in fact come on for hearing until Friday, 23 October 2020. In the meantime, there seems to have been a falling out between the Clewers and their solicitors, Freeths. The precise basis for this is unclear, but one matter which appears from the evidence is that Mrs Clewer was unhappy that she had been included as a Claimant in the proceedings, but at the same time was concerned about the possible cost consequences of serving a notice of discontinuance. At any rate, Freeths ceased to act on 16 September 2020. The Clewers became litigants in person.

The Hearing before Deputy Master Hansen

14. The hearing on 23 October was before Deputy Master Hansen. This was the hearing which gave rise to the Order which I have already described. In summary, Deputy Master Hansen:

    i) refused the Clewers' application for permission to amend the Claim Form to reflect the higher claim value. That was because, since the Claim Form had not been served, they did not need permission. They could amend without permission under CPR, rule 17.1;

    ii) refused any further stay, in light of the time which had already elapsed;

    iii) refused to strike-out the Claim Form, as Higgs & Sons had requested; but instead –

    iv) made the Order already set out above at [3], requiring the Claim Form and Particulars to be served by 4pm on 1 November 2020, and the additional £7,500 Court fee to be paid by the same deadline. In fact, 1 November 2020 was a Sunday: its significance was that it was four months from the date of issue of the Claim Form on 1 July 2020, and so after that the Claim Form would expire.

15. That gave Mr and Mrs Clewer a last chance to serve their Claim Form. But they needed to act quickly. They had just over a week to comply.

Wednesday 28 October to Monday 2 November 2020

16. As noted, Mr and Mrs Clewer no longer had the benefit of assistance from Freeths. On Wednesday 28 October 2020, they engaged the services of a Mr Michael Shrimpton, who visited them at their home. Mr Shrimpton was not a solicitor. I understand he is a former barrister, now disbarred. I pause to point out that 28 October was just two working days before the 1 November 2020 deadline.

17. Thereafter, the evidence reveals the following.

18. On Thursday, 29 October, Mr Clewer sent to the Court by post a Form EX160 which he had completed, following discussions with Mr Shrimpton. This is a form headed, "*Apply for help with fees*." In a box headed, "*About your application*", it said: "*High Court claim fee notice of appeal*". In a later box headed, "*Do you have a case, claim, appeal or 'notice to pay' number?"*, Mr Clewer provided the following case number – "*BL-2020-000994*". That is the case number of his High Court Claim, i.e., the action in which Deputy Master Hansen had made his Order on 23 October.

19. Mr Clewer's evidence about posting the form was quite specific. He said as follows:

> " *... Mal [i.e. Mrs Clewer] and I went together to the post office in Queen Street, Wolverhampton and posted it off to the Court first class on the next day, Thursday the 29th. It was too late for us to send the form by recorded delivery by the time we got there. We went to Rymans the stationers first to get a*

> *photocopy. Mr Shrimpton was advised that the papers had been posted, by email on the same date at 17.18 …".*

20. Mrs Clewer's evidence was to the same effect.

21. On Friday 30 October 2020, at around 5pm in the afternoon, Mr Shrimpton emailed various recipients including the email address Chancery.Mastersappointments@justice.gov.uk, and the Defendants' solicitors, Kennedys. His email enclosed "*by way of service*" a document described as "*Amended Claim Form*". This was signed by both Mr and Mrs Clewer as Claimants. In fact, the only amendment concerned the value of the claim; this was now put at over £5m but not exceeding £30m, so the overall fee payable was £10,000 (not the £2,500 already paid). The "*Amended Claim Form*" did not bear any Court seal. In the box headed, "*Fee Account no.*", however, it continued to refer to the Fee Account number for the Clewers' former solicitors, Freeths, even though by this stage they were no longer acting.

22. Mr Shrimpton's email made a number of other points. Three need to be mentioned. *First*, he explained the relevance of the Form EX160, which had been posted by Mr Clewer the day before: the intention was that the application for fee exemption would obviate the need for payment of the £7,500 additional Court fee as directed by the Deputy Master. Mr Shrimpton in his email said:

> "*The Claimants were unaware of the Fees Exemption scheme until we explained it to them on Wednesday and so far as we know the issue was not addressed before the learned Deputy Master*."

23. *Second*, Mr Shrimpton's email dealt with the position of Mrs Clewer. No similar form seeking fee exemption had been sent by her. Mr Shrimpton in his email said: "*We respectfully (sic.) you to agree to an order whereby the claim is discontinued as regards her, with no order as to costs*."

24. *Third*, Mr Shrimpton gave notice, "*that the Claimants intend to appeal the decision of Deputy Master Hansen*."

25. On 31 October 2020 (a Saturday), Mr Shrimpton sent two further emails.

26. The *first*, timed at 19:37, was again sent to the email address: Chancery.Mastersappointments@justice.gov.uk, but copied to a number of other recipients, including Mr Clewer. Mr Shrimpton said that, out of an abundance of caution, he was emailing to the Court "*a scanned copy of Form EX160, the original of which was posted to the Court on Thursday evening, shortly before the Post Office shut."* He went on, "*It is respectfully submitted that the Claimants are now entitled to Fees Exemption, as per the attached EX160*." It is clear from this email that Mr Shrimpton had been in contact with the Court by telephone on the afternoon of Friday, 30 October.

27. The *second* email of Saturday, 31 October, sent to Kennedys but copied to the Chancery.Mastersappointments@gov.uk email address, enclosed "*Particulars of*

Claim by way of service." The heading to the Particulars of Claim identified both Mr and Mrs Clewer as Claimants.

28. I note for completeness that on the evening of Saturday, 31 October 2020, the second national lockdown came into effect, in light of the ongoing Coronavirus pandemic.

29. Those then were the steps taken by the Clewers by the 1 November 2020 deadline in Deputy Master Hansen's Order.

30. According to later witness statements made by both Mr and Mrs Clewer for the hearing before Deputy Master Marsh, on Monday 2 November Mrs Clewer took a telephone call from a Court official. Mrs Clewer recounts it as follows:

> " *... a Court official rang me on Monday 2nd November to say that the form had been received and that all was in order ... He apologised for not being able to refund the payment of £2,500 paid on 1st July when the claim form was issued as it was more than three months before*."

31. Mr Clewer made a statement saying he had broadly the same recollection, having listened in to part of the call.

Later events: Higgs & Co. Seek a Declaration; the Clewers seek to Appeal

32. Notwithstanding the above, Kennedys took the position that there had not been compliance with the Order of Deputy Master Hansen, and so they made an application on behalf of the Defendants for a declaration that the Claim had automatically been struck out. It is that application which was later heard by Deputy Master Marsh on 16 June 2021.

33. I have mentioned above that Mr Shrimpton in his email of 30 October 2020 said that the Clewers intended to try and appeal Deputy Master Hansen's Order. They duly did, but Trower J refused permission to appeal on the papers in February 2021, and Michael Green J refused a renewed application at a later oral hearing in April.

34. One Ground of Appeal sought to be relied on was that Deputy Master Hansen, in formulating para. 4(b) of his Order in terms which required the Clewers having to "*pay*" an additional £7,500, had failed to provide for the possibility that they might be entitled an exemption from paying fees. In dealing with that Ground, Trower J said the following:

> *"I do not think that this ground has a real prospect of success. So far as I can tell from the note of the hearing, the Deputy Master was not told that the appellants were unable to afford the fees that he directed to be paid. Based on the information that was given to him at the hearing, there was no reason for him to formulate paragraph 4(b) of the order so as to refer to that scheme as an alternative to paying the balance of the court fee. The order that he made in paragraph 4(b) was a case management decision that was within the generous ambit of his discretion and is one with which this court should not interfere.*

> *Indeed, I consider that in light of what had occurred, it was incumbent on his to take the approach that he did."*

Preparations for the Hearing Before Deputy Master Marsh

35. I must now mention briefly certain events which took place in the period immediately prior to the hearing before Deputy Master Marsh, on 16 June 2021.

36. It seems that on around 3 June 2021, with the hearing before Deputy Master Marsh coming up on 16 June, Kennedys became concerned about the possible relevance of the Clewers having obtained a fee exemption. They had been told by Mr Shrimpton in October 2020 that an application for fee exemption had been sent to the Court, but were not sent a copy and did not know the outcome. They decided to make their own inquiries. They sent a letter to the Court on 3 June 2021. They asked for confirmation whether the Court had in fact ever received the "*Claimants' Form EX160*", and if so what the outcome of the application was, including the date of any decision.

37. On 4 June, the Clerk to Master Shuman responded to say:

> "*I have checked the Courts Help with Fees system, and can confirm that there have been two successful applications both made by Mr Clewer. However, both fee applications relate to filings under the appeal number (CH-2020-000268).*"

38. A few days after this, a new firm of solicitors came on the record for Mr and Mrs Clewer. That was H&C Associates, who continue to act. On 10 June 2021, they too made a request of the Court about the status of the fee exemption application made by Mr Clewer. In their email, they reported having been told that the application had been refused. In saying this, they may have misconstrued the information received by Kennedy's, mentioned immediately above. At any rate, they asked what the position was. The response received on the same day was effectively the same as that already provided to Kennedys:

> "*Thank you for your email.*
>
> *I have checked our Help with Fees system and there have been no applications made in relation to the above claim.*
>
> *Two applications were made by Mr Clewer under the appeal case (CH-2020-000268), which were both successful*."

39. The following day, 11 June 2021, H&C followed up. They had obtained a copy of the Form EX160 posted by Mr Clewer on Thursday 29 October 2020, and emailed to the Court by Mr Shrimpton on Saturday 31 October 2020. They forwarded a copy to the Court and asked:

> "*Could you check if this was received by the Fees Office on or about 30/10/20?*
>
> *If it was not we would be grateful if it could be processed*."

40. The Court responded on the same day, 11 June 2021, and said:

> "*There is no record of the attached application being processed by the Court.*
>
> *Mr Clewer will need to complete a new form as this is almost 7 months old … .*"

41. I note the reference in this email to there being no record of the application being *processed*; there is no comment about whether it was *received* or not.

42. It is these events which seem to have prompted Mr and Mrs Clewer to make the Witness Statements I have already referred to (both dated 12 June 2021 – in fact a Saturday), in which Mrs Clewer gave evidence (affirmed by Mr Clewer) of the call with the Court official on the morning of Monday, 2 November 2020 (see [30] above). In their evidence both Mr and Mrs Clewer expressed surprise that the matter of the fee exemption was apparently now being brought into question. By way of corroboration, Mrs Clewer referred to an email sent to Mr Shrimpton by Mr Clewer on 2 November 2020, after the call with the Court official, in which Mr Clewer said:

> "*Michael, left you a phone message, court been in touch, said £7,500 covered, will apply to his manager for £2,500 to be returned due to the circumstances, will send email within two days so we may forward to you as we are not capable to deal with it ourselves they would require a letter from you. Raymond*."

43. On Monday, 14 June 2021, H&C followed up their inquiries with the Court. Two emails were sent by H&C, to two different recipients: one to the clerk to Master Shuman, and the second to a Ms Pathan. Both forwarded copies of Mr Shrimpton's email to the Court of Saturday, 31 October 2020 (see above at [26]), to which he had attached a copy of Mr Clewer's Form EX160. The email to Ms Pathan said:

> "*We hope in the exceptional circumstances of this case that the Fee Exemption can still be issued and backdated; this will protect the Amended Claim Form to remain live, when it is considered at the hearing on 16 June ….*"

44. There seems to have been no reply prior to 16 June 2021, the day of the hearing. At 10.28 am that day, Mr Shrimpton, who had been called on to assist, forwarded to Master Shuman's clerk a copy of Mr Clewer's email to him of 2 November, set out above at [42]. Mr Shrimpton said he did not have the name of the Court official to whom the Clewers had spoken, but it might have been a Mr Orton, to whom Mr Shrimpton had spoken on Friday 30 October 2020. At about the same time, H&C emailed Ms Pathan again, attaching a copy of the original Form EX160 from October 2020, together with a copy of the Amended Claim Form. There was no substantive reply to either email, however, and so the matter was not advanced any further.

<u>The Hearing before Deputy Master Marsh</u>

45. That, then, is how matters stood at the time of the hearing before Deputy Master Marsh. He had some evidence available to him on the question of exemption from fees (the Witness Statements of Mr and Mrs Clewer); but as far as Higgs & Sons' solicitors Kennedys were concerned, their inquiries had revealed that the only fee exemption approvals on record were in connection with the Claimants' failed attempt to appeal the Order of Deputy Master Hansen. H&C had made further inquiries, but these were unresolved.

46. I have already set out above the Deputy Master's core reasoning. It relied on three key points. The Deputy Master considered that (1) no Claim Form had been served by 1 November 2020, because the document submitted by Mr Shrimpton on Friday, 30 October 2020 did not bear a Court seal; and (2) that being so, although Particulars of Claim had been sent by Mr Shrimpton on Saturday, 31 October, they were of no value and existed "*only in the ether*". As to (3), the question of the unpaid additional Court fee of £7,500, the Deputy Master said the following in his Judgment at [22]:

> "*An issue has arisen between parties concerning payment of the court fee. It is said by the Claimants that the Deputy Master should have had in mind that the Claimants were impecunious and wish to take advantage of the fee exemption scheme. I need only say that that was an express ground for seeking permission to the appeal and Trower J … concluded it did not provide a ground for seeking permission to appeal*."

47. Deputy Master Marsh's Order was sealed the following day, 17 June 2021. The Clewers' claim was recorded as being struck out. Costs were awarded against them.

Further Developments: 18-29 June 2021

48. I must also deal with what happened next. This is revealed in a series of further emails between H&C and the Court.

49. On 18 June 2021, Mr Payne of H&C had a further email exchange with the Court via the Chancery Masters Appointments email address already referred to above (i.e., Chancery.Mastersappointments@gov.uk). The email from the Court made a number of points;

i) It confirmed:

> *"… that the email dated 31st October 2020 was forwarded to the Chancery Issues Department on Mon 02/11/2020 09:49 … You will need to contact Chancery Issues to discuss the time it would have taken to seal the Claim Form*"

ii) It attached a copy of the email sent by Chancery Masters Appointments to Chancery Issues (Chancery.issue@Justice.gov.uk) on the morning of Monday, 2 November 2020, forwarding Mr Shrimpton's first email of Saturday 31 October containing a scan of the EX160 Form as posted by Mr Clewer.

iii) Finally it confirmed, in response to a specific question from H&C, that the Court had been open in the period before 1 November 2020, i.e., in the period

immediately prior to the second national lockdown which started on Saturday, 31 October 2020.

50. On 28 June 2021, now 12 days after the hearing before Deputy Master Marsh, the Court sent a further email to H&C as follows:

> "*Please see attached the Fee Remission No: PA21-0412 eligibility printout. The First Claimant [i.e., Mr Clewer] is eligible for fee remission under reference number: PA21-041200.*
>
> *I await the completed EX160 in respect of the second claimant*."

51. It seems to me clear that this was belated confirmation that a copy of Mr Clewer's original Form EX160 had in fact been received by email on 31 October 2020, but for some reason – probably related to the pandemic restrictions which came into effect over the weekend of 31 October/1 November – had not been processed at the time. I think this follows from a fair reading of the relevant email exchanges looked at together. In particular the Court's email of 11 June (see [40] above) indicated that a new Form EX160 would need to be submitted by Mr Clewer. None was submitted, but the fee exemption was confirmed anyway after the emails of 14 and 16 June from H&C (above at [43]-[44]), which showed Mr Clewer's Form EX160 having been sent by email on Saturday, 31 October. Also, the response from the Court dated 18 June (above at [49]) showed the Form EX160 being forwarded to the Chancery Issues Department on the morning of Monday, 2 November 2020. That is all consistent with the idea that it was *received* on 31 October but overlooked and not finally *processed* until much later.

52. That still left though the question of fee exemption for Mrs Clewer. Also on 28 June 2021, H&C provided to the Court – for the first time – a Form EX160 in the name of Mrs Clewer. This was signed by Mrs Clewer. Next to her signature, there is a box headed, "*Date signed*", which gives the date, "*28.10.2020*", which is the same date Mr Clewer signed his form, although there is nothing before 28 June 2021 to suggest that Mrs Clewer in fact signed a form in October 2020.

53. On the following day, 29 June 2021, the Court sent a final email to H&C, saying the following:

> "*I refer to your yesterday's email & the attached EX160 in respect of the second claimant.*
>
> *Mrs Marilyn Clewer is entitled to Fee Remission under reference number: PA21-041553, a copy attached herewith for your records.*
>
> *I also attach herewith a copy of the sealed claim form*."

54. The attached sealed Claim Form was in the form as amended and sent by Mr Shrimpton to the Court on Friday 30 October 2020 – i.e., reflecting an amended and increased claim value. It now bore a Court seal – dated 31 October 2020, the date of

Mr Shrimpton's email sending Mr Clewer's original Form EX160, and importantly one day before the 1 November 2020 deadline specified in the Order of Deputy Master Hansen.

The Grounds of Appeal

55. It is against that background that Mr Clewer now brings this present Appeal. Originally, some 8 Grounds were relied upon, but the Court gave permission only in relation to two, which are as follows:

    i) Ground 6: This is a challenge to the conclusion that, in the circumstances, Mr Clewer had failed to serve a Claim Form, because the document headed "*Amended Claim Form*" served on 30 October 2020 was not sealed. The point taken is that it was not possible for Mr Clewer to serve a sealed Claim Form by 1 November because the Court had not by then supplied him with one, even though by then he had submitted not only the Amended Claim Form itself but also his EX160 Form seeking an exemption from paying fees. Ground 6 goes on:

    > " *... after the Court eventually tracked down the Amended Claim Form ... which it had mislaid, it did issue and seal the Amended Claim Form. Crucially, the court fixed the date of issue, appearing within the High Court seal, as 31 October 2020, recognising that this was the date on which it should have sealed the Amended Claim Form*."

    ii) Ground 7: This concerns the Deputy Master's conclusion that the additional fee had not been *paid*, as the Order of Deputy Master Hansen required. Two points are made. The first is that the fee *was* in fact *paid*, in the sense that it was discharged, by means of Mr Clewer applying before 1 November for a fee exemption. What is said is that since that application was later approved, Mr Clewer was never in fact liable to pay any additional funds on 1 November, and that being so the additional amount should be treated as having been *paid* – in the sense that Mr Clewer was not in fact liable to discharge it. The second point is an alternative argument. It is that, as at 1 November 2020, Freeths were still holding the £7,500 Mr and Mrs Clewer had paid to them on 24 July 2020 (see [12] above); and since the Amended Claim Form document still contained the number for Freeths' Fee Account, even though by this stage they were no longer acting, the Court could equally well have debited Freeths' account and that would have resulted in the additional £7,500 being *paid*.

Discussion and Conclusions

New Evidence on Appeal

56. A preliminary question is whether the Appellants should be entitled to rely on certain evidence which was not before Deputy Master Marsh. Principally, this was evidence (in the form of a Witness Statement from their Solicitor Mr Adesanu) of what happened *after* the hearing before Deputy Master Marsh, and in particular the fact that after the hearing, on 29 June 2021, the Court produced a copy of the Amended Claim Form bearing a seal dated 31 October 2020. Some additional materials however

covered the period *before* the hearing, including the emails to the Court of 14 June 2020 mentioned above at [43]. At the hearing before me, by agreement, these materials were all referred to *de bene esse*, on the basis that I should rule on their admissibility in this Judgment.

57. I have come to the view that the additional materials should be treated as admissible. The discretion to allow reference on appeal to evidence which was not before the lower Court is preserved by CPR rule 52.21(2)(b). In applying that rule, the Court must seek to give effect to the overriding objective of dealing with cases justly, although it has also been said that "*the pre-CPR cases, including Ladd v. Marshall, remain of relevance and indeed of powerful persuasive authority*" (Sharab v. Al-Saud [2009] EWCA Civ. 353; [2009] 2 Lloyd's Rep. 160, CA, per Richards LJ at [52]).

58. My view here is that dealing with the present case justly requires the new evidence to be available. Mr Bacon argued, by reference to the guidance in Ladd v. Marshall, that it could have been obtained much earlier and before the relevant hearing, had the Clewers acted more diligently.

59. I see force in that proposition, but on balance prefer Mr Wolman's submissions on this point. As Mr Wolman put it, the chain of email communications from H&C which eventually resulted in the Court's email of 29 June 2021 was in fact prompted by Higgs & Sons having obtained an indication from the Court on 4 June that Mr Clewer's fee exemption form had *not* been approved (see [37] above). This was news to Mr Clewer. Before then, he and his wife had relied on the assurance they had been given by the Court on the morning of 2 November 2020 that " *... the form had been received and all was in order*" (see [30] above). I take the view that, having been given that assurance, they were entitled to rely on it, and are not to be penalised for failing to take further steps to verify what they were told until it was put in issue by Higgs & Sons' inquiries, made in early June 2021. Neither should they be penalised because their own inquiries, once made, took time to resolve and were not concluded before the hearing came on. I think it clear that that was because of confusion on the part of the Court about what in fact had been done or not done with Mr Clewer's form in November 2020. When the inquiries were completed, the result was that they confirmed what Mr and Mrs Clewer had been told on 2 November 2020, i.e., that Mr Clewer's Form EX160 was "*in order*." In such circumstances, I think it would be quite unfair to deny Mr and Mrs Clewer the ability to rely on evidence as to the nature and outcome of those inquiries in support of their present appeal.

The Substance of the Appeal

60. I now turn to the substance of the appeal. I have come to the view that the Appeal must be dismissed. Although the factual background is somewhat tortuous, and although I have had very detailed submissions from both sides, in particular the Appellants, ultimately it seems to me that the analysis is quite clear, and the overall position simple.

61. I will take the analysis in stages. I think it best to start briefly with Ground 7. In short, I am sympathetic to Ground 7, and would uphold it, but that does not make any difference to the overall outcome because I am clear that Ground 6 must be rejected.

Ground 7

62. Ground 7 is the challenge to Deputy Master Marsh's conclusion as to payment of the additional £7,500 fee required under para. 4(b) of Deputy Master Hansen's Order. On this point, I agree with Mr Wolman's argument that Deputy Master Marsh's reasoning did not sufficiently address the question whether the proper meaning of the word "*pay*" was wide enough to include the situation in which a successful application for fee exemption was made. Deputy Master Marsh relied only on the fact that the Clewers' application for permission to appeal the Order of Deputy Master Hansen had been dismissed. But as I read it (see the reasoning of Trower J above at [34]), the nature of the proposed challenge on appeal was that Deputy Master Hansen should have made a different form of Order to the one he in fact made. That argument was rightly rejected, but that conclusion did not determine the question of what needed to be done to comply with the Order which *was* made. Deputy Master Marsh glossed over that question in his reasoning, and I think if he had considered it, he would have been forced to conclude that the making of a successful application for fee exemption *could* amount to *payment* as required. What the Order required, in substance, was that the position vis-à-vis payment of the Court fee be regularised. I fail to see why that could not be done by the making of a successful application for fee exemption as well as by payment of a sum of money. In either case, the fee payable to the Court would be settled. Nothing would remain due and owing. There would be nothing further left to "*pay*". I think to hold otherwise would be quite artificial.

63. There is also the question of timing. Mr Clewer's Form EX160 was received before the 1 November 2020 deadline, by email on the evening of 31 October 2020 (see above at [26]), but approved only after it, at the earliest on the morning of 2 November 2020 when Mr Clewer was told that all was "*in order*". Final approval then came only much later, in June 2021, after the long delay which again must have been the result of confusion following the national lockdown introduced on the evening of 31 October and the ongoing Coronavirus pandemic.

64. Again, I think this raises a question of construction of Deputy Master Hansen's Order. The point was not much developed in submissions, but in my opinion *payment* in the required sense *was* effected by Mr Clewer lodging with the Court before 1 November 2020 a completed form entitling him to remission from fees, albeit that confirmation of his entitlement came only later. The later confirmation, whenever given, was only a declaration of the state of affairs which already existed on 31 October when his Form EX160 was received. I think that explains why, when he was eventually provided with an Amended Claim Form in June 2021, it bore a seal dated 31 October 2020. I therefore think it right that Mr Clewer should be treated as having *paid* the outstanding £7,500 by that date. Finally on this point, and to deal with one of Mr Bacon's submissions, I do not think it makes a difference to *Mr* Clewer's position that *Mrs* Clewer had not submitted any fee exemption form by 31 October 2020, even though she was later asked to do so before the sealed Amended Claim Form was eventually provided in June 2021 (see above at [54]). I was not addressed in detail on Mrs Clewer's position looked at in isolation, but it seems to me that at most this resulted in *Mrs* Clewer being in default, but not *Mr* Clewer. His claim remained intact, subject to the question of service, which I will come on to shortly.

65. The view I have taken on Ground 7 makes it unnecessary for me to deal with Mr Wolman's alternative argument that payment of the additional fee was in any event

made by means of Freeths' Fee Account number being included in the Amended Claim Form filed by Mr Shrimpton on the afternoon of 30 October (see above at [21]). In the circumstances I will not seek to resolve this question, though I do think it doubtful that payment was made in this manner given that by 30 October 2020 Freeths were no longer acting for the Clewers.

Ground 6

66. Ground 6 concerns Deputy Master Marsh's conclusion that the *Claim Form* had not been served by 1 November 2020. Whatever the position as regards payment of the additional fee (see above), I consider that Deputy Master Marsh was correct to reach that conclusion. Moreover in my judgment, none of the matters which came to light after the date of the hearing before the Deputy Master make any difference to that outcome.

67. To start with, I think it entirely plain on the basis of recent Court of Appeal authority that what Mr Clewer was required to do by 4pm on 1 November 2022 was to serve a *sealed* Claim Form. An unsealed Claim Form would not do.

68. This point was authoritatively determined in Ideal Shopping Direct Ltd v. Mastercard Inc. [2022] EWCA Civ. 14, [2022] 1 WLR 1541. That case was concerned with questions of service under the Electronic Working Pilot Scheme (PD 51O), which does not apply here since at the relevant time the Clewers were litigants in person (see [13] above). All the same, the reasoning of the Court of Appeal was that the same basic approach applied to cases within the Scheme as to other cases outside the Scheme. As [137], Sir Julian Flaux, C described the general position as follows:

> *"In relation to the first ground of appeal, I agree with the defendants that the starting point under the CPR, in a case where Electronic Working does not operate, is that the general rule is that the claim form must be sealed before it can be validly served. Reading rules 2.6(1) and 7.5 together, the claim form that is issued and served must by definition be a sealed one. This is not only the court practice as accurately stated by the notes at paras 6.2.3 and 6.3.2 of the White Book, but is reflected in the case law. The general rule that what is served must be an original sealed claim form is made absolutely clear from the passage in para 57 of the judgment of this court in McManus v Sharif, one of the cases reported with Cranfield [2003] 1 WLR 2441 which I cited at para 100 above. Although that case was decided under the previous version of the CPR, the same general rule applies under the current version of the CPR, as is clear from the decision of Ramsey J in Hills [2014] 1 WLR 1 which was correctly decided."*

69. The simple fact is that here, the document sent by Mr Shrimpton by email on the afternoon of Friday, 30 October 2020 (see above at [21]) did not bear a Court seal.

70. Of course, Mr and Mrs Clewer at the time had a sealed version of the Claim Form to hand – the one sealed at the time of issue on 1 July 2020. But they did not serve that document. Instead, they served an unsealed document, showing the text of their

proposed amendment to reflect the increased and more accurate claim value. Does any of this change the analysis?

71. I think it clear the answer is no. The point is again very clearly dealt with in the Judgment of Sir Julian Flaux in the Ideal Shopping case. After the passage quoted above, the Chancellor went on expressly at [139] to say that the same basic analysis applied even in cases where the Claimant wished to make amendments. A *sealed* Claim Form still had to be served, and the Claimant could not get around that requirement by instead serving an *unsealed* Claim Form marked-up to show the amendments proposed (which is what happened in the present case). The Chancellor said:

> *"Any suggestion that it made any difference that what were to be served were amended claim forms is misconceived. There is nothing in rule 17.1 which removes the requirements in earlier rules such as Parts 6 and 7 in relation to the commencement of proceedings. I agree with Mr Hoskins that, were it otherwise, the claimant could avoid the requirement to serve a sealed claim form simply by amending an original claim form without permission under rule 17.1 and then serving the amended unsealed claim form, which, as he said, would make a nonsense of the scheme of the Rules"*

72. On the face of it, it seems to me these principles derived from Ideal Shopping are fatal to Ground 6.

73. On behalf of Mr Clewer, however, Mr Wolman sought to argue that the present case is different, because Ideal Shopping was based on a reading of CPR, rule 2.6(1) (which deals with the sealing of Court documents), and CPR, rule 7.5 (which provides the 4 month time limit for the service of the Claim Form). Mr Wolman argued that in the present case, we were concerned not so much with rule 7.5 as with the Order of Deputy Master Hansen, and with the provisions of Part 6 (rather than Part 7) of the CPR. He said in particular that the definition of "*claim*" CPR, rule 6.2(c) includes "*any application made before action or to commence proceedings*", and since an application made *before action* might include an urgent application which was dealt with before being issued, it must follow that a "*claim*" within CPR Part 6 did not have to bear a Court seal.

74. For my part, however, I cannot see that these are points which properly distinguish the present case from Ideal Shopping. The logic in that decision was straightforward. CPR, rule 2.6(1) requires a Claim Form to be sealed at the point of issue. Thus, when CPR, rule 7.5 specifies that a Claim Form to be served within the jurisdiction must be served before midnight on the calendar day 4 months after the date of issue, it must be referring to a document bearing a Court seal – because a seal must be affixed on issue. That logic must equally well apply here, and looked at in context must be what the Deputy Master had in mind in making his Order, not least given that the date he specified for service was fixed by reference to the 4 month period under CPR, rule 7.5 which was imminently due to expire given that the Claim Form had been issued on 1 July 2020. He was giving Mr and Mrs Clewer one final chance to effect service, after the delays which had already occurred. I think Mr Wolman's argument based on CPR, rule 6.2 is misconceived. The fact that, in some very exceptional cases, the

Court may dispose of an urgent application before it has been issued does not justify the general proposition that a claim form need not be sealed before it is served. In any event, the proposition is emphatically undermined by the clear reasoning of the Court of Appeal in Ideal Shopping, which is binding on this Court, and which expressly referenced and approved (in the quotation above at [68]) the White Book Commentary on CPR Part 6, to the effect that service under Part 6 requires service of a claim form which has been sealed.

75. What, though, of the point which has now emerged, and which Deputy Master Marsh did not know about, because it had not occurred at the time of his Judgment, namely the fact that on 29 June 2021 Mr and Mrs Clewer were provided with a *sealed* copy of their *Amended* Claim Form, but with the seal showing an issue date of 31 October 2020, the day before expiry of the deadline on 1 November 2020?

76. This is a very unusual feature of this case. As I have said already, it is clear that something went wrong. The eventual sealing of the Amended Claim Form many months after it was lodged was plainly linked to the question of Mr Clewer's application for fee exemption finally being traced, although it had been submitted in October 2020 and was "*in order*" even then. A mistake must have occurred and Mr Clewer's application must have been overlooked or misplaced. In his submissions Mr Wolman pressed the point that the Court has a wide jurisdiction to make appropriate Orders in order to avoid an injustice which might otherwise occur as a result of errors by Court staff or in the process of Court administration. Thus, in Riniker v. University College London (31st March 1999), the Court of Appeal accepted there was jurisdiction to backdate the sealing and issue of a writ to the date on which the Court originally received it. The policy had been explained in an earlier Court of Appeal decision, Aly v Aly (1st January 1984), in which Eveleigh LJ said:

> *"… it does not make sense to penalise a party who has done all that is in his power to do on the basis that a further act is required by the court which has not been done in time to allow the party to qualify for the relief for which he is asking*."

77. Does any of this make a difference to my conclusion? I think not.

78. I think the key point is as follows. The critical obligation owed by Mr Clewer was to serve a *sealed* Claim Form by 1 November 2020. Mr Wolman's submission was that what he therefore really needed was a *sealed* version of the *Amended* Claim Form in his hands by 1 November. Admittedly he did not have one, but Mr Wolman submitted that was not Mr Clewer's fault. It is on this central point that I disagree.

79. It is tempting to think that because the Amended Claim Form Mr Clewer eventually received was dated 31 October 2020, that means it should have been *made available* to him to effect service with on 31 October 2020, but I do not think that follows. I do not see how that could ever have been the case.

80. One need only look at the basic chronology. The hard copy of Mr Clewer's EX106 Form was only posted by him late in the afternoon of Thursday, 29 October (above at [19]). There is no record of it being seen again, but even with a fair wind, it must be very unlikely indeed that it would have arrived with the Court for processing the following day, Friday 30 October. There is no evidence to suggest that it did. Mr

Shrimpton was obviously concerned it had not arrived and would not do so in time, even after his discussions with Court staff on the afternoon of Friday, 30 October, which is presumably why he sent a pdf version by email on the evening of Saturday, 31 October (see above at [26]). We now know (see [49] above) that it is that document which was sent to the "*Chancery Issue*" email address on the morning of 2 November 2020 but apparently overlooked, until a further copy was sent by the Clewers' then solicitors in June 2021 and it was followed up.

81. It seems to me clear on the basis of this chronology that the earliest point in time Mr Clewer could *possibly* have received a *sealed Amended* Claim Form was Monday, 2 November 2020, and that is only if his Form EX106 had been processed immediately that day.

82. The trouble is that Monday, 2 November 2020, was already too late. Moreover, it would still have been too late, *even if,* consistent with Mr Clewer being treated as having paid the relevant Court fee by then, the Amended Claim Form had shown an issue date of 31 October. It would still, even on that hypothesis, not have been *served* by 1 November, which is what the Order of Deputy Master Hansen required.

83. I think this point is again established by the Ideal Shopping case, which shows that issue and service are different things, and so the fact that a Claim Form is treated as having been *issued* on a particular date does not entitle the Claimant to say it should also be treated as having been *served* then.

84. The final date for service in Ideal Shopping was Friday, 17 July 2020. Amended Claim Forms were submitted on that day for sealing. They were processed and sealed the following week, but under the terms of the Electronic Working Pilot Scheme, were treated as having been *issued* on 17 July. They were then *served* between 24 and 29 July. It was held there had been no effective *service* by the 17 July deadline. It made no difference that unsealed copies of the Amended Claim Forms had been provided on 17 July, or that after processing, they were deemed to have been *issued* on that date.

85. I think the same basic logic must apply here. Even if the Amended Claim Form is treated as having been re-issued and sealed on 31 October, it would never have been provided to the Clewers for *service* until after the 1 November 2020 deadline. Whatever the deemed date of re-issue or sealing, there was never any hope or expectation that it would be made available over the course of the weekend. That outcome was not caused by any error by Court staff or otherwise in the process of Court administration. It was caused by the fact that the Clewers left everything too late. None of the required documents was provided to the Court until after business hours on Friday, 30 October 2020 (see above at [21]), and most of the relevant communications were on Saturday, 31 October (see above at [25]). The matter was far from straightforward, and was never going to be sorted out and a sealed Amended Claim Form provided until Monday 2 November at the earliest. That was already too late.

86. As I read it, the logic of the decision in Ideal Shopping was that it is the Claimant's responsibility to ensure that a Claim Form is *served* before it expires. Service means having a *sealed* Claim Form in hand which can be provided to the Defendant. That being so, a Claimant faced with a looming deadline for service must take action, and

has limited procedural options if concerned the deadline may not be met. They are essentially (i) to apply under CPR, rules 6.15 or 6.16 for an order for alternative service or for an order dispensing with service, or (ii) to apply under CPR, rule 7.6(2) for an Order extending time for service. If the time for service has already passed, the Claimant can apply to extend time retrospectively under CPR, rule 7.6(3).

87. None of those things happened here. Mr Wolman submitted it was very unlikely, given the nature and purpose of the unless Order made by Deputy Master Hansen, that the Clewers would have been able to obtain relief in any of the forms described, and so in reality they were not options that were open to them. That may be correct, but is not an answer to the underlying point, which is that there needs to be finality in litigation, and if a litigant finds himself in a position where no procedural escape route is available to him, that is not a signal of unfairness but a signal he has reached the end of the road. I think that is what happened here. The effect of Deputy Master Hansen's Order was to give the Clewers a final chance to do what they should have done months before. Regrettably, they failed to take it. They left things too late and the consequence was that the deadline for service was not met. That is the conclusion Deputy Master Marsh arrived at and I consider he was correct to do so. I therefore reject Ground 6.

Overall Conclusion and Disposition

88. I will allow the appeal in respect of Ground 7 but dismiss the appeal in respect of Ground 6. The overall effect is that the Appeal fails and the Order of Deputy Master Marsh stands, although I reach that overall conclusion relying on different reasons to the Learned Deputy Master.