BL-2021-001819, CH-2023-000126, CH-2023-000127, CH-2023-000149

Neutral Citation Number: [2023] EWHC 2554 (Ch)

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

13 October 2023

Before:

MR JUSTICE LEECH

- -

B E T W E E N:

PAUL ANDREW WHITTAKER **Claimant**

- and –

BERTHA UK LIMITED **Defendant**

- -

THE CLAIMANT appeared in person.

MR ALEXANDER POLLEY KC (instructed by **White & Case LLP**) appeared on behalf of the Defendant.

Hearing dates: 1 September 2023

- -

APPROVED JUDGMENT

- -

This judgment was handed down remotely at 10.30 am on Friday 13 October 2023 by circulation by email to the parties or their legal representatives and by release to the National Archives.

Mr Justice Leech:

I. The Applications

1. By Appellant's Notice filed on 14 July 2023 the Appellant, Mr Andrew Whittaker, applied for permission to appeal against the Order of Deputy Master Bowles dated 23 June 2023 (the "**June Order**") granting judgment and dismissing this action. The appeal was given the appeal number Ch 2023 000149 and in the Appellant's Notice Mr Whittaker applied for a stay of execution. On 21 July 2023 I dismissed that application on paper. By email dated 21 July 2023 Mr Whittaker immediately applied to renew that application orally. I will refer to the oral renewal application as the "**First Stay Application**".

2. Between 13 July 2023 and 1 August 2023 when the First Stay Application was put before me for further consideration, Mr Whittaker made a series of further applications which I summarise as follows:

   (1) By Application Notice dated 13 July 2023 which he made in the underlying proceedings (the claim number of which is BL 2021 001819) he applied to set aside the June Order on the basis that it had been made in his absence and to stay it in the meantime on the basis of personal financial hardship. I will refer to this as the "**Set Aside Application**".

   (2) By Application Notice also dated 21 July 2023 he made a second application in the underlying proceedings for permission to bring a contempt application. The contempt of court upon which he relied was the unauthorised disclosure of paragraph 8 of the Order of Deputy Master Marsh dated 20 April 2023 (the "**April Order**"). I will refer to this application as the "**First Contempt Application**".

   (3) By Application Notice dated 25 July he applied to vary the Order which Meade J had made on 18 July 2023 refusing his application to stay the Order of Master Kaye dated 30 May 2023 (the "**May Order**"). At a hearing on that date she had made an unless order in relation to the April Order requiring compliance by 12 June 2023. The May Order is the subject matter of a separate appeal which Mr

Whittaker initiated by a second Appellant's Notice dated 13 June 2023. It was given appeal number Ch 2023 000127 and in the Appellant's Notice Mr Whittaker had also applied to stay the May Order both on the grounds of financial hardship and on the basis that the Defendant had failed to serve a Statement of Costs before the hearing on 30 May 2023. I will refer to this application as the "**Second Stay Application**".

(4) By Application Notice dated 26 July 2023 Mr Whittaker made a further application to stay the June Order this time on the same basis as the Second Stay Application, namely, that the Defendant had failed to serve a Statement of Costs before the June hearing. I will call this the "**Third Stay Application**".

(5) By Application Notice dated 26 July 2023 he also applied to stay the Order of Deputy Master Marsh dated 30 April 2023 (the "**April Order**") in which the Master had ordered Mr Whittaker to comply with his disclosure obligations and made an order for costs. Again, the April Order is the subject matter of a separate appeal which Mr Whittaker initiated by an Appellant's Notice dated 13 June 2023 and it was given the appeal number Ch 2023 000126. Mr Whittaker applied for a stay of execution of the April Order on the same basis as the Second and Third Stay Applications, namely, that the Defendant had failed to serve a Statement of Costs before the April hearing. I will refer to this stay application as the "**Fourth Stay Application**".

(6) By Application Notice also dated 26 July 2023 Mr Whittaker also applied for a further stay of execution of the May Order on the basis that the Defendant had failed to serve a Statement of Costs before the May hearing and I will refer to this stay application as the "**Fifth Stay Application**". This application duplicated the Second Stay Application (or part of it).

(7) Finally, by Application Notice dated 26 July 2023 he made an application in the underlying proceedings for a stay of execution of all three of the orders subject to appeal again in reliance on the failure to serve a Statement of Costs. I will refer to this stay application as the "**Sixth Stay Application**". This application duplicated the Second, Third, Fourth and Fifth Stay Applications.

3. I will refer to the six stay applications together as the "**Stay Applications**". I will also refer to the underlying proceedings as "**Claim No. 1819**" or the "**Claim**" and to the three appeals as "**Appeal 126**", "**Appeal 127**" and "**Appeal 149**" or collectively as the "**Appeals**". On 1 August 2023, which was the first day of the vacation, I made an order in the Claim and all three Appeals listing the Stay Applications and the First Contempt Application to be heard together on 1 September 2023. On 9 August 2023 Master Kaye also listed the Set Aside Application to be heard at the same time.

4. By Application Notice dated 1 September 2023 (the "**Second Contempt Application**") Mr Whittaker issued a contempt application under CPR 81.4. The contempt of court which Mr Whittaker alleged was in wider terms than in the First Contempt Application. The summary of facts in Box 12 contained a number of new allegations of misconduct including witness tampering and destruction of evidence. Mr Whittaker filed the Second Contempt Application and supporting evidence on CE File on the day of the hearing but he had not served it on White & Case LLP ("**White & Case**"), who were acting for the Defendant. Nor had it been listed before me.

5. At the hearing on 1 September 2023 I raised with the parties the fact that the applications for permission to appeal (each of which I will describe as a "**PTA Application**" and collectively as the "**PTA Applications**") had not been listed before me and suggested that it was appropriate for me to deal with them on paper and then incorporate my reasons into this judgment. Both Mr Whittaker and Mr Alexander Polley KC, who appeared for the Defendant, told me that they had understood Master Kaye to be listing the PTA Applications for hearing on 1 September 2023 and that they had come prepared to deal with them. In the event, I heard their submissions on both the PTA Applications and the Stay Applications. The consequence of treating the PTA Applications as listed before me was that Mr Whittaker would not have been entitled to renew them orally a second time. This was a point of concern and I return to it at the end of this judgment.

II. Procedural Chronology

(1) The Claim

6. By Claim Form dated 7 October 2021 Mr Whittaker commenced proceedings against the Defendant claiming a declaration that there had been a "change of control" within

the meaning of a shareholder's agreement dated 9 September 2011 (the "**Shareholders Agreement**") made between the parties and relating to their shares in a company called Dogwoof Ltd ("**Dogwoof**"). He also claimed that as a consequence he was entitled to acquire the Defendant's shares at fair value and claimed specific performance of the Shareholders Agreement or damages for failure to disclose the change of control.

7. The relevant events upon which Mr Whittaker relied in support of his claim took place between 2012 and 2014 (for the most part) and on 8 November 2021 the Defendant served a Defence (which was later amended on 23 March 2023) denying Mr Whittaker's claims both on the merits and because of the substantial delay in bringing proceedings. The Defendant relied both on a statutory defence under the Limitation Act 1980 and the equitable doctrine of laches. It also denied that Mr Whittaker's case on causation and contended that he had waived his right to enforce the Shareholders Agreement (or was estopped from doing so). On 22 December 2021 Mr Whittaker served his Reply.

8. On 9 June 2022 the first Costs and Case Management Conference (the "**CCMC**") took place. Master Kaye gave directions for trial which was listed to be heard in a window in July 2023. In paragraph 9 she made an Extended Disclosure Order (the "**Extended Disclosure Order**") requiring Mr Whittaker to give Model D disclosure by 16 September 2022 in relation to a number of issues and, in particular, the issue of causation and the defences of laches, limitation, waiver and estoppel. On 14 October 2022 Mr Anthony Tabatznik, a director, signed the Defendant's Disclosure Certificate and on 21 December 2022 Mr Whittaker signed his own Disclosure Certificate. He disclosed 116 documents of which only a small number related to the period before 20 May 2020. For example, he disclosed only one email from his personal email account in a date range spanning 11 years. He also stated that he had not had access to his company emails including the reply to a data subject access request ("**DSAR**") which he had made to Dogwoof.

(2) The April Order

9. The Defendant took the position that Mr Whittaker had failed to comply with the Extended Disclosure Order and by Application Notice dated 7 March 2023 (the "**Remedial Disclosure Application**") it applied for an order requiring him to do so

under Practice Direction 57AD, paragraph 17.1. In support of the Remedial Disclosure Application the Defendant served a witness statement dated 6 March 2023 made by Mr William Corbett-Graham, a solicitor, of White & Case ("**Corbett-Graham 1**"). Mr Corbett-Graham gave the following evidence:

(1) Before the CCMC Mr Whittaker had agreed to conduct searches of his work email account ([REDACTED]) which was described by him as the most relevant source of documents in his Disclosure Review Document.

(2) However, at the CCMC his counsel submitted that his dismissal as a director and employee of Dogwoof had given rise to a significant change of circumstances because he now expected to be unable to access his work emails and the Defendant might have to disclose them itself.

(3) The Defendant therefore agreed to search Mr Whittaker's work email account. But at Mr Whittaker's request, it also agreed to search the account according to a protocol designed to protect privileged and confidential material which the parties agreed to negotiate in correspondence. Despite multiple requests in correspondence, Mr Whittaker failed to provide the review protocol and, indeed, had not done so by the issue of the Remedial Disclosure Application.

(4) On 21 July 2022 the Defendant proposed to download Mr Whittaker's entire mailbox and provide it to him. However, it was informed by Dogwoof that it would be unable to do so because he held the "super-administrator" credentials necessary to access the account. On 5 August 2022 he stated that he would provide those credentials but he failed to do this either.

(5) On 25 August 2022 Druces LLP ("**Druces**"), who were then acting for Mr Whittaker, wrote to White & Case informing them that he was liaising directly with Dogwoof to get access to his work emails but if that did not resolve the question "our client proposes to simply access the data himself for searching". Mr Corbett-Graham's evidence was that this demonstrated that Mr Whittaker had been able to access his work email account all along (contrary to the position which his counsel had presented at the CCMC).

(6) Mr Whittaker did not search his emails or provide disclosure. By email dated 9 December 2022 (i.e. shortly before the extended deadline agreed for compliance with the Extended Disclosure Order) he stated that he had lost access to his work email account and to the material supplied to him in response to the DSAR. In the Disclosure Certificate which Druces served on Mr Whittaker's behalf on 21 December 2022 they stated that he had "not had access to his "Dogwoof" company emails and so they have not been searched".

(7) On 27 February 2022 Dogwoof's IT personnel confirmed that Mr Whittaker had retained access to his work email account until 31 October 2022 and that Dogwoof had then gained access to his email account and removed his "super-administrator" privileges.

10. On 12 April 2023 Druces served a Notice of Change stating that they were no longer acting for Mr Whittaker and, although he was later assisted by a new firm of solicitors, RWK Goodman LLP ("**RWK**"), he was acting in person from 12 April 2023 until 20 April 2023 when the April Order was made.

11. On 13 April 2023 Mr Corbett-Graham made a second witness statement ("**Corbett-Graham 2**") on the basis of information from Dogwoof. His evidence was that Mr Whittaker had in fact accessed his work email account and forwarded emails to his personal email account on 30 July 2022 six weeks after the CCMC. Mr Corbett-Graham also gave evidence that by letter dated 29 March 2023 Druces accepted that Mr Whittaker had retained access to his work email account during the relevant period although they described this access as "limited and inconsistent". Finally, he gave evidence that on 22 March 2023 the Defendant had supplied Mr Whittaker with a hard drive containing his work emails and that in their letter dated 29 March 2023 Druces had agreed to search them although only on random or sample basis.

12. On 17 April 2023 Mr Whittaker made a witness statement in answer to the Remedial Disclosure Application and Mr Corbett-Graham's evidence. He dealt with his work email account in the following passage:

> "25. As per my correspondence in March 2023, I stated that I had not failed in my disclosure obligations regarding my personal email. In addition I offered to conduct a review and explore possible options to address remaining concerns.

> 26. The Defendant has argued that I have not conducted a thorough search of my over 300,000 emails. However it should be noted that I was unable to access my work emails. The letter for my dismissal without notice was signed by Andrew Case, a Director nominated by Bertha UK to the Company, just prior to the Case Management Hearing. Despite being well aware of my dismissal, the Defendant continues to assert that I have not fulfilled my obligations regarding the search for work-related emails.
>
> 27. The Defendant supplied this [sic] emails on 23 March 2023, and had the ability to send these to me much before this date.
>
> 28. As of 1 June 2022 I was dismissed without notice, by a grievance committee comprised of 2 Directors nominated by Bertha UK after the Coutts Bank enquiry. A claim for unfair dismissal is in progress.
>
> 29. It is apparent that the Defendant would have been aware that my dismissal would make searching my a. work emails, b. Coutts Bank records, c. DASR requests a more difficult exercise.
>
> 30. Given my unfair dismissal, I did not have full access to my work email. It would have been unreasonable for me to access it following dismissal without notice, as it could have jeopardised my employment tribunal claim and other litigation."

13. On 20 April 2023 Deputy Master Marsh heard the Defendant's application. Mr Whittaker appeared in person and the Defendant was represented by leading counsel, Mr James MacDonald KC. The Master did not give a reasoned judgment dealing with compliance with the Disclosure Order because Mr Whittaker's position both in his Skeleton Argument and at the hearing was that he was willing to submit to an order requiring him to carry out further searches and to make a new Disclosure Certificate. In his Skeleton Argument for the hearing he stated as follows:

> "10. As per the correspondence I have engaged with the Defendant's open proposal made on 3 April 2023, to compromise the Application by way of a consent order. I made a compromise offer of £25,000 and agreed to the Consent order, provided that the search keywords were refined to make the results proportionate. However the Defendant did not accept my offer, leading to the change in my position. 11. I am cooperating with the Defendant, and have engaged in discussions to agree refined keywords for further searches, to comply with the disclosure obligations. I have promptly addressed concerns related to personal emails and consented to additional searches, to help resolve the outstanding issues. However, the Defendant's delay in providing my work emails and DASR documents has hindered the disclosure process. Despite this setback, I remain committed to finding a compromise with the Defendant to ensure that we can fulfil our disclosure requirements."

14. Mr Whittaker's principal complaint both in his Skeleton Argument and before the Master (and, indeed, before me) was not that he had complied with the Disclosure Order but that he had been prevented from doing so by the Defendant's refusal to give him access to his work email account and its conduct more generally. He summarised his position in paragraph 12 of his Skeleton Argument:

> "In the months leading up to the trial, the Defendant has engaged in a series of tactics that caused delay to the proceedings, including seeking to amend its claim, blocking the sending of documents relating to my DASR request, and work emails, and making excessive disclosure requests, and refusing to engage in settlement negotiations. In addition in a change of circumstances, removing me as an Employee, Chair and Director of the Company in a change of circumstances (whilst appointing Andrew Case as Chair). Following the disclosure by Coutts Bank about the change of control, Mr Tabatznik emailed the CEO of the Company, "My solution if they are right. I resign as director. Appoint Andrew Case, a lawyer, as director. Or someone else..."""

15. Nevertheless, Mr Whittaker made it clear to the Master that he was prepared to submit to a further order and put forward the following proposal in paragraphs 23 and 24 of his Skeleton Argument:

> "23. Draft Order. To clarify my position, I propose the below based on the Draft Order in the application:
>
> • Defendant shall provide copies of the files related to my DASRs
> • Parties shall collaborate and agree on a narrowed down set of keywords
> • Claimant to Conduct The [sic] Searches on the following Sources:
> • Personal email
> • Work Email
> • DASR documents
>
> • Claimant to serve a new Disclosure Certificate and Extended Disclosure List of Documents.
>
> • The procedural timetable be adjusted as agreed
>
> • Costs
> • "No Order as to costs", meaning that each party pays their own relating to the application.
> • Alternatively I suggest "Costs in the case", where the loser of the case as a whole will pay the other's costs for the application. In this situation I believe "Costs in the case" would be a fairer and more appropriate solution.
>
> 24. My position, for the most part, has remained consistent. I was willing to make concessions on all of the terms, subject to advice, regarding the Consent Order. Unfortunately these concessions were insufficient to avoid this Hearing."

16. At the hearing Mr MacDonald opened the application and took the Master through the correspondence. He pointed out that the disclosure deadline had been extended four times at Mr Whittaker's request. He submitted that there had been an "ever-changing series of excuses for Mr Whittaker's failure to search his work email account" and he took the Master through the relevant correspondence including Druces' letter dated 25 August 2021 and the Disclosure Certificate in which they had stated that Mr Whittaker had not had access to the account. In relation to the keywords he submitted as follows:

> "MR. MACDONALD: Then (c), which does I think still work, is to arrange for the provider to apply the key words. We have set out the key words in appendix 1 of the order. Just to be clear those key words were all agreed back in 2022 and they were the key words that Mr. Whittaker actually applied to the limited disclosure that he gave, so these are new key words, they are not coming out of ether. They have all been agreed. They broadly reflect two items. One is documents relevant to the corporate structure, so that is key words relevant to C's knowledge, and then the value, the finance point, which is key words relevant to C's finances. So this is all done on this order on 28th April and then at paragraph (d) we have a reporting to us on that date of the number of documents that have been collected and the number that are responsive to the keywords. The whole point of that is that if it is then necessary to reduce the keywords or to finesse them we can have a quick, swift and hopefully helpful discussion about it. You will see in sub-paragraph (c) that we provided for the key words in appendix 1 "or such other Keywords as shall be agreed between the parties." We have made it clear in correspondence that we are very happy to be flexible but we do need engagement and helpful input."

17. Mr Whittaker told the Master that he was willing to search his personal email account, his work email account and any replies to the Dogwoof DSAR (as the draft order put forward by the Defendant required him to do). He maintained his position that his original Disclosure Certificate had been accurate and that he was not responsible for the failure to search his work email account. Nevertheless, he accepted that he now had access to the account and that he had been carrying out searches since 22 March 2023. I set out the relevant exchanges from the transcript:

> "DEPUTY MASTER MARSH: In any event, you do have access now. You have access to your work email account and you can carry out a search. THE CLAIMANT: As from 22nd March and we are doing the search. DEPUTY MASTER MARSH: So that is a month ago and you are searching it, are you? THE CLAIMANT: We have been trying to apply the method to filter down the keyword searches. DEPUTY MASTER MARSH: Have you undertaken searches using the keywords to establish

> the number of hits? THE CLAIMANT: Yes, and it is around 300,000. DEPUTY MASTER MARSH: Yes, in aggregate, but are you able to tell me today what the number of hits per keyword is? It is not in your witness statement, because that is all that matters. Some keywords may have no documents responsive to them and some documents may have many tens of thousands of documents responsive to them and most keywords are probably somewhere in the middle. That is how you work out which keywords are likely to be useful. THE CLAIMANT: Yes. DEPUTY MASTER MARSH: But just to say there is a total number of hits of 300,000 is meaningless. THE CLAIMANT: So a report has been requested to Brian(?) following a conversation, I think it was on Monday actually, to produce that initial report, and then we can look at refining the keywords further. This is also partly where the sampling came in and the idea of being random is to show that it was not biased. DEPUTY MASTER MARSH: You say refining the keywords, who is refining them? This is a consensual bilateral process in your mind or something which is unilateral? THE CLAIMANT: No, no, exactly, so based off the reports, as you say per keyword, this is the method we are looking at doing, which is on the keywords number of hits per and then essentially inform the other side of the searches. So, as you say, if there is one search that is triggering something that is 10,000 hits, how can we reduce that noise, or as ---- DEPUTY MASTER MARSH: If you have an aggregate number of hits, you know already the number of hits per keyword, do you not? THE CLAIMANT: Yes. DEPUTY MASTER MARSH: You have the information already. So why has that information not been supplied to the defendants? THE CLAIMANT: It was literally on -- that information has come to me about two hours ago. DEPUTY MASTER MARSH: So you have available to you now a report in some form or another which shows the number of hits per keyword and whether those numbers are de-duplicated or not, yes, or not? THE CLAIMANT: Well, I have not actually read the message, so I would have to check, but -- this is a different one. But a report has been produced today, that is what I do know and it was requested to do a report, exactly what you are describing, which is by keyword. DEPUTY MASTER MARSH: All right. So in principle, on your case then, in relation to your work email account, you have access to that account, work is being done on it, you are able to deal with proportionality to the extent you need to? THE CLAIMANT: Yes -- well, the worry is -- well, okay, a question on that is because White & Case were insisting that every document is searched, so that is where I flagged the worry of proportionality because we can refine keywords but if every document has to be searched and redacted and everything else that would be quite a disproportionate exercise."

18. The Master told Mr Whittaker that he understood the need for proportionality and moved on to ask about his personal email account. Mr Whittaker accepted that his e-disclosure provider ("**EDP**") now had access to his personal email account and that one

report had been produced but he said that he could not deal with the replies to the DSAR:

> "DEPUTY MASTER MARSH: I am not interested in who they were recommended by but they exist, do they, and are working for you? THE CLAIMANT: For sure. They exist and they are very good and diligent. So they have full access to my personal email web server account. They now have, so eventually received the work emails, so they have that and today -- what I do not know is which report, so I know that one report has been produced because they are running the hit word -- the hit count reports on the personal email and on the work email. They cannot do it as per the draft order for the DASRs because I still have not been supplied those by White & Case. DEPUTY MASTER MARSH: I think you are under a misapprehension about the DASR. As I understand it, it is not the defendant who is going to respond to that request. It is the company. It is Dogwoof. And all they are saying is that to the extent you received documents from Dogwoof you must disclose them to the defendant. It is not a question of carrying out searches. THE CLAIMANT: Yes. Just to qualify that, this then becomes a conduct query so the later parts of my skeleton is, like I say, you know, when Coutts was raised, the board looked very different in the company. And I think you call it retaliation. So since I have raised this query about the change of control -- oh, so Bertha UK says it is a UK company and says that I may have known. Even Coutts Bank did not know. I did ask the directors nominated by Bertha UK to tell Barclays Bank, which was refused point blank by the Bertha directors. There are around four BVI entities ---- DEPUTY MASTER MARSH: I think you need, again Mr. Whittaker I am going to stop you. You need you to stick to the point here. Do you understand what the DASR position is? There is a request to the company, the company will respond. Bertha are not the company, they are simply a shareholder, as you are, and to the extent that you received documents in response to that DASR request you are requested to disclose them to Bertha. It is not difficult."

19. Mr Whittaker resisted this suggestion by the Master on the basis that the grievance committee and the appeal committee of Dogwoof had refused to answer the DSAR and that he had contacted them before he signed the Disclosure Certificate on 21 December 2022. However, he then accepted that he was prepared to make a new Disclosure Certificate and he repeated again that he had offered to consent to an earlier form of the draft order and to pay costs of £25,000 to avoid a hearing:

> "THE CLAIMANT: So as some context for that, so when the order -- in one of the versions of the draft order, the consent order, I did offer a compromise, I did offer agreement. I offered a proposal of a draft order, as you just described to do, actually I agreed to do all four searches of all the data sources, also for the changes of the procedural timetable, I think

> both parties have agreed that. And I offered 25,000 in costs to avoid this hearing. But that was rejected by the other side. Then having done the further investigation, this is when I changed my position, because I checked into the disclosure certificate, Druces assured me what I had stated in there is correct. There was clearly an unintentional misunderstanding on the personal email, but that we are looking to rectify as soon as possible and the EDP has full access to that that is doing the searches. Now we have the work emails. My simple point on that was the simple argument is that I understand what you are saying it is the company on the work emails. I seem to be being blamed for essentially being removed from the company and then not accessing my work emails and I struggle to get my head around that. For me that feels like a -- I am repeating ----"

20. At this point, the Master cut Mr Whittaker short and told him that he was not prepared to spend time considering further who was responsible for the failure to access the work emails. He impressed upon Mr Whittaker the risk to the trial date and asked him whether (and when) he would be in a position to exchange witness statements. The following exchange then took place:

> "DEPUTY MASTER MARSH: -- any disclosure in relation to BVI documents. All right. At the moment where I am provisionally is that it seems to me the very latest date that your revised disclosure certificate could be provided with the documents that are being disclosed is 19th May and a date for exchange of witness statements 19th June and experts' reports 16th June because effectively the trial is the beginning of July. You cannot have these steps taking place in the days before a trial starts because trials need to be prepared. Is there anything you want to say about those dates? THE CLAIMANT: In discussion, so we did have some good discussions this week, that is one of the reasons why I have become a litigant in person because essentially it seemed to be a bit of an impasse in that February/March period, so, you know, the tactic of this is to essentially make sure that we are talking and getting this moving faster and more efficiently. One of the things that was agreed is we do not think there is a dependency on the expert evidence -- the expert evidence could essentially be run in parallel. I am happy to make that request. I understand where we each get our own report, so we can both get that, and that can be, if not already started, that can be started now. So it is not a dependency on the disclosure is what I am trying to do, and that will set the valuations for the date of the change of ownership on the relevant dates. DEPUTY MASTER MARSH: All right. But even there the joint expert statement will be just a week before the trial starts so absolutely no slippage can be there. But leave the expert evidence on one side for a moment, it is really disclosure and witness statements that have concerned me. If I set a new timetable it is going to be on the basis that the parties have no entitlement to change it between the two of them consensually. It simply is just not possible to let the parties adjust the

> timetable any further. So this is the last stop, the last-chance saloon for revising the timetable so that we need to set a timetable that is going to be complied with. And I hope you understand that if there are -- if the defendant says there is a failure to comply with orders, they will be saying to the trial judge you should draw adverse inferences. In other words, you may well damage your case. THE CLAIMANT: Yes. DEPUTY MASTER MARSH: So you need to be extremely careful, and indeed they are going to say if you do not comply, I know they are going to apply for further orders with a sanction which will be seeking to strike out the claim, I am sure. So this is a very critical stage. This is the point I was trying to make sue. It is a very critical stage. Do you accept the 19th May date? THE CLAIMANT: For? DEPUTY MASTER MARSH: Disclosure. THE CLAIMANT: It is tight, but yes I have to, don't I? If I can get one more week I would be happier but I can accept 19th May. I obviously do not want to put the trial at risk, but one more week would make a big difference. It is not a must. If Mr. MacDonald -- I do not know, I am happy to take your view on that. DEPUTY MASTER MARSH: Mr. MacDonald? THE CLAIMANT: 19th is fine. DEPUTY MASTER MARSH: Mr. MacDonald, you have been listening to this discussion I am sure. Is there any, so far as the defendant is concerned is there any scope for an adjustment there? This is an open question, it is not me asking, trying to persuade you one way or the other, but just ask the question. MR. MACDONALD: I think the 19th May would be the latest possible date for us. We have tried to give as much time as we think can work. It has to be met on that date. 3 DEPUTY MASTER MARSH: I think, Mr. Whittaker, dates have a habit of slipping, so having said that there will be no ability to extend, I mean, I will build into the order that the parties may agree a 48-hour change to those dates but nothing more than that. 8 All right. So where we have got to is that there will be an order that you provide revised disclosure for 19th May."

21. The Master then went on to deal with costs. He dealt first with the incidence of costs and he was satisfied that Mr Whittaker's failure to comply with the Extended Disclosure Order had made it necessary for the Defendant to make the Remedial Disclosure Application. He also ordered Mr Whittaker to pay the costs on an indemnity basis:

> "All right. I am dealing with the question of costs on the defendant's application dated 7th March 2023. I am going to deal with the principle as to whether the claimant should pay the costs of the application and then 16 consider whether, if so, those costs should be paid on the indemnity basis. The application relates to disclosure made pursuant to the order of Master Kaye at the costs case management conference on 9th June 2022. It has been evident for a very lengthy period of time that the claimant has not provided disclosure in accordance with the agreed issues for disclosure and the sources of documents which were agreed to be searched. Efforts have been made by the defendants over a very lengthy

> period of time to resolve that failure, finally leading to an application. I am in no doubt that the failure to comply with the order is a direct consequence of the claimant's failure to do what was necessary in order to ensure compliance. Attempts were made by his solicitors, who were then acting for him, to say that he was under no further obligation to provide disclosure, but that was plainly wrong. He has now accepted and I have ordered that wide-ranging additional disclosure is to be provided with searches to be undertaken in respect of two important email accounts and attempts to provide disclosure from other sources. The application comes before the court at a critical stage with a trial date in early July 2023. It is vital that the order is complied with if the trial is to take place on a fair and proper basis. It seems to me there can be no order other than that Mr. Whittaker pays the costs of the application. Belated attempts to resolve matters were made and yesterday terms were broadly agreed with a proposal that a contribution to costs of £25,000 be made. However, the skeleton argument that Mr. Whittaker has provided today, together with the draft order, do not match what was said to be the agreement yesterday. In any event, I am satisfied there has been a wholesale failure to comply with the order for disclosure without any proper explanation being provided and it is right that Mr. Whittaker should be ordered to pay the costs of the application.
>
> As to the basis upon which assessment should take place, an application is made for an order that the costs be assessed on the indemnity basis. It does seem to me that this is a case which is outside the norm, in the sense that the order for costs was made in June last year. The date for compliance was moved on four occasions to accommodate the claimant's requests. Disclosure was provided shortly before Christmas last year and only then was it apparent that there was a complete failure to comply with the order with a failure to undertake proper searches. Instead of efforts being made to remedy the position promptly, there was a denial on the part of the claimant that there was anything wrong with the disclosure and only now belated -- very belated -- agreement to remedy the position. In my judgment, that takes the application outside the norm and it is appropriate that costs be assessed on the indemnity basis and I now undertake a summary assessment."

22. The transcript records that Mr MacDonald told the Master that the Defendant's Statement of Costs had been filed the previous day. He did not suggest that it had been served on Mr Whittaker and Mr Polley accepted that the Defendant had not done so (as it should have done). However, the Master went on to carry out a summary assessment and after raising a number of issues with Mr MacDonald he delivered the following judgment:

> "I am now undertaking a summary assessment of the defendant's costs of their application on the indemnity basis. The headline figure that is sought is slightly in excess of £100,000, including VAT. The issues that

> arise are relatively limited here. I accept broadly Mr. MacDonald's submission that the hours that are claimed are not in themselves excessive. There has, however, been a model operated here which has involved three fee earners being involved in all aspects of the work together with leading counsel and that inevitably makes the costs claimed more significant than might be objectively justifiable. There is then the question of hourly rates. The grade A associate is charged at £848 which is very significantly above guideline rates. The grade C associate at £496 per hour and grade D trainee and legal assistant at £320 and £292 respectively. The claim is only of moderate complexity. In the range of cases dealt with in the Chancery Division it is somewhere around the median, perhaps a little below the median level of complexity, and the value is not especially high. Therefore, adjustments will need to be made in respect of hourly rates. As to the question of whether this is a case in which the defendants are justified in using leading counsel, it is of note that Mr. MacDonald KC is dealing with this case (at least at present) on his own and it does seem to me that it is a case in which it is proper to instruct leading counsel, or at least proper that the fees of leading counsel are recoverable on an application of this type. Undertaking, therefore, a broad assessment, which is what I am required to do, I am going to summarily assess the costs at £65,000 plus VAT, which I consider to be an appropriate sum."

23. The Master then made the April Order. Paragraph 1 required Mr Whittaker to identify his e-disclosure provider ("**EDP**"). Paragraphs 2 to 6 contained the orders for disclosure and paragraph 8 the order for costs:

> "2. By not later than 28 April 2023, and unless otherwise agreed by the Defendant in writing, the Claimant shall: a. Collect documents from the following sources:
>
> i. His personal email account ([REDACTED])
>
> ii. The emails collected from his work email account ([REDACTED]) provided by the Defendant on 22 March 2023;
>
> iii. The records of the following financial agents and advisors: Coutts, Arbuthnot Latham, Mr Merryck Lowe, Mr Jeff Bocan of VC Okapi, Mr David Fenkel of A24 and Mr Rob Ryan of Balbec; and
>
> iv. His financial records, including bank statements, investment accounts, savings accounts and loan accounts (together, the "Sources").
>
> b. Arrange for the EDP to apply the keywords in Appendix 1 to this Order, or such other keywords as shall be agreed between the parties (the "Keywords") to the documents collected pursuant to paragraph 1.a.
>
> c. Report the following information to the Defendant:
>
> i. The number of documents that have been collected from each of

> the Sources; and
>
> ii. The number of documents that have been collected from each of the Sources that are responsive to the Keywords.
>
> 3. The Claimant shall conduct searches of the documents identified by paragraph 1 of this Order relating to the agreed list of issues for disclosure ("LOID") recorded in the Disclosure Review Document, enclosed at Appendix 2 to this Order.
>
> 4. On both 5 and 12 May 2023, the Claimant shall update the Defendant regarding the number of documents reviewed as of that date and the number of documents still remaining for review.
>
> 5. By not later than 19 May 2023, the Claimant shall serve a revised Disclosure Certificate and Extended Disclosure List of Documents.
>
> 6. The Court shall list a hearing on 30 May 2023 at 2.30pm, subject to the availability of Master Kaye, to be used if required to address any non-compliance with this Order."
>
> "8. The Claimant shall pay the Defendant's costs of the Application, which have been summarily assessed at £65,000, within 28 days of this Order."

(3) The May Order

24. Mr Whittaker did not comply with the April Order and on 30 May 2023 the hearing ordered by Deputy Master Marsh took place before Master Kaye. In the summary at the end of his Skeleton Argument for that hearing dated 30 May 2023, Mr Whittaker stated that an Extended Disclosure list for 3,172 documents was available but that he still had over 3,000 documents to review manually. He also accepted that he still needed to comply with the costs order in paragraph 8. However, he submitted that he had done a lot of work "to comply with the Orders, and to remedy the Breaches".

25. The transcript records that Mr MacDonald (who appeared again for the Defendant) told the Master that shortly before the hearing Mr Whittaker had served his Extended Disclosure List on White & Case. He also took the Master through the recent correspondence, made submissions about Mr Whittaker's failure to comply with the disclosure elements of the April Order and invited her to make an unless order. He then took her to the relevant authorities dealing with the question whether the Court should make an unless order in relation to non-payment of a costs order and submitted that an unless order should be made in the present case.

26. The transcript also records that Mr Whittaker accepted that he had not strictly complied with the disclosure element of the April Order and Master Kaye invited him to explain why not. After a lengthy explanation she then asked him how long he needed to comply with the Order and he said a week or so:

> "MASTER KAYE: So, Mr. Whittaker, can I cut through? THE CLAIMANT: Yes. MASTER KAYE: How long do you say you need to tidy this up and finish it off, leaving aside the fact that it is likely that Mr. MacDonald will want to, and White & Case may raise queries about it. THE CLAIMANT: Yes. Understood. MASTER KAYE: How long? THE CLAIMANT: A week. I got into this problem last time. We have the documents, right, so in fact I believe we have, apart from DASRs, we have the documents. I would love my DASRs, as you can tell, but that seems to be a battle. But the other documents we have, financial records, well, we have what we -- Gosh, I know I have to pick my phrasing. We have made all the requests to all of the people on the order. Documents have been supplied, all sorts of phone calls have happened and the exercise was completed in December, and I believe again it was, Druces confirmed it was completed. But we have done another round with Goodman and yes. So how long? It needs packaging up, searching for relevance, confidentiality, and then handing over; yes? That should not be a big exercise. We are looking at like, what, 100 documents this time? MASTER KAYE: I have no idea, Mr. Whittaker."

27. Master Kaye then asked Mr Whittaker about payment of the costs element of the April Order and Mr Whittaker stated that he was in the process of getting the money and asked for a number of weeks to make the payment. When the Master asked why she should not make an unless order, Mr Whittaker submitted that this would be draconian and asked for the Court's guidance:

> "MASTER KAYE: Okay. Now tell me about costs. THE CLAIMANT: Yes. Essentially, yes, friends and family, i have a bridging loan. Yes, when I accepted 28 days, I believed that was possible. But people with that type of money, it is in high interest accounts, they do not have it, they are not necessarily having it cash at hand. So I have asked for it. I have been offered it and so I am in the process of getting that money. I am happy to -- well, if I have a chance to follow-up to provide reasons on that and to provide a firmer date, but at the moment, that one would be longer. That would be weeks away at the present, to my current knowledge. MASTER KAYE: Help me with this: why should I give you weeks and why, as a second question, should not any deadline I set be an unless order? THE CLAIMANT: That is probably a good question. I think, actually, to be honest, if this costs order was made as, gosh, 4 what do you call it, costs in the case? MASTER KAYE: No, this is for the £65,000 you owe. THE CLAIMANT: Okay. If it is an unless order again, obviously, I am not a lawyer, I have done some of the reading. That is a

> difficult question. Is there a reason you should not do that? I think it would be draconian. I think, actually, I think 10 when Master Marsh made that order, he was partly influenced by, well, he was influenced by Mr. MacDonald's statement of £9 million as a valuation. My budget for disclosure originally was £40,000. The defendant's was £180,000. I apologise if that is wrong, but certainly much bigger. I know it is the defendant's costs but that costs order is below, you know, from a budget point of view, I am not expecting a £65,000 bill at this stage, plus the extra cost I have had to go to. No, that just from a cash flow point of view. From a cash flow point of view, it is a bump not budgeted or expected. From a payment point of view, yes, I understand my responsibility to pay it. I have no idea whether that should be an you unless order. I would have to take your guidance."

28. Having heard these submissions the Master delivered a reasoned judgment. She took into account the fact that Mr Whittaker was unrepresented at the hearing but pointed out that he had been represented by solicitors for most of the case and that there was no lesser obligation upon a litigant in person to comply with Court orders: see [5]. She also directed herself that were it not for the fact that the trial was in July, one would have anticipated that the disclosure exercise would have been undertaken on a collaborative basis but that there was not the same luxury to run alternative search terms so close to trial: see [8] and [9]. She also recorded the fact that Mr Whittaker had made disclosure of 3,000 documents shortly before trial: see [10]. She then continued as follows:

> "11. It is common ground that there has not been compliance with the Remedial Disclosure Order. The question for me is really only what sort of order I make in relation to further compliance with it.
>
> 12. In relation to the summarily assessed costs – they have not been paid. There is no proper explanation as to what the problem is, although Mr. Whittaker says that he has had to obtain a bridging loan from family and friends. He says that whilst he believed it would be possible to do that within 28 days, it has not proved to be possible. He was vague as to when precisely it might be possible to make the payment.
>
> 13. Mr Whittaker says that he had a budget for disclosure of some £41,000. It seemed to me that that was a misunderstanding of what the cost budgeting process is for. The cost budgeting process at the CCMC produced approved or agreed figures for cost budgets including the disclosure phase. Mr Whittaker's costs budget for disclosure was £41,000. I do not know what he agreed with Druces but a costs budget does not reflect the amount that either party may actually have to spend on a particular phase to undertake the work required in that phase. Nor does it justify stopping work or not undertaking the work necessary that the costs have exceeded the budget. It reflects only the figures which the court considers on the basis of the information available to it at the time that it considers to be reasonable and proportionate for the other party to

pay on a standard basis in the event that a costs order is made against the relevant party at the end of the case. It is therefore a red herring. From what I understood Mr. Whittaker had budgeted £41,000 for disclosure and had now discovered that the exercise is somewhat larger and more complex and more expensive. Again no application has been made or was made at an appropriate point to seek to vary the budget. It does not change the obligation to comply with the Remedial Costs Order. I am not clear how that would affect payment of the adverse costs order arising out of a failure to comply with the Remedial Disclosure Order. The costs were summarily assessed by Master Marsh (sitting in retirement). Those costs were entirely separate to the disclosure costs in the budget and were a consequence of the application following the defective disclosure in December 2022.

14. It is clear that there is a gulf between these parties the defendant perceives Mr. Whittaker's attempts to comply as being poorly explained. Although he is clearly able and articulate he is not a lawyer and the language used in his application and witness statement was open to interpretation – raising more questions about what he had been doing and how he had been doing it and whether there were further issues with his disclosure process. He does not always use the right words and it was only when he explained what he meant that it became clear what he is actually trying to explain.

15. However, I have to keep in mind that Mr. Whittaker is not really a litigant-in-person, although he appears before me as a litigant-in-person. He has had solicitors advising him and representing him throughout the majority of this case. The fact that he appeared on the last hearing and appears today unrepresented does not make him a litigant-in-person in the sense of someone who has attempted to undertake all of this work on their own without any assistance at all. For the last month he has had RWK Goodman Derrick, Epiq and AVBT assisting him with the disclosure exercise. Prior to 12 April he was represented by Druces who undertook the original defective disclosure exercise in December 2022.

16. But in any event there is no lesser obligation on an litigant in person to comply with court orders. There is only one authority I need to refer to in relation to litigants in person, but it is well-known. In *Barton v Wright Hassall LLP* [2018] UKSC 12 Lord Sumption said that where a party is unrepresented:

> ".. it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties."

17. That is particularly relevant because it means that the test, for example, for whether to apply an unless order in this case must be applied to the same standard irrespective of whether a party is represented or not. That obviously makes good sense and is part of the backbone of our legal process. Whilst there might be room for some

> latitude at the margins, the fact that Mr. Whittaker is unrepresented today before me cannot affect the standard against which his compliance with the disclosure obligations is measured and determined."

29. The question whether to make an unless order in relation to the costs element of the April Order required the Master to consider the principles set out by Sir Richard Field in *Michael Wilson & Partners v Sinclair* [2017] 5 Costs LR 877 at [29]:

> "(1) The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion pursuant to the Court's inherent jurisdiction.
>
> (2) The Court should keep carefully in mind the policy behind the imposition of costs orders made payable within a specified period of time before the end of the litigation, namely, that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.
>
> (3) Consideration must be given to all the relevant circumstances including: (a) the potential applicability of Article 6 ECHR; (b) the availability of alternative means of enforcing the costs order through the different mechanisms of execution; (c) whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings in question; and where no such submission was made whether it ought to have been made or there is no good reason for it not having been made.
>
> (4) A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice and/or in breach of Article 6 of ECHR should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.
>
> (5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.
>
> (6) If the court decides that a debarring order should be made, the order ought to be an unless order except where there are strong reasons for imposing an immediate order."

30. Having set out these principles at [19] and referred to the decision of Saini J in *Sidddiqi v Aidiniantz* [2020] EWHC 699 (QB), the Master then turned to consider whether it was

appropriate to make an unless order. She dealt with the costs element of the April Order at [21] and [22]:

> "21. In relation to the costs here, on the last occasion Mr. Whittaker sought and was granted 28 days in which to pay the costs. He did not suggest there was any reason why he could not pay in that time period and he candidly accepted today that he had anticipated being able to pay within that 28-day period. He has not produced any cogent or credible evidence setting out why it is he cannot pay and when he anticipates being able to pay. He is based out of the jurisdiction and has not provided evidence of any assets within the jurisdiction. He does not say he is impecunious. Indeed were he to do so it would substantially undermine his claim. 22. It seems to me, in this particular case, that it is appropriate to make an unless order in relation to the costs. As for the date by which payment should be made, I will come back to that at the end."

31. The Master then dealt with the disclosure element of the April Order. She reminded herself of the fact that Mr Whittaker was "nearly there" in relation to disclosure, that it had been a time-consuming exercise and that his evidence was that he did not intend to flout the Disclosure Order: see [23] and [24]. She then cited the decision of Foxton J in *Terre Neuve Sarl v Yewdale Ltd* [2023] EWHC 677 and directed herself that she had power to make an unless order where there had been a failure to comply with previous orders before going on to decide that it was appropriate to make an unless order for the following reasons:

> "25. In this case, I have to take into account that the original order for disclosure was due to be complied with by September 2022. The eventual compliance in December 2022 was defective. There was a resistance to any acceptance that there was any failure in that compliance up until the last hearing in April 2023, when, as I say, the finding of Master Marsh (sitting in retirement) was that there had been a wholesale failure in relation to the disclosure exercise. There has now been a further failure to comply. The reason Mr. Whittaker finds himself in the difficulties he is in now is because since last June, and until April of this year, there had been that wholesale failure to comply. He has therefore had to concertina the proper disclosure process into a month. That is the consequence of the earlier failure to comply, but does not make the month period an unreasonable period against a trial in six weeks from now.
>
> 26. He did explain that there have been a number of other matters going on in his life which have caused him to have more to do than he anticipated in the last month. He referred to his ill-health. He referred to an Employment Tribunal strike-out application last week. He referred to the process by which the disclosure was undertaken and the fact he had to deal with letters from White & Case alleging breaches of the order. As I have already said, not only was he in breach of the order, but the letters

> were not inappropriate. He also referred to some minutes from the company relating back to 2022 which he had only recently become aware of that had an effect on his position. All in all, he seems to have found himself to be weighed down by the number of matters which he has had to deal with over the last month. Despite that at no stage did RWK Goodman apply for any extension of time. I note in passing of course that had the disclosure exercise been undertaken more fully last year we would not be here at all. However, the time period for compliance with the Remedial Disclosure Order expired and he had not complied, as he accepts, and therefore he is in breach. His application for an extension of time was not made until this morning. The application for the unless order was made last week.
>
> 27. The authorities make it clear that one of the circumstances in which it is appropriate to make an unless order in relation to disclosure is where there is a risk to the trial. Master Marsh (sitting in retirement) was very concerned by this on the last occasion at the end of April, now five weeks ago. He said that it was vital that the order was to be complied with if the trial was to take place on a fair and proper basis. He discussed with Mr. Whittaker the need for him to work very hard. He explained clearly to Mr. Whittaker that that was the last stop, the last chance saloon for revising the timetable and ensuring that the case goes to trial.
>
> 28. Clearly the case is important to Mr. Whittaker, but he has many things on his mind and he does not necessarily focus and prioritise the matters that we might think he should. He is going to need to do that now, as is seems to me the only fair answer in this case is to make an unless order in relation to disclosure as well.
>
> 29. I am satisfied that an unless order in relation to both disclosure and the costs is reasonable and proportionate and consistent with the overriding objective of dealing with cases justly and fairly. In this case, as I say, there is a trial in about six weeks' time. Whatever order I make now, potentially puts that trial at risk if there is non-compliance and if there is non-compliance therefore, it is right and proper that the claim should fall away. If Mr. Whittaker is committed to his claim, he needs to now put in the last effort to make sure he deals with the disclosure and the costs in a good and effective manner."

32. The Master then considered how long Mr Whittaker should be given to comply with the April Order and gave him almost two further weeks until 4 pm on 12 June 2023 in relation to both elements of the April Order. Finally, she then dealt with the question of costs even though (as Mr Polley accepted) the Defendant had again filed its Statement of Costs but not served it on Mr Whittaker. She held that Mr Whittaker should pay the costs of the application before proceeding to a summary assessment. Her judgment was as follows:

> "35. The final matter I need to rule on is the question of costs. I have

> indicated that a costs order should be made in favour of Bertha, the defendant, against Mr. Whittaker. I have a costs schedule at £64,541.60.
>
> 36. Summary assessment on the standard basis means I need to be satisfied the costs are reasonable and proportionate. The element of doubt weighs against the party who is to receive the costs and in favour of the party who has to pay the costs. Summary assessment is a rough-and-ready exercise and I have a very broad discretion generally in relation to costs.
>
> 37. In relation to this costs schedule it was accepted by Mr. MacDonald that the hourly rates exceed the guideline hourly rates. Ultimately, I am concerned with what is reasonable and proportionate for this application.
>
> 38. In relation to this matter, Mr. MacDonald's fees are £15,000. He has been heavily engaged with this matter and it was an important application on the part of the defendant. However, when I measure that as against the documents item and the other attendances, it seems to me that there is a significant risk in this case that there will have been some element of duplication and relatively heavy reliance on counsel. In that regard, I then look at the documents item and I see that there are some 17 and a half hours' preparing the third witness statement of Mr. Corbett-Graham, together with the exhibit, and then a further 17 hours preparing the bundle. These costs seem to me to be on the high side. I then add to that the schedule of costs for the hearing, which is itself another five hours. Overall it therefore seems to me that the documents item at £23,000 is high.
>
> 39. Looking at the other costs, there are in addition internal attendances, obviously internal attendances where you have a team of lawyers, working on a claim are an inevitable part of the process and some of those costs are quite properly recoverable inter partes but I have to take into account the possibility of duplication rather than appropriate delegation.
>
> 40. I also note that the attendance of the hearing is at four hours for each of the fee earners attending. Whilst again it is an important hearing for the clients, two fee earners for four hours, which is substantially longer than the hearing, albeit it probably includes travelling, is again on the high side.
>
> 41. Taking all of those factors into account, it seems to me I should reduce the costs to reflect that although this was an important application for the defendant and they had to deal with Mr. Whittaker's very late evidence it, none the less, seems to me that £64,451.60 is far too high and the amount I will allow for costs on a standard basis is £45,000. I will summarily assess at that figure."

33. The May Order provided for different consequences if Mr Whittaker failed to comply with the costs and disclosure elements of the April Order. If he failed to pay the costs of £65,000 by 12 June 2023 the claim was to be struck out but if he failed to give the relevant disclosure, he was to be debarred from advancing a positive case in relation to

causation, delay or waiver and estoppel. As the April Order had done, the May Order specifically provided for a further hearing in the event of non-compliance:

> "1. Unless by 4:00pm on 12 June 2023 the Claimant complies with paragraph 8 of Remedial Disclosure Order, which required him to pay £65,000 towards the Defendant's costs by 18 May 2023, his claims in these proceedings shall be struck out.
>
> 2. Unless by 4:00pm on 12 June 2023 the Claimant complies with paragraph 5 of the Remedial Disclosure Order, which required him to serve a revised Disclosure Certificate and Extended Disclosure List of Documents by 19 May 2023 (as amended by agreement 228 between the parties), he shall be debarred from advancing any positive case or adducing any evidence in relation to:
>
> a. the issue of causation, as pleaded in paragraphs 28, 33 - 35 of the Particulars of Claim, paragraphs 29.4 and 29.5(g) of the Amended Defence, and paragraphs 7 - 8 of the Reply and as relevant to Issue for Trial 6;
>
> b. the issue of delay, as pleaded in paragraph 36 - 37 of the Particulars of Claim, paragraphs 20.2, 25, 30 and 32 of the Amended Defence, and paragraphs 2 - 5, 9 - 17 of the Reply and as relevant to Issue for Trial 7; and
>
> c. the issue of waiver and estoppel, as pleaded in paragraphs 20.2 and 26 of the Defendant's Amended Defence and as relevant to Issue for Trial 9.
>
> 3. By 4:00pm on 12 June 2023, the Claimant shall provide a witness statement explaining in full how his disclosure exercise has been carried out.
>
> 4. The Court shall list a hearing on 23 June 2023 at 2pm to be used if required to address any non-compliance with this Order."

(4) Appeal 126

34. On 12 June 2023 Mr Whittaker made various applications to extend time for compliance with the April and May Orders. On 12 June 2023 he also filed an Appellant's Notice in Appeal 126 in which he applied for permission to appeal against paragraphs 2(ii), 3 and 8 of the April Order. Paragraph 2(ii) (above) of the April Order related only to Mr Whittaker's work emails and not the other documents which formed the subject matter of that order. Although this first PTA Application was out of time, Mr Whittaker did not ask for an extension of time in section 10 or provide any explanation for the delay in filing the Appellant's Notice in section 11.

35. I say that Mr Whittaker filed an Appellant's Notice on 12 June 2023. But I should record that the only version filed on CE file differed from the first version which appeared in both the soft copy and hard copy hearing bundles for the hearing on 1 September 2023. The second version filed on CE File (which also appeared elsewhere in the hearing bundles) was dated 13 June 2023 and in it, Mr Whittaker appealed only against the order for costs in paragraph 8 of the April Order. Although it is a mystery why it was not filed on CE File, the version dated 12 June 2023 was sealed on 13 June 2023 and, in my judgment, Mr Whittaker was entitled to rely on it and is therefore entitled to apply for permission to appeal against paragraphs 2(ii) and 3 of the April Order.

(5) Appeal 127

36. On 13 June 2023 Mr Whittaker also filed the Appellant's Notice in Appeal 127 applying for permission to appeal against paragraph 1 of the May Order and the costs order which Master Kaye made (and recorded in paragraph 6). He did not apply for permission to appeal against paragraph 2 and the debarring order which Master Kaye made if he failed to comply with the disclosure element of the April Order. This is a point of some importance to which I will have to return. I note that this PTA Application was made within time although Mr Whittaker ticked the box applying for an extension of time.

(6) The June Order

37. Mr Whittaker did not comply with either paragraph 1 or paragraph 2 of the May Order. On 12 June 2023 he made two payments of £5,000 and £20,000 to White & Case's client account from a personal bank account no. [REDACTED] at [REDACTED]. The bank statement to which Mr Whittaker referred me also showed that he had a further £25,000 in that account but did not pay it over to White & Case. It also showed that all three sums were transferred into the account from another account in Mr Whittaker's name. He did not, however, put any statements for that second account in evidence. Again, I return to this point below.

38. By Application Notice dated 16 June 2023 the Defendant applied for an order that following the strike out of the Claim in accordance with the May Order judgment should be entered for the Defendant or, alternatively, that unless Mr Whittaker paid the

balance of the costs order of £65,000 due by 27 June 2023 the Claim should be struck out. The Defendant also applied for an order that, in any event, Mr Whittaker should be debarred from advancing a positive case in relation to causation, delay, waiver or estoppel. These alternatives reflected the Defendant's position that the Claim had been automatically struck out notwithstanding the payment of £25,000 (or should be struck out in accordance with the May Order) and that even if the Court was prepared to give Mr Whittaker more time to pay the balance of £40,000, he was still debarred from advancing a positive case on critical issues.

39. By email dated 21 June 2023 and headed "Without Prejudice Save as to Costs" Mr Whittaker wrote to White & Case stating that he proposed to pay the sum of £65,000 by 10 am on 23 June. He offered to withdraw his outstanding applications if they agreed that there should be no order as to costs on the Defendant's application. By email dated 22 June 2023 White & Case declined this offer. Mr Whittaker chose to put his offer before the Court and Mr Polley had no objection to me looking at it and also at White & Case's reply. The evidence before the Court also suggested that Mr Whittaker had told White & Case that he had raised the money to pay the costs order from family and friends.

40. On 23 June 2023 the hearing which Master Kaye had ordered in paragraph 4 of the May Order was listed before Deputy Master Bowles (who was sitting in for her). Shortly before the hearing Mr Whittaker sent an email to the Court applying to postpone it urgently on grounds of ill-health and his inability to prepare sufficiently. He attached to his email three items of correspondence: first, a letter dated 15 December 2021 from Dr Joshua Kua of the Raffles Hospital in Singapore stating that he was not fit to attend court at that date; secondly, a letter from Dr Kua dated 27 April 2023 stating that he had become more stable with treatment (and that one of the factors which had led to this improvement was the adoption of a dog); and, thirdly, a certificate from Dr Wicky also of the Raffles Hospital dated 15 June 2023 stating that he was entitled to take sick leave until 23 June 2023.

41. On 23 June 2023 the scheduled hearing took place before Deputy Master Bowles. Mr Whittaker did not appear and was not represented and the Defendant was represented by Mr MacDonald, as before. Shortly after the beginning of the hearing, the Master expressed the view that he could not see the harm in extending the time for compliance

by seven days to enable Mr Whittaker to raise the relevant funds. Despite these first thoughts Mr MacDonald persuaded him not to grant an adjournment or to extend time for compliance with the Order and he gave a judgment setting out his reasons. He dealt with Mr Whittaker's application for an adjournment at [8] to [11]:

> "8. There is also an application by Mr Whittaker in relation to disclosure, which, for reasons which will become clear in a moment, the court does not need to resolve and, as of early this morning, an application by way of e-mail communication to the court for an adjournment of the entirety of today's proceedings on the grounds of Mr. Whittaker's ill health; in this case ill health arising from a mixed anxiety and depressive condition. What is said is that he is beset, not just by this litigation but by other litigation, which is going on, as it were, around this litigation. This has brought on some form of panic attack, and he is now in simply no position to comprehend and deal with this case Therefore matters need to be adjourned. He supports that application with no current medical evidence at all. He prays in aid a medical report which goes back some two years, I think, and indicates, and I accept, that he has some form of depressive or anxiety condition. He prays in aid a rather curious sick note dated, I think, 15th June, which, on its face, albeit that it is a Singapore document and is dealing with judicial process in Singapore and not here, specifies, in terms, that it is not a document suitable for establishing unfitness in respect of judicial proceedings. He also prays in aid a document which is really not at all in point as to whether or not he should be allowed to take his dog on an aeroplane. That is the extent of the medical evidence.
>
> 9. One is always sympathetic, but one has to say, in the light of the authorities, that this is miles away from the quality of evidence which could encourage a court to grant an adjournment, particularly in the context of a case such as this where there are before the courts applications which are likely to lead to the termination of the proceedings if they are successful, but where if they are not successful the full panoply of a long High Court trial is going to have to be prepared and made ready to take place within three weeks or so.
>
> 10. To adjourn these matters, which have tremendous and obvious knock-on effects in relation to the preparation of the case for trial, quite simply the knock-on effects of whether or not there is to be a case to be prepared for trial, to adjourn such applications on such limited material is a strong thing. I would only feel able to grant such an adjournment if I found the circumstances compelling.
>
> 11. In that context, in terms of what is or what is not compelling, one has on the authorities, and rightly, to ask whether the adjournment will achieve anything; that is to say whether there are realistic prospects that in this case Mr. Whittaker would be in a position, on an adjournment of his application, to resist the applications that are being brought against him in relation to both his non-payment of costs and also to the inadequacy of his disclosure.

> 12. I have been through the matter with some care with Mr. MacDonald this afternoon, and I am satisfied that an adjournment in this case, particularly one where the medical grounds are so weakly founded, if founded at all, will achieve no purpose. The reason for that is because it seems to me, with respect, and Mr. MacDonald has taken me through the matters with great care, and answered a considerable number of questions raised by me, that actually the applications brought by the defendant are compelling. Only one of them really needs to be compelling, in context, and that is the one which deals with the non-payment of costs, because if that application succeeds, and if the unless order operates on the basis of the non-payment of costs by Mr. Whittaker, then the case is struck out, there will be judgment for the defendant and everything else effectively falls way."

42. The Master then turned to consider whether he should extend time for compliance with the May Order. He carefully directed himself that the purpose of attaching a sanction to an order for costs was to procure payment and that it would be an abuse to use it for the purpose of achieving a strike out of the claim. He then continued at [14] to [18] as follows:

> "14. That then raises the question with me as to whether, if the function of the process is merely to get in the money, and, subject to what I will say in a moment, it does not impinge upon the continuing preparation of the case going to trial, would a sensible answer not to be to give the claimant a little more time to pay the costs? The claimant has, ultimately, asked for rather more than a little time to pay the costs. He has, in seeking this adjournment to a date later in July, asked for a significant time. However, would there be any harm done, I put it that way, if he was given another week or so to pay the costs, assuming it did not impinge significantly upon the defendant's legitimate concerns in getting this case ready to be heard?
>
> 15. There are two answers to that question. The first is that, in this case, I accept from Mr. MacDonald that leaving the question of the strike out uncertain by allowing the claimant even a modest amount of additional time to bring in the costs would impinge, in this case, significantly and prejudicially upon the preparation of the case for trial, because we are now so close to trial that we are now at the time when briefs are to be delivered, when the costs of working up the case for a trial, preparing for bundles, all the hard work that goes into the final three weeks of preparation of a substantial High Court trial.
>
> 16. All those costs are about to be incurred and any significant delay, (and significant in this context means effectively even a few days) in knowing the position as to the existence or otherwise of the claim to be tried is going to put the defendant in the position that they must work on the footing that the claim goes on and incur costs and time and expense in circumstances where there is still actually a significant question mark over all that time and expenditure. In this case, even a short adjournment

> would be prejudicial.
>
> 17. There is also this, as it was put to me by Mr. MacDonald, and as I accept, that there is absolutely no indication or clarity to show that, if I were to grant even a limited extension, that would not simply be just another step in the road, in the sense that a few days on, there would be a further application for a further extension, and again time, resources, the run-up time necessary to prepare a major case for trial, all that would be put in jeopardy by further last-minute applications of the nature of the one which has been made by Mr. Whittaker and is before the court today.
>
> 18. The conclusion that I have reached, therefore, is that there is no scope here for an extension, even of the very limited nature that I have canvassed, let alone any scope for an extension of the kind that would follow from an adjournment, and that any such extension, or adjournment, would materially prejudice the defendant in a way which would be wrong to countenance."

43. The Master also pointed out that he had read Mr Whittaker's substantive witness statement for trial (which he had filed on 22 June 2023) and that Mr Whittaker had given evidence that he was able to raise the funds to acquire the Defendant's shares in Dogwoof if he succeeded in winning the Claim and that there was no proper evidence that he was impecunious or unable to pay the costs which were the subject of the April and May Orders: see [19] to [21]. He also stated again that he was not prepared to extend time for compliance given the trial date and the costs of preparation. He then dealt with an alternative submission made by Mr MacDonald:

> "25. For completeness, I should add that Mr. MacDonald and I looked carefully this afternoon at the other limb of the defendant's application, which was to do with disclosure and the debarring order and which was also the subject of a sanction; that is to say Mr. Whittaker would be debarred from putting forward his case on causation on delay and on laches unless he, as I have already explained, put in a disclosure certificate by a particular day; such a disclosure certificate evidencing material and substantial disclosure in accordance with the review disclosure order made by Deputy Master Marsh earlier this year.
>
> 26. There has, as already stated, been a disclosure certificate, but Mr. MacDonald has satisfied me -- I am not going to go into the detail -- that although in form there is a certificate, in substance there has not been the necessary substantial and material disclosure. It is particularly salient in relation to financial documents. It is quite clear that various banking documents and bank statements material to issues of causation in this case simply have not been provided. One only has to look at a particular page of a Lloyds Bank statement that has been disclosed to see that it demonstrates the existence of other bank accounts in Mr. Whittaker's name which have not been disclosed. That is, in itself, a substantial non-compliance. It is perfectly plain also that there are financial advisers

> involved who are relevant to the causation case as providing records of, effectively, Mr. Whittaker's financial ability at relevant dates and times. Although it seems that some enquiries have been made of such financial advisers, very little of any substance has been provided by way of actual disclosure. It may well be, as Mr. MacDonald comments in the course of submissions, that Mr. Whittaker looked at that material from the wrong perspective. He looked at it as to whether these advisers had knowledge of the corporate transactions which underlie this case. That actually was not the function of the disclosure, as was perfectly plain from the disclosure review order. What the disclosure was about was demonstrating Mr. Whittaker's financial position and the merit of his position causatively in terms of whether or not this case could be made out.
>
> 27. Having failed in these two obvious and material particulars, it seems to me that he has no effective answer to the debarring order.
>
> 28. In the result, there being no effective answer to the defendant's application, and no realistic prospect of Mr Whittaker varying the outcome that I have already indicated, there is simply no point in adjourning the hearing of these matters to allow Mr Whittaker to attend.
>
> 29. I am going to refuse to adjourn the matter. I am going to strike out the claim. I am going to give judgment for the defendant."

44. For these reasons, therefore, the Master granted the primary relief for which the Defendant was asking in paragraph 1 of the Application Notice dated 16 June 2023 and in the June Order he entered judgment for the Defendant (paragraph 1), he ordered Mr Whittaker to pay the costs of the proceedings to be the subject of detailed assessment (paragraph 3) and he ordered Mr Whittaker to pay the Defendant's costs of the application which he summarily assessed at £55,000 (paragraph 4). It is common ground that the Defendant did not serve its Statement of Costs on Mr Whittaker before the hearing.

45. The recitals to the June Order record that not only were the various applications which Mr Whittaker had made to extend time or to suspend or vary the April and May Orders before the Court but also his PTA Applications in Appeal 126 and Appeal 127 and in paragraph 2 of the June Order Deputy Master Bowles dismissed them. Mr Whittaker ought to have made those applications to Deputy Master Marsh on 20 April 2023 and to Master Kaye on 30 May 2023 rather than to Master Bowles although Mr Polley accepted in his Skeleton Argument that they could be characterised as a refusal by the lower court so that Mr Whittaker was entitled to seek permission from this Court under Practice Direction, PD 52A, paragraph 4.1. I return to this concession again below.

(7) The Statutory Demands

46. On 22 May 2023 White & Case served a statutory demand (the "**First Statutory Demand**") on Mr Whittaker in relation to the costs of £65,000 which had fallen due for payment under the April Order on 18 May 2023. On 14 June 2023 White & Case served a second statutory demand (the "**Second Statutory Demand**") on Mr Whittaker in relation to the costs of £45,000 which had fallen due under the May Order. Finally, on 20 July 2023 they served a third statutory demand (the "**Third Statutory Demand**") on Mr Whittaker in relation to the costs of £55,000 which had fallen due for payment under the June Order. I will refer to all three demands together as the "**Statutory Demands**".

47. By Application Notices dated 7 June 2023, 16 June 2023 and 1 August 2023 Mr Whittaker has applied to set aside the Statutory Demands. Mr Whittaker has made a witness statement in support of each application and it is unnecessary for me to set out the grounds on which he has applied to set them aside apart from one. Mr Whittaker asserts that by issuing the Statutory Demands the Defendant is acting for an improper purpose and that it is an abuse of process because the Defendant is attempting to stifle the Claim.

(8) The Set Aside Application

48. On 13 July 2023 Mr Whittaker issued the Set Aside Application. In the Application Notice Mr Whittaker relied on "extreme financial hardship". In his seventh witness statement dated 13 July 2023 he relied on the financial hardship which he would suffer if the Court permitted the Defendant to enforce the various costs orders made against him, his medical condition, Article 6 of the European Convention on Human Rights and the improper or collateral purpose of the Defendant in seeking to enforce the various costs orders to stifle his claim.

(9) Appeal 149

49. On 14 July 2023 Mr Whittaker filed the Appellant's Notice in Appeal 149 applying for permission to appeal against the June Order and making the First Stay Application. In section 10 he stated that the payment of costs would cause him great hardship and that if he paid the costs orders in full, he would be unable to continue the Claim without

legal representation. He also stated that enforcing the June Order would cause him to suffer potential irreparable harm. On 18 July 2023 he also filed his Skeleton Arguments in Appeal 126 and Appeal 127.

(10) The First Committal Application

50. By email dated 21 July 2023 Ms Ana Godas, who is Mr Whittaker's former wife and the Chief Executive Officer of Dogwoof, wrote to Mr Whittaker to complain about his failure to comply with a child maintenance order. In the email she stated that: "I know you've paid £25,000 on court fees recently for the Whittaker vs Bertha UK". On the same day Mr Whittaker issued the First Contempt Application applying for permission to make an application to commit the Defendant for contempt of Court on the basis that the Defendant should not have disclosed paragraph 8 of the April Order and the payments of £25,000 to Ms Godas.

III. The Law

(1) CPR Part 23.11

51. In his Skeleton Argument for the hearing on 1 September 2023 Mr Whittaker applied to set aside the June Order under CPR Part 23.11 and also CPR Part 39.3. The first of those provisions (which is headed "Power of the court to proceed in the absence of a party") provides as follows:

> "(1) Where the applicant or any respondent fails to attend the hearing of an application, the court may proceed in his absence. (2) Where— (a) the applicant or any respondent fails to attend the hearing of an application; and (b) the court makes an order at the hearing, the court may, on application or of its own initiative, re-list the application."

52. In the notes to CPR Part 23.11 in the Supreme Court Practice (2023 ed) Vol 1, the editors state that the power to relist an application is unfettered but should be exercised sparingly and having regard to the overriding objective: see 23.11.3. The notes refer to the decision in *Riverpath Properties Ltd v Brammall* (unreported, 31 January 2000) where Neuberger J (as he then was) gave the following guidance at pages 17 and 18 of the transcript of the judgment:

> "To my mind, in agreement with Mr Hunter, the concept of relisting the application effectively means that the court can rehear the application in

> full and make such different order as it thinks appropriate. It seems to me that the effect of rule 23.11(2) is to give the court a very flexible power as to what it does in relation to setting aside and ordering a rehearing in respect of an order that it made in the absence of a party. I say that it is flexible because rule 23.11(2) contains no fetter on the court's discretion. In my judgment, however, it would be a very rare case where the court exercised this jurisdiction to set aside an order that it had made, if it was satisfied that there was no real prospect of any new order being different from that which it originally made. Furthermore, there may be circumstances where the order has been acted on in such a way as to make it more unjust to set aside the order than to refuse to do so. It also seems to me that the court has a fairly wide discretion as to the terms upon which it may grant or refuse such an application. However, I accept that the court should be careful before it exercises its powers so as to interfere with a party's contractual or other rights. Nonetheless, there may be circumstances where to insist upon one party having its contractual right without qualification would be unjust."

53. I accept that the power to re-list a hearing is unfettered but that it must be exercised sparingly. I also accept the guidance of Neuberger J in *Riverpath Properties Ltd v Brammall* (above). In my judgment, it would only be appropriate to re-list the Defendant's application dated 16 June 2023 for re-hearing if I am satisfied that Mr Whittaker has a real prospect of persuading the Court both that it was not appropriate to make the June Order and that he has a real prospect of persuading the Court to re-list the Claim for trial. It therefore seems sensible to me to consider this issue after having considered the merits of the PTA Applications. Moreover, if any of the three appeals has a real prospect of success, then it might well be appropriate to short cut the process by re-listing the Defendant's application for re-hearing. On the other hand, if I take the view that none of the three appeals has any real prospect of success, then the considerations will be different.

(2) CPR Part 39.3

54. CPR Part 39.3 is headed "Failure to attend the trial" and it provides that the Court may strike out proceedings where a claimant fails to attend a trial but that it may subsequently restore the proceedings and the party who failed to attend may apply for any order or judgment to be set aside:

> "(1) The court may proceed with a trial in the absence of a party but— (a) if no party attends the trial, it may strike out the whole of the proceedings; (b) if the claimant does not attend, it may strike out his claim and any defence to counterclaim; and (c) if a defendant does not

> attend, it may strike out his defence or counterclaim (or both).
>
> (2) Where the court strikes out proceedings, or any part of them, under this rule, it may subsequently restore the proceedings, or that part.
>
> (3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.
>
> (4) An application under paragraph (2) or paragraph (3) must be supported by evidence.
>
> (5) Where an application is made under paragraph (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant— (a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him; (b) had a good reason for not attending the trial; and (c) has a reasonable prospect of success at the trial."

55. In the notes to CPR Part 39.3 the editors point out that the word "trial" is not defined in the rule and that there is a serious doubt whether it applies to an appeal at all. Moreover, in *Forcelux Ltd v Binnie* [2009] EWCA Civ 854 the Court of Appeal held that a hearing under CPR Part 55.8 to determine whether to make a possession order was not a trial. I doubt whether many litigation solicitors or advocates would describe the hearing before Deputy Master Bowles on 23 June 2023 as a "trial" and at first blush I am not satisfied that CPR Part 39.3 applies to such a hearing.

56. However, it is not necessary in my judgment to decide whether the hearing on 23 June 2023 was a "trial" within the meaning of CPR Part 39.3 and since I did not hear any detailed argument on this issue it is better that I should leave the issue for further consideration where the point is fully argued. I have reached the conclusion that it is not necessary for me to decide this point because I take the view that CPR Part 39.3 does not apply to the hearing on 23 June 2023 for a separate and discrete reason. The Master did not strike out Mr Whittaker's claim for non-attendance at the hearing on 23 June 2023 under CPR Part 39.3(1)(b). He struck it out because Mr Whittaker had failed to comply with the May Order. It follows, therefore, that CPR Part 39.3(2) and 39.3(3) are not engaged and that Mr Whittaker's only recourse is to appeal against that decision or to persuade the Court to exercise the unfettered power under CPR Part 29.11. I therefore dismiss Mr Whittaker's application under CPR Part 39.3 without further consideration.

(3) Permission to Appeal

57. CPR Part 52.6 sets out the test which the Court must apply to first appeals and it provides as follows:

> "(1) Except where rule 52.7 applies, permission to appeal may be given only where— (a) the court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason for the appeal to be heard.
>
> (2) An order giving permission under this rule or under rule 52.7 may— (a) limit the issues to be heard; and (b) be made subject to conditions."

58. Where a party applies for permission to appeal against a case management decision (including decisions made under CPR Part 3.1(2)) Practice Direction 52A, paragraph 4.6 provides that the Court may take into account wider factors in deciding whether to grant permission:

> "Where the application is for permission to appeal from a case management decision, the court dealing with the application may take into account whether— (a) the issue is of sufficient significance to justify the costs of an appeal; (b) the procedural consequences of an appeal (e.g. loss of trial date) outweigh the significance of the case management decision; (c) it would be more convenient to determine the issue at or after trial. Case management decisions include decisions made under rule 3.1(2) and decisions about disclosure, filing of witness statements or experts' reports, directions about the timetable of the claim, adding a party to a claim and security for costs."

59. In the present case, Mr Whittaker appeals against a series of case management decisions and the resulting costs orders made against him. There can be no doubt that the April Order and the May Order involved case management decisions and, although Deputy Master Bowles entered judgment for the Defendant at the hearing on 23 June 2023, Mr Whittaker appeals against that order on the basis that the Master should not have refused his application for a short adjournment or an extension of time under CPR Part 3.1(2)(b).

60. CPR Part 52.21 (formerly CPR Part 52.11) sets out the powers of an appeal court in relation to the hearing of an appeal:

> "(1) Every appeal will be limited to a review of the decision of the lower court unless— (a) a practice direction makes different provision for a particular category of appeal; or (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

> (2) Unless it orders otherwise, the appeal court will not receive— (a) oral evidence; or (b) evidence which was not before the lower court.
>
> (3) The appeal court will allow an appeal where the decision of the lower court was— (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
>
> (4) The appeal court may draw any inference of fact which it considers justified on the evidence.
>
> (5) At the hearing of the appeal, a party may not rely on a matter not contained in that party's appeal notice unless the court gives permission."

61. In *Tanfern Ltd. v Cameron-Macdonald* [2000] 1 WLR 1311 the Court of Appeal gave guidance for the application of both limbs of the test in CPR Part 52.21(3)(a) and (b) to interlocutory appeals. Brooke LJ stated as follows at [32] and [33]:

> "32. The first ground for interference speaks for itself. The epithet "wrong" is to be applied to the substance of the decision made by the lower court. If the appeal is against the exercise of a discretion by the lower court, the decision of the House of Lords in *G. v. G. (Minors: Custody Appeal)* [1985] 1 WLR 647 warrants attention. In that case Lord Fraser of Tullybelton said, at p. 652:
>
> > "Certainly it would not be useful to inquire whether different shades of meaning are intended to be conveyed by words such as 'blatant error' used by the President in the present case, and words such as 'clearly wrong,' 'plainly wrong,' or simply 'wrong' used by other judges in other cases. All these various expressions were used in order to emphasise the point that the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."
>
> 33. So far as the second ground for interference is concerned, it must be noted that the appeal court only has power to interfere if the procedural or other irregularity which it has detected in the proceedings in the lower court was a serious one, and that this irregularity caused the decision of the lower court to be an unjust decision."

62. This guidance applies not only to the disclosure elements of the April Order and the May Order but also to Deputy Master Bowles' decision to refuse an adjournment or extend time on 23 June 2023. In *Dhillon v Asiedu* [2012] EWCA Civ 1020 the Court of Appeal applied *Tanfern* to an application for an adjournment under CPR Part 3.1(2)(b). After citing *Tanfern* and the decision of the Court of Appeal in *Terluk v Berezovsky* [2010] EWCA Civ 1345 Baron J continued as follows (at [33]):

> "Although the language in these two cases is entirely different, the foundation of the decisions is both consistent and analogous. The conclusions which I derive from the authorities are that:
>
> a. the overriding objective requires cases to be dealt with justly. CPR 1.1(2)(d) demands that the Court deals with cases 'expeditiously and fairly'. Fairness requires the position of both sides to be considered and this is in accordance with Article 6 ECHR.
>
> b. fairness can only be determined by taking all relevant matters into account (and excluding irrelevant matters).
>
> c. it may be, in any one scenario, that a number of fair outcomes are possible. Therefore a balancing exercise has to be conducted in each case. It is only when the decision of the first instance judge is plainly wrong that the Court of Appeal will interfere with that decision.
>
> d. unless the Appeal Court can identify that the judge has taken into account immaterial factors, omitted to take into account material factors, erred in principle or come to a decision that was impermissible (*Aldi Stores Limited v WSP Group Plc* [2007] EWCA Civ 1260. [2008] 1 WLR 748, paragraph 16) the decision at First Instance must prevail."

63. Similar principles apply to applications for permission to appeal against an order for costs. In *Johnsey Estates (1990) Ltd v The Secretary of State for the Environment* [2001] EWCA Civ 535 Chadwick LJ stated that an appeal court should exercise self-restraint and should not interfere with the decision of the lower court unless satisfied it was flawed. He stated this at [21] and [22]:

> "21. The principles applicable in the present case may, I think, be summarised as follows: (i) costs cannot be recovered except under an order of the court; (ii) the question whether to make any order as to costs — and, if so, what order — is a matter entrusted to the discretion of the trial judge; (iii) the starting point for the exercise of discretion is that costs should follow the event; nevertheless, (iv) the judge may make different orders for costs in relation to discrete issues — and, in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue and, in that event, may make an order for costs against the party who has been generally successful in the litigation; and (v) the judge may deprive a party of costs on an issue on which he has been successful if satisfied that the party has acted unreasonably in relation to that issue; (vi) an appellate court should not interfere with the judge's exercise of discretion merely because it takes the view that it would have exercised that discretion differently.
>
> 22. The last of those principles requires an appellate court to exercise a degree of self-restraint. It must recognise the advantage which the trial judge enjoys as a result of his 'feel' for the case which he has tried. Indeed, as it seems to me, it is not for an appellate court even to consider whether it would have exercised the discretion differently unless it has

> first reached the conclusion that the judge's exercise of his discretion is flawed. That is to say, that he has erred in principle, taken into account matters which should have been left out account, left out of account matters which should have been taken into account; or reached a conclusion which is so plainly wrong that it can be described as perverse — see *Alltrans Express Limited v CVA Holdings Limited* [1984] 1 WLR 394, per Lord Justice Stephenson at 400C–F and Lord Justice Griffiths at page 403G–H."

64. In *Kupeli v Sirketi* [2019] 1 WLR 1235 Hickinbottom LJ also provided the following summary of the principles which an appeal court should apply in considering an appeal on costs (at [5]):

> "(i) In considering orders for costs, the court is of course bound to pursue the overriding objective as set out in CPR r 1.1, i e it must make an order that deals justly with the issue of costs as between the parties. Therefore, when considering whether to make a costs order—and, if so, the order it makes—the court has to make an evaluative judgment as to where justice lies, on the facts and circumstances as it has found them to be.
>
> (ii) Before an appeal court will interfere with the exercise of that discretion, as with any appeal, it must be satisfied that the decision of the lower court was wrong or unjust because of a serious irregularity in the proceedings below: CPR r 52.21(3). No one suggests that there was a serious irregularity in this case.
>
> (iii) Before an appeal court concludes that the costs decision below was "wrong", it must be persuaded that the judge erred in principle, or left out of account a material factor that he should have taken into account, or took into account an immaterial factor, or that the exercise of his discretion was "wholly wrong": see, e g, *Adamson v Halifax plc* [2003] 1 WLR 60, para 16, per Sir Murray Stuart-Smith, adopting (post-CPR) the conventional (pre- CPR) approach he described in *Roache v News Group Newspapers Ltd* [1998] EMLR 161, 172.
>
> (iv) An appeal court will only rarely find that the exercise of discretion below is "wholly wrong", because not only is that discretion particularly wide but the judge below is usually uniquely well-placed to make the required assessment, having heard the relevant evidence."

(4) Stay of Execution

65. CPR Part 52.16 provides that (a) unless the appeal court or the lower court orders otherwise or (b) the appeal is from the Upper Tribunal (Immigration and Asylum Chamber) an appeal shall not operate as a stay of any order or decision of the lower court. In the notes in the Supreme Court Practice (2023 ed) Vol 1 at 52.16.3 the editors cite the decision of the Court of Appeal in *Hammond Suddard Solicitors v Agrichem*

International Holdings Ltd [2001] EWCA Civ 2065 for the test which the appeal court should apply. In that case the unsuccessful defendant made a renewed application for a stay of execution of both the judgment debt and costs. However, the Court of Appeal identified two issues of principle and reserved judgment. Clarke LJ explained the background at [1] to [3]:

> "1. The applications before the court in this case are at first sight straightforward. Pending the hearing of the substantive appeal, the appellant seeks a stay of orders made by the judge for the payment of the judgment debt and costs. The respondents make a cross-application for security for their costs of the appeal.
>
> 2. Two factors, however, make the case unusual. The first is that the appellant is a limited liability company registered in the British Virgin Islands, with a PO box address in Jersey, and with no assets within the United Kingdom (or, as it would have us believe, anywhere else). The second is that the respondents seek not only to oppose the appellant's application for a stay, but also ask for an order that the appeal be struck out unless, by a given date, the appellant pays or secures the full amount of both the judgment debt and the specific orders for costs made by the judge, as well as providing security for costs in whatever sum the court determines.
>
> 3. The application to strike out gives rise to two points point of principle. The first is whether it is a permissible exercise of the court's powers, either when granting permission to appeal or subsequently, to make the prosecution of the appeal conditional upon the payment of the judgment debt and costs. The second is, if so, whether it is appropriate to do so in a case where, as here, the appellant might have to obtain the funds to meet the various orders from a third party. There appears to be little authority on these questions, which seem to us as potentially of some considerable practical importance. It was for this reason that, having heard full argument, we reserved judgment."

66. Although these two issues of principle do not arise in the present case because Mr Whittaker issued all of the Stay Applications before any of his PTA Applications had been determined, Clarke LJ set out the general test which the Court should apply in deciding whether to grant a stay of execution (and the relevant rule was at the time CPR Part 52.7):

> "22. By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or

> both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"

67. It is also instructive to consider how the Court applied that test in *Hammond Suddard v Agrichem*. The Appellant relied on a witness statement and set of accounts which suggested that it was balance sheet insolvent. However, Clarke LJ was not willing to accept this evidence at face value for the following reasons (at [13] to [15]):

> "13. We regard the "balance sheet" produced by Ms Marr as a wholly inadequate document to support an application for discretionary relief by an entity such as the appellant, which is not registered in the United Kingdom, has no assets here and a PO box address in Jersey and is not subject to either the Brussels or the Lugano Conventions. In our judgment, the evidence in support of an application for a stay needs to be full, frank and clear. The "balance sheet", in our view, is none of these.
>
> 14. While it may well be the case that the law of the British Virgin Islands does not require the appellant to produce accounts, this does not mean that they do not exist. Given the scale of the appellant's business transactions (to which further reference is made below) it is inconceivable that accounts do not exist. It is therefore wholly unacceptable for this court to be told, on such an application as the present, that the only document the court is to see is a single sheet of paper produced for the purposes of the application and that the court must accept this as sufficient evidence of the appellant's financial position.
>
> 15. We note in this regard that, when it was perceived to be in the appellant's interests to show that it was of financial substance, Ms Marr was willing to give a much more expansive description of the appellant's status.

68. Clarke LJ then ran through the inconsistent statements which Ms Marr had made earlier in the proceedings (including the statement that the Appellant had access to substantial funds under a revolving credit facility) before reaching the following conclusions (at [18] to [20]):

> "18. The only other information we have about the appellant derives from a company search carried out on behalf of the respondents in January 2000. This showed that it was incorporated in July 1992 and was then "in good standing". It had paid its licence fee up to November 2000; it had authorised capital of US$50,000, divided into $1 shares; the

> directors were empowered to issue bearer shares and its objects clause is extremely wide. In the search the appellant's registered agent was reported to have declined to name the company's principal banker and it was made clear that the appellant was not required under the laws of the British Virgin Islands to disclose details of directors and shareholders. In addition, as we have already seen, the appellant was not required to publish or disclose balance sheets.
>
> 19. The material we have set out above explains why we take the view that Ms Marr's statement produced for this application is wholly insufficient evidence to show that there is any risk of the appeal being stifled unless a stay is granted. In our judgment, a foreign corporate entity without assets within the United Kingdom and without readily identifiable assets elsewhere, which is not subject to any international conventions to facilitate enforcement, and which seeks to stay orders obtained after a lengthy and fair hearing must produce cogent evidence that there is a real risk of injustice if enforcement is allowed to take place pending appeal.
>
> 20. Before it could properly grant a stay, the court needs to have a full understanding of the true state of the company's affairs. Simple assertion, particularly if it is scarcely consistent with previous assertions, is not enough. Thus, in the instant case, we would have expected the appellant to produce accounts showing precisely what its trading and financial position is and how it has changed since 1998 in order to evaluate the risks of allowing enforcement to proceed in the ordinary way."

69. *Hammond Suddard v Agrichem* has been consistently applied at first instance where the Court is considering whether to grant a stay of execution pending the determination of a PTA Application and I am satisfied that it is the appropriate test to apply at that stage. The Court has also emphasised the importance of an Appellant producing cogent evidence that he or she is unable to meet a judgment or costs order and that there is a significant risk that this will stifle an appeal. For example, in *Otkritie International Investment Management Ltd v Urumov* [2014] EWHC 755 (Comm) Eder J summarised the relevant principles at [22]:

> "i) First, unless the appeal court or the lower court orders otherwise, an appeal shall not operate as a stay of any order or decision of the lower court: CPR r 52.7.
>
> ii) Second, the correct starting point is that a successful claimant is not to be prevented from enforcing his judgment even though an appeal is pending: *Winchester Cigarette Machinery Ltd v Payne* (CA Unrep, 10 December 1993, per Ralph Gibson LJ).
>
> iii) Third, as stated in *DEFRA v Downs* [2009] EWCA Civ 257 at §§8–9, per Sullivan LJ (emphasis supplied): "…A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a

> stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted. It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal. So what is the basis on which a stay is sought in the present case?"
>
> iv) Fourth, the sorts of questions to be asked when undertaking the "balancing exercise" are set out in *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065 at §22, per Clarke LJ.
>
> v) Finally, the normal rule is for no stay to be granted, but where the justice of that approach is in doubt, the answer may depend on the perceived strength of the appeal: *Leicester Circuits Ltd v Coates Brothers plc* [2002] EWCA Civ 474 at §13, per Potter LJ."

70. In *Readie Construction Ltd v GEO Quarries Ltd* [2021] EWHC 484 (QB) Steyn J applied *Otkritie v Urumov*. She placed particular emphasis on the extract from Sullivan LJ's judgment in *DEFRA v Downs* set out in the passage above and, in particular, the requirement that the Applicant must produce solid grounds to support the conclusion that there is a risk of irremediable harm before the Court will undertake the balancing exercise described by Clarke LJ in *Agrichem*. She also described the test as the "irremediable harm" test: see [7] and [8]. In *Moss v Martin* [2022] EWHC 3258 (Comm) His Honour Judge Russen KC described the irremediable harm test as a "high bar": see [57].

71. If, however, the Appellant is able to provide cogent evidence that he or she is unable to meet a judgment or, indeed, a costs orders and there is good reason to believe that enforcement will result in bankruptcy (or liquidation in the case of a corporate Appellant), then the balance may well come down in favour of a stay. *Ackerman v Ackerman* [2012] EWCA Civ 768 provides an illustration of that principle. In that case Aikens LJ continued the order made by Vos J (as he then was) at first instance staying a number of orders for the interim payment of costs. He stated this (at [42]):

> "A stay of execution will, of course, prevent the respondents from enforcing their orders for interim payments, but there is no evidence that

> Joseph can or is likely to dispose of any assets still available to him in a way that will materially prejudice their position in the meantime. On the other hand there are good reasons for thinking that if those orders were to be enforced Joseph would be forced into bankruptcy and it is doubtful, to say the least, whether his trustee would be prepared to pursue the appeal. In those circumstances I have come to the conclusion that the stay imposed by Vos J. on the orders for interim payments should be continued until the determination of the appeal or further order. It follows that I would dismiss the respondents' applications that Joseph be required to satisfy those orders as a condition of being allowed to pursue his appeal."

72. If there is a fine balance between the risk of injustice to the Appellant in enforcing a judgment or costs order and a risk of injustice to the Respondent by granting a stay, it is appropriate for the Court to take into account the merits of the appeal: see principle (v) in *Otkritie* (above). In my judgment, principle (v) may assume critical importance where (as here) the appeals are against case management decisions or costs orders, the threshold for granting permission to appeal is a high one and the Court is entitled to take into account the wider factors set out in PD 52A, paragraph 4.6.

73. Finally, it may seem obvious but it is worth stating that where the Court has refused permission to appeal, the same considerations do not necessarily apply as they would to a stay application made after the Court has granted permission to appeal or before the PTA Application has been heard. For example, in *Renewable Power & Light Plc v Renewable Power & Light Services Inc* [2008] EWHC 3584 (QB) Lewison J (as he then was) did not accept that he was bound to apply the irremediable harm test where he had refused permission to appeal. He stated this at [2] and [3] (referring to *Hammond Suddard v Agrichem*):

> "2. There are two differences between the situation that Lord Justice Clarke was contemplating and the situation that faces me. First, Lord Justice Clarke was contemplating an appeal. An appeal can only be brought, save in exceptional cases, with the permission either of the lower court or the appeal court. The grant of permission signifies that whichever court granted the permission took the view that the appeal had a real prospect of success. In the present case, by contrast, there is no permission to appeal because I refused permission, and although I am told that an application will be made to Court of Appeal for permission to appeal, that court has not yet granted permission either.
>
> 3. The second difference is that the order which I made is an order for the payment of costs by the would-be appellant. The would-be appellant is, so the evidence goes, significantly better off in financial terms than

> the putative respondent. So Lord Justice Clarke's first question - what are the risks of an appeal being stifled? - is not an apposite question in the situation that I have to deal with. It is not, on the other hand, suggested by the respondents that there is any risk of their being unable effectively to respond to the appeal without the payment of £40,000."

74. At risk of putting my own gloss on a test which has been the subject matter of detailed judicial consideration, the principles which I propose to apply to the six Stay Applications made by Mr Whittaker are as follows:

(1) An appeal does not operate as a stay of execution and the general principle is that a successful party is entitled to enforce a judgment or order whether or not the unsuccessful party has applied for or obtained permission to appeal.

(2) The Court has a general discretion to grant a stay of execution and may take into account all relevant circumstances in deciding whether to do so. But in exercising that discretion the Court will normally carry out a balancing exercise to weigh up the risk of injustice to the Appellant by permitting enforcement and the risk of injustice to the Respondent by granting a stay of execution until the hearing of the appeal. If there is a greater risk of injustice to the Appellant unless a stay is granted, the Court should grant a stay of execution.

(3) Where the Appellant satisfies the Court that there are solid grounds to believe that they will suffer irremediable harm if a stay is refused and the Respondent is permitted to enforce the relevant order or judgment, the Court may grant a stay of execution. Where enforcement is likely to result in the Appellant's bankruptcy or liquidation before the appeal can be heard, then the Court is likely to accept that this amounts to irremediable harm and that a stay should be granted.

(4) However, the Appellant must adduce cogent evidence that there is a real risk of irremediable harm and if the Appellant gives evidence that he or she is unable to pay a money judgment or costs order the Court is not bound to accept that evidence unless the Appellant has given adequate disclosure of their financial circumstances and any available source of funds (including third parties).

(5) Where there is a fine balance between the risk of injustice to the Appellant if a stay is refused and enforcement is permitted and the countervailing risk of

injustice to the Respondent if a stay is granted, the Court is entitled to have regard to the merits of the appeal. This may be of particular importance where the Appellant has applied for permission to appeal against a case management decision or costs order.

(6) The Court is not bound to carry out the same balancing exercise where it has refused permission to appeal (even if an application for permission has been made to the appeal court). However, the Court may nevertheless do so if satisfied that there is a real risk of irremediable harm.

(7) Finally, the authorities make no distinction between the test to be applied where the Appellant applies for the stay of execution of a final money judgment or for the stay of execution of a costs order (including an interim payment on account of costs).

(5) Summary Assessment

75. CPR Part 44.6(1) provides that where the Court orders a party to pay costs to another party, it may either make a summary assessment or order a detailed assessment. In the notes to CPR Part 44.6 in the Supreme Court Practice (2023 ed) Vol 1 the editors state that appeals against summary assessments are dealt with under the ordinary rules relating to appeals (i.e. CPR Part 52): see 44.6.6. The principles which Chadwick LJ explained in *Johnsey Estates (1990) Ltd v The Secretary of State for the Environment* (above) apply, therefore, with equal force to Mr Whittaker's appeals against the summary assessments which were made at each of the three hearings.

76. Practice Direction 44, paragraph 9.5(1) provides that it is the duty of the parties and their legal representatives to assist the judge in making a summary assessment of costs and paragraph 9.5(2) and (3) provide that they must prepare a written schedule which contains certain information, follows form N260 as closely as possible and is signed by the party or their representative. Paragraph 9.5(4) then provides:

> "The statement of costs must be filed at court and copies of it must be served on any party against whom an order for payment of those costs is intended to be sought as soon as possible and in any event— (a) for a fast track trial, not less than 2 days before the trial; and (b)for all other hearings, not less than 24 hours before the time fixed for the hearing."

77. Paragraph 9.6 provides that the failure by a party without reasonable excuse to comply with paragraph 9.5 will be taken into account by the court in deciding what order to make about costs. In *MacDonald v Taree Holdings Ltd* [2001] Costs LR 147 Neuberger J (as he then was) considered what measures the Court should adopt where a successful party failed to comply with paragraph 9.5(4). He stated that the correct approach was as follows at [23] to [27]:

> "23. In my judgement, the correct approach is this. Where there is a failure to comply with the Practice Direction and a schedule of costs is not served more than 24 hours before the hearing, the court should take that into account but its reaction should be proportionate. Where there is a mere failure to comply, that is a failure to comply without aggravating factors, it seems to me that the first question for the court should be: what, if any, prejudice has that failure to comply caused to the other party? If no prejudice, then the court should go on and assess the costs in the normal way. If satisfied it has caused prejudice, the next question is: how should that prejudice best be dealt with? To my mind, there would normally be three answers. The first would be to give the paying party a brief adjournment of, say, quarter of an hour or so, to consider the schedule and then to proceed to assess costs. If that course were taken, then the court should bear in mind the fact that the paying party has not had as much time as it should have done, and it should err in favour of a light figure rather than a heavy figure, in any case of doubt.
>
> 24. The second possibility would be for the court to stand over the matter for a detailed assessment; if it takes that course, it may well be right to require the receiving party to pay the costs of the detailed assessment or at any rate to make it clear that the costs judge should consider that option when assessing costs.
>
> 25. The third possibility would be to stand over the assessment of costs but to keep the assessment on a summary basis. In many cases I suspect that would not require another hearing: it could be dealt with by the parties each sending their respective submissions, and in particular the paying party sending its submissions in writing and for the court to communicate its decision also in writing.
>
> 26. I do not take the view, bolstered by the brief observation of the Court of Appeal, that in a case of mere failure to comply, without more, it would be right to deprive a party, otherwise entitled to a summary assessment of his costs, of his costs altogether.
>
> 27. However, where there is a failure to apply plus some aggravating factor, then it may very well be right to deprive the party who would otherwise be entitled to his costs, of all or a significant proportion of his costs. For instance, if it can be shown that the party concerned was specifically asked for his schedule of costs in time, and the court is satisfied that the failure to comply was deliberate, that may well justify depriving him of all or some of his costs. Similarly, if the party

> concerned can be shown to have had a history in the litigation of failing to serve a schedule within time and it had been drawn to his attention, and he still fails to comply, that would be an aggravating factor. It would be wholly inappropriate for me to pretend that I could set out all the aggravating factors, and those are but two examples. Similarly, it may be that there are other factors which are not aggravating factors but which, when taken together with the failure to comply, may suffice to persuade the court that no order for costs should be made in favour of the successful party, or a less favourable order should be made in his favour than if he had complied. But, in the absence of aggravating factors, I think that it would be an unusual case where the failure to comply involved the party who would otherwise recover his costs being deprived of any of his costs save (a) to the extent of the court leaning against him if it carries out an immediate assessment or (b) requiring him to pay the extra costs of a further hearing, be it before the court concerned or before the costs judge."

78. In *Group M UK Ltd v Cabinet Office* [2014] 6 Costs LR 1090 Akenhead J applied the three-stage test in *Denton v TH White Ltd* [2014] 1 WLR 795 to the failure to comply with the Practice Direction. He held that the failure to serve a costs schedule until three hours before the hearing could be classified as significant and serious but that there was an understandable explanation for it. In relation to the third stage of the test, he held that it would be unjust to refuse the successful party the entirety of its costs and deducted £2,000 from the schedule for the following reasons at [14]:

> "(a) The failure to comply with the Practice Direction was at the lower end of serious.
>
> (b) Unlike the provisions relating to costs and management budgets which expressly impose a sanction (unless other factors suggest that the sanction should not be imposed), no sanction is expressly identified in the Practice Direction. Paragraph 9.6 of the Practice Direction simply requires the court to take the failure into account.
>
> (c) Exactly the same arguments of principle and of quantification of costs would have been argued and have had to be addressed in any event. The hearing on the handing down of the judgment would, I assess, have taken about another 45 to 60 minutes and there would have had to have been more preparation for the hearing, which would all have cost more at that stage. Although, I suspect, that the costs of dealing with the matter after the event and by way of written representations would be somewhat more than the cost of dealing with a summary assessment at the hearing, I suspect that Group M's additional costs are relatively small and would be unlikely to exceed several thousand pounds at the outside. Carat makes no claim for its additional costs. The court has not been unduly inconvenienced.
>
> (d) Having decided that in principle that Carat should have its reasonable

> costs of its involvement in the Cabinet Office's application, it would be unjust to refuse it any quantified sum simply because for understandable reasons it did not file its Statement of Costs more than 24 hours before the handing down judgment. The prejudice or detriment suffered by Group M is minimal, other than possibly its incurring a small amount of costs (say £2,000) over and above what it would have incurred in any event if the Statement of Costs had been served more than 24 hours before the handing down. To punish Carat for its failure in effect to the tune of some £40,000 plus would to most right thinking people be wholly disproportionate. The additional cost can be taken off any summary assessment to which Carat is found to be entitled."

79. In both *MacDonald v Taree Holdings Ltd* and *Group M UK Ltd v Cabinet Office* the Court rejected the submission that the receiving party should be deprived of its costs for failing to comply with paragraph 9.5(4) and applied a sanction based on the prejudice or detriment which the paying party had incurred as a consequence of the failure to serve the Statement of Costs in time. If this results in an adjournment, further written submissions or even a detailed assessment, the receiving party will not recover the additional costs which it has incurred as a consequence and costs will be deducted from the final figure to reflect the additional cost to the paying party. Where the summary assessment proceeds, the Court can take deduct any additional costs thrown away as a consequence of the failure to serve a Statement of Costs from the final figure.

80. In *MacDonald v Taree Holdings Ltd* Neuberger J contemplated that there might be aggravating factors which would justify the Court imposing a different and more serious sanction such as making no order as to costs or depriving the receiving party of a substantial element of its costs. He also contemplated that if the Court proceeded to an immediate summary assessment, it could approach the exercise by leaning against the receiving party in resolving any questions of doubt.

IV. Permission to Appeal

(1) Appeal 126

(i) Remedial Disclosure

81. Practice Direction 57A, paragraph 17 is headed "Extended Disclosure" and it provides that the Court may make such further orders as may be appropriate where there has been a failure to comply with an order for Extended Disclosure:

> "17.1 Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to— (1) serve a further, or revised, Disclosure Certificate; (2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure; (3) provide a further or improved Extended Disclosure List of Documents; (4) produce documents; or (5) make a witness statement explaining any matter relating to disclosure.
>
> 17.2 The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4).
>
> 17.3 An application for any order under paragraph 17.1 should normally be supported by a witness statement."

82. In paragraphs 2(ii) and 3 of the April Order Deputy Master Marsh ordered Mr Whittaker to collect the emails from his work email account and arrange for his e-disclosure provider to apply the search terms in Appendix 1 both to them and to the other documents in paragraph 2. Mr Whittaker now applies for permission to appeal against those orders. But his Grounds of Appeal dated 12 July 2023 refer only to the order for costs in paragraph 8 although one of the general grounds which he advanced was that the April Order was disproportionate.

83. In the Skeleton Argument which Mr Whittaker filed on 18 July 2023 he argued for a modification of the April Order on the basis that the conditions were too onerous and unreasonable. He also argued that the Defendant's application dated 7 March 2023 was made in bad faith because the Claimant had only provided him with his work emails after submitting the Remedial Disclosure Application. I, therefore, approach the first PTA Application on the basis that it would be open to Mr Whittaker to argue on appeal that paragraphs 2(ii) and 3 of the April Order were disproportionate and imposed too high a burden on him as a litigant in person so close to trial.

84. To succeed on his first PTA Application Mr Whittaker must satisfy the Court that he has a real prospect of demonstrating that in considering the question of proportionality Deputy Master Marsh made not only an imperfect decision but exceeded the generous ambit within which reasonable disagreement is possible. In other words, he has to show that he has a real prospect of persuading an appeal court not only that the Master could have made an alternative case management decision but that any reasonable tribunal

would have done so. In my judgment, Mr Whittaker has no real prospect of persuading an appeal court of this for the following reasons:

(1) There was no issue before the Master that Mr Whittaker had failed to comply with the Disclosure Order or that Deputy Master Marsh had the power to make the April Order under PD57A, paragraph 17.1. The issue for him was whether it was appropriate for him to make that order.

(2) It was appropriate for him to make the orders in paragraph 2(ii) and 3 despite the concerns which Mr Whittaker raised about the proportionality of the exercise because he ultimately accepted that he was obliged to carry out those searches and disclose the results in the long passages from the transcript which I have set out above. He asked for a week longer than the Master was prepared to give him to comply with the Disclosure Order but then he accepted that he had to comply by 19 May 2023.

(3) But even if Mr Whittaker should not be held to those concessions as a litigant in person, I am not satisfied that he has any real prospect of persuading the Court that it was too onerous or unreasonable. Mr Whittaker had disclosed virtually no documents relating to causation, delay, waiver and estoppel for the relevant period and his work emails were the obvious source of documents relating to those issues. Nor did he dispute that the search terms in Appendix 1 to the April Order had been agreed between the parties the previous year in relation to the Disclosure Order. In any event, the April Order expressly provided that the parties could agree to modify those search terms.

(4) Further, given the proximity of the trial and the fact that Mr Whittaker had already instructed his EDP to engage with the disclosure process, I am not satisfied that he has any real prospect either of persuading the Court that it was unreasonable to impose a deadline of 19 May 2023. Indeed, given his conclusions after hearing the costs argument, the Master had every justification for imposing a tighter deadline.

(5) Finally, I am satisfied that it was unnecessary for the Master to decide who was responsible for the delay in obtaining access to Mr Whittaker's work email account and carrying out the searches in deciding whether to make the April

Order. By 20 April 2023 this was water under the bridge because Mr Whittaker and his EDP had obtained access to his work email account four weeks before.

85. I am also satisfied that Mr Whittaker has no prospect of persuading an appeal court that the Remedial Disclosure Application was made in bad faith and that the Defendant or its advisers knew that he could not give disclosure of his work emails (or that he could not do so until they provided the hard drive to him on 22 March 2023). It is not open to him to advance this Ground of Appeal but, in any event, I am fully satisfied that there is no basis whatever for suggesting that the Defendant was acting in bad faith for the following reasons:

(1) Mr Corbett-Graham's evidence was that the Defendant did not download Mr Whittaker's mailbox or provide it to him in July or August 2022 both because Mr Whittaker failed to provide the "super-administrator" credentials to White & Case and also because Druces later informed White & Case that he would access the mailbox himself. By the date on which the Remedial Disclosure Application was made, Dogwoof's IT personnel had confirmed that Mr Whittaker had access to his mailbox until 31 October 2022.

(2) In the Disclosure Certificate, however, Druces then asserted that Mr Whittaker had not searched his work email account because he did not have access to it. The point which the Defendant took in Corbett-Graham 1 was that he had failed to explain why he did not search his work email account before 31 October 2022 or grant access to the Defendant to do so. The Defendant was clearly entitled to apply for an order requiring Mr Whittaker to provide such an explanation under PD 57A, paragraph 17.1(5).

(3) By the time he made Corbett-Graham 2, Mr Corbett-Graham had been told by Dogwoof that not only did Mr Whittaker have access to his work email account until 31 October 2022 but that he had accessed that account and forwarded emails to his personal email address after the CCMC and the Extended Disclosure Order had been made. This cast further doubt on the accuracy of the Disclosure Certificate and the honesty of the statement that Mr Whittaker had not had access to his work emails.

(4) On 29 March 2023 Druces confirmed that Mr Whittaker had retained access to his work email account although they asserted that this access was "limited" and "inconsistent" and on 17 April 2023 Mr Whittaker made a witness statement in which he asserted that he did not have full access to it or that it would be unreasonable for him to access it after his dismissal. Mr Whittaker also conceded to the Master in the course of the costs argument that he had accessed that account by mobile phone.

(5) Given the inconsistency between the Disclosure Certificate and the information from Dogwoof's IT personnel together with the unsatisfactory explanations given by Druces and Mr Whittaker himself, the Defendant was plainly entitled to require Mr Whittaker to make a revised Disclosure Certificate under CPR Part 17.1(1) and Mr Whittaker accepted on 20 April 2023 that he would have to make one.

(6) But things had also moved on between the issue of the Remedial Disclosure Application and the hearing. The Defendant provided Mr Whittaker with the hard drive containing his work email account and asked him to carry out searches. In their letter dated 29 March 2023 Druces agreed to conduct searches but only on a random or sample basis. Very shortly before the hearing Mr Whittaker made a further offer to comply with his disclosure obligations. But, as the Master recorded, his position had changed again by the hearing.

(7) Accordingly, the Master was fully entitled to find that Mr Whittaker's conduct made it necessary for the Defendant to apply not only for a revised Disclosure Certificate but also an order that Mr Whittaker carry out the searches in the original Disclosure Order.

(8) Finally, Mr Whittaker's suggestion that the Remedial Disclosure Application was issued in bad faith ignores entirely the fact that the Defendant was seeking wider disclosure including emails from his personal email account. Deputy Master Marsh made orders that Mr Whittaker should disclose emails from his personal email account and other financial records and correspondence. He did not appeal against those orders and before me he candidly admitted that he had failed to

search for his personal emails stored in the cloud although he described this as an "oversight".

(ii) Costs

86. The Master made an order that Mr Whittaker should pay the costs of the Remedial Disclosure Application on an indemnity basis. In his Grounds of Appeal Mr Whittaker contends that the Defendant's conduct in applying for and obtaining a costs order was an abuse of process because it intentionally caused him financial hardship, that his resulting impecuniosity will stifle the claim and impede access to justice and that it was a breach of his Article 6 rights. He also contends that the legal issues raised have broader implications and that the outcome of the appeal has the potential to establish new principles and shape the legal landscape. In his Skeleton Argument dated 18 July 2023 Mr Whittaker argued that the Remedial Disclosure Application was a tactical attempt to stifle the Claim and that the costs order was too onerous and disproportionate.

87. To succeed on this first PTA Application in relation to the order for costs made by Deputy Master Marsh, Mr Whittaker must satisfy the Court that he has a real prospect of demonstrating that the test in *Kupeli* (above) is satisfied and the decision was wrong in the sense described by Hickinbottom LJ. In my judgment, he has no real prospect of doing so for the following reasons:

(1) CPR Part 44.2(2)(a) provides that the general rule is that the unsuccessful party should pay the costs of the successful party. Mr Whittaker would have to satisfy an appeal court that the Master erred in principle or was wholly wrong to apply the general rule. This is a very high threshold indeed for Mr Whittaker to cross. Moreover, he clearly conceded that the general principle was applicable by making an open offer to pay £25,000 in costs before the hearing took place.

(2) The Master might have been persuaded that costs should not follow the event if he had accepted that the Defendant was responsible for preventing Mr Whittaker from having access to his work email account or complying with his disclosure obligations more generally. But he did not take that view. Indeed, he took the view that there had been a wholesale failure by Mr Whittaker to

comply with the Extended Disclosure Order and to provide any proper explanation for that failure. There was ample evidence upon which he was entitled to reach the conclusions which I have set out in section II of this judgment and the summarised in [85] (above).

(3) The Master also gave sufficient reasons to justify an order for costs on the indemnity basis. On 14 October 2022 Mr Tabatznik signed the Defendant's Disclosure Certificate and there was no issue that Mr Whittaker was the party responsible for four extensions of time until 21 December 2022. Moreover, he continued to maintain before the Master that his Disclosure Certificate was accurate until very shortly before the hearing when he offered to undertake further disclosure and to provide a revised Disclosure Certificate.

(4) In my judgment, therefore, the Master was entitled to take the view that Mr Whittaker's failure to accept that his Disclosure Certificate was inaccurate and to undertake to remedy the position until the eve of the hearing of the Remedial Disclosure Application took his conduct outside the norm. But even if I might have taken a more charitable view of Mr Whittaker's conduct, the Master was uniquely well-placed to make the required assessment having read all of the relevant correspondence and heard the relevant evidence.

(5) In his Skeleton Argument Mr Whittaker argued that the costs claimed by the Defendant were unreasonable and disproportionate relying on the costs budgets of both parties and he submitted that the Defendant was using the Remedial Disclosure Application as a means to "financially drain" him. I am satisfied that the Master was entitled to reject that submission. Mr Whittaker did not address his financial hardship in his witness statement dated 17 April 2023 and, as Mr Macdonald pointed out in argument, Mr Whittaker was warned about the costs risk in letters dated 12 August 2022, 24 August 2022, 2 February 2023 and 14 April 2023. He was fully aware of the costs risk and could have avoided it if he had complied with the Extended Disclosure Order in good time.

(6) In those circumstances, I am satisfied that Mr Whittaker has no real prospect of persuading an appeal court that the Remedial Disclosure Application was

abusive or that it involved a breach of his Article 6 rights. Moreover, his submission that the Master was stifling an important and ground-breaking claim was at odds with the position which he took at the time. In his Skeleton Argument for the hearing he submitted that the action was not "commercial litigation on a grand scale" and described the Claim as "a construction summons for which the legal consequences need to be worked out".

(iii) Summary Assessment

88. Mr Whittaker also challenges the costs order made by the Deputy Master Marsh in the April Order on the basis that the Defendant failed to serve its Statement of Costs on him before the hearing. This is not a point which he took in the Appellant's Notice or the Grounds of Appeal. But it is a point which he has now taken in the Fourth Stay Application. Mr Polley did not submit that Mr Whittaker should not be permitted to rely on this point in support of his first PTA Application and I, therefore, consider it in that context first.

89. To succeed on any of the PTA Applications Mr Whittaker must satisfy the Court that he has a real prospect of demonstrating that Deputy Master Marsh's decision to award the Defendant costs was unjust or wrong because of a serious irregularity in the proceedings below: see CPR Part 52.21(3). For the purposes of all three PTA Applications I am prepared to accept that Mr Whittaker has a real prospect of persuading an appeal court that the failure to serve each Statement of Costs was a serious irregularity. Akenhead J accepted that a failure to comply with paragraph 9.5(4) was serious although at the lower end of the scale and I take the same view in the present case.

90. However, I am not satisfied that Mr Whittaker has any real prospect of persuading the Court that the Master's decision was unjust or wrong and I have reached this conclusion for the following reasons:

(1) The present case differs from both *MacDonald v Taree Holdings Ltd* and *Group M UK Ltd v Cabinet Office* because the point was not raised at the hearing and Deputy Master Marsh did not have to decide what (if any) adjustments to make to the Statement of Costs for the failure to comply with paragraph 9.5(4). In his third witness statement dated 26 July 2023 in support of the Fourth Stay Application,

Mr Whittaker asserted that he had suffered detriment or prejudice because the failure to serve the Statement of Costs deprived him of the ability to respond effectively and present his case. He also argued that at the very least the Court should order a detailed assessment so that he could take legal advice and "see what this piece of paper means".

(2) I am not satisfied that Mr Whittaker has any real prospect of persuading the Court that he would have taken legal advice if the Defendant had served the Statement of Costs 24 hours before the hearing. Druces had ceased to act for him on 12 April 2023 and he was acting in person at the hearing before Deputy Master Marsh. He engaged RWK for the limited purpose of assisting him to comply with the April Order but he did not instruct them for the hearings in May and June (or was unable to do so).

(3) But even if the Defendant had served the Statement of Costs 24 hours before the hearing and Mr Whittaker had taken legal advice, I am not satisfied that he has a real prospect of persuading the Court that it would have made a difference. Although the Master made an order that Mr Whittaker should pay the costs on an indemnity basis, he was very careful to take every point in Mr Whittaker's favour as a litigant in person and reduced the amount of costs by over £35,000. It is unlikely that Mr Whittaker would have persuaded him to award a lower figure even with the benefit of legal advice.

(4) Moreover, even if Mr Whittaker had taken the point or the Master had taken it himself at the hearing, I am not satisfied that there is a real prospect that this would have made any difference either. It is possible that the Master would have given Mr Whittaker time to consider the Statement of Costs. But it is more likely that he would have decided to proceed with the summary assessment but leaning in Mr Whittaker's favour (as he did) on any point of doubt.

(5) But in any event, I am fully satisfied that the very best which Mr Whittaker could have hoped to achieve is a further reduction of, say, £2,000 to £5,000 if he had taken this point and the Master had granted a short adjournment or proceeded with the summary assessment immediately but with this point in mind.

(iv) Extension of Time

91. Mr Whittaker should have filed the Appellant's Notice in Appeal 126 within 21 days of the April Order and, therefore, by 11 May 2023. He did not apply to Deputy Master Marsh for permission to appeal or ask him to extend time for applying to this Court for permission to appeal and it follows that when he filed the Appellant's Notice on either 12 or 13 June 2023 he did so out of time.

92. On 23 June 2023 Deputy Master Bowles dismissed Mr Whittaker's first PTA Application (as is recorded in the June Order) and Mr Polley fairly conceded that I should treat this as the dismissal of the PTA application by the lower Court. He did not, however, make a concession (whether formal or otherwise) that the PTA Application was made within time either to Deputy Master Bowles at the hearing on 23 June 2023 or to this Court and I did not understand him to be making such a concession. The PTA Application to Deputy Master Bowles was already out of time and he was entitled to dismiss it. Moreover, he did not grant an extension of time himself.

93. Mr Polley did not rely on the fact that the Appellant's Notice was filed out of time either in his Skeleton Argument or oral submissions perhaps because Mr Whittaker was a litigant in person and perhaps because the focus of the hearing on 1 September 2023 was directed at the June Order. For this reason I have addressed the PTA Application in Appeal 126 on the merits. Nevertheless, and for the avoidance of any doubt, I dismiss Mr Whittaker's application for an extension of time for three reasons:

    (1) Mr Whittaker provided no explanation to the Court for his failure to apply for permission to appeal either at the hearing before Deputy Master Marsh or to file his Appellant's Notice in time and he did not address this issue orally at the hearing. If he wished to pursue Appeal 126 he should have done so although (as I indicate below) I will give him one final opportunity to do so.

    (2) The inference which I draw is that Mr Whittaker made the PTA Application when it became clear to him that he would be unable to comply with the May Order. But if he had wished to challenge the April Order he should have done so promptly and within time. An appeal is not something which a party may keep up his or her sleeve in case he is unable or unwilling to comply with the Court's orders. That party must either comply or appeal.

(3) Moreover, if Mr Whittaker had applied promptly for permission to appeal and taken the point that the Defendant had failed to comply with paragraph 9.5(4), I have no doubt that this Court would have refused permission to appeal either because the issue was not of sufficient significance to justify an appeal and because the procedural consequences of an appeal outweighed its significance. At best Mr Whittaker would have succeeded in reducing the costs order by £2,000 to £5,000 and this did not justify the costs of an appeal and would have resulted in the loss of the trial date.

(2) Appeal 127

(i) The Unless Order

94. On 13 June 2023 Mr Whittaker applied for permission to appeal against paragraph 1 of the May Order. As I have indicated above, Appeal 127 was within time but it was limited to the unless order which Master Kaye made in relation to the costs' element of the April Order. It follows that Mr Whittaker does not challenge the disclosure element of the May Order or suggest that Master Kaye was wrong to make that Order. This is an important feature of Appeal 127.

95. Mr Whittaker's Grounds of Appeal for Appeal 127 were in almost identical form to his Grounds of Appeal in Appeal 126. In his Skeleton Argument dated 18 July he argued that the Defendant's application for an unless order was a tactical attempt to stifle the Claim and that it used the Court's rules as a weapon rather than to ensure the fair conduct and progress of the action. However, most of his Skeleton Argument was directed at the disclosure issues and involved an attempt to reargue the issues resolved by the Court at the April hearing.

96. Again, to succeed on this second PTA Application Mr Whittaker must satisfy the Court that he has a real prospect of demonstrating not only that Master Kaye could have made an alternative case management decision but that any reasonable tribunal should have done so. In my judgment, Mr Whittaker has no real prospect of doing so and I say this for the following reasons:

(1) Mr Whittaker did not suggest that Master Kaye misdirected herself in relation to the relevant law. She cited three authorities which were directly relevant to her

decision and the key decision relating to the making of an unless order in relation to costs: see *Michael Wilson & Partners v Sinclair*, *Sidddiqi v Aidiniantz* and *Terre Neuve Sarl v Yewdale Ltd* (above).

(2) As Master Kaye recorded in her judgment, Mr Whittaker did not suggest that there was any reason why he could not pay the costs ordered by Deputy Master Marsh and he told her that he anticipated being able to pay them within a further 28 days. She also concluded that he had not produced any cogent or credible evidence explaining why he could not pay them and that he had not provided evidence of any assets within the jurisdiction.

(3) Mr Whittaker has no real prospect of challenging those conclusions. In his second witness statement dated 30 May 2023 he did not give evidence that he lacked the means to pay the costs element of the April Order or provide any evidence about his financial position and the Master was entitled to take at face value Mr Whittaker's statement that he intended to comply with the April Order in 28 days.

(4) On any view, therefore, the Master was entitled to adopt the general principles that the Court should require payment of the costs element of the April Order as the price of continuing the Claim and that the Court should normally impose an unless order as a suitable form of relief: see *Michael Wilson & Partners v Sinclair* (above) at [29](5) and (6).

(5) In the present case, there was an additional reason for imposing an unless order, namely, the proximity of the trial. The Master was entitled to take that feature into account and decided that it was reasonable and proportionate to make an unless order so that the Claim would fall away if Mr Whittaker failed to comply.

(6) I am not satisfied that Mr Whittaker has any real prospect of persuading the Court that the application for an unless order was abusive or an attempt to stifle the Claim given that Mr Whittaker did not challenge paragraph 2 of the Order. Mr Whittaker remained in breach of the April Order and the Defendant was entitled to come to Court to ensure compliance. This was not an abuse of process or a breach of his Article 6 rights. The fact that the Defendant had served a statutory demand for payment on 22 May 2023 does not, in my judgment, alter that conclusion.

(ii) Costs

97. For the reasons which I have given for refusing permission to appeal in relation to the costs element of the April Order I am not satisfied that Mr Whittaker has any real prospect of challenging the costs element of the May Order. Given that Mr Whittaker does not challenge paragraphs 2 to 4 of the May Order, I am satisfied that Master Kaye was entitled to make an order that costs should follow the event and that Mr Whittaker has no real prospect of persuading an appeal court that this was an order which no reasonable tribunal should have made.

(iii) Summary Assessment

98. In the Second, Fifth and Sixth Stay Applications Mr Whittaker challenges Master Kaye's summary assessment of the costs at £45,000 because the Defendant failed to comply with paragraph 9.5(4) and serve the Statement of Costs 24 hours before the hearing. For the same reasons which I gave for refusing permission to appeal in relation to the Master's summary assessment at the April hearing, I am not satisfied that Mr Whittaker has any real prospect of challenging that figure. The Master directed herself that the element of doubt weighed against the Defendant and reduced its costs by almost £20,000 (or about one third).

99. But in any event, I refuse permission to appeal because this issue is not of sufficient significance to justify an appeal. At best, Mr Whittaker is only likely to persuade an appeal court that the Master should have reduced the amount of costs which she awarded by £1,000 to £5,000 for non-compliance with paragraph 9.5(4). This outcome does not justify an appeal. Moreover, the outcome of an appeal on this issue would not affect the outcome of any of the other issues on this appeal or either of the other appeals. The costs element of the May Order was not the subject of an unless order and the failure to comply with it did not result in the Claim being struck out.

(3) Appeal 149

(i) Adjournment

100. Mr Whittaker did not file Grounds of Appeal with his Appellant's Notice in Appeal 149. On 31 August 2023 he filed a Skeleton Argument for the appeal on CE File and

for the hearing on 1 September 2023. The primary relief which he asked the Court to grant was to set aside the June 2023 Order and he did so primarily on the basis that the Master should have granted a short adjournment on medical grounds to enable him to comply with the May Order. In a section headed "Hardship" he repeated the allegations that the Defendant had used the costs order made by Deputy Master Marsh as a weapon. However, he also relied on the fact that he had already paid £25,000 and that he had managed to secure £65,000 as a loan to repay the balance ahead of the hearing on 23 June 2023.

101. On 1 September 2023 Mr Whittaker accepted that the medical evidence which he put before Deputy Master Bowles for the hearing on 23 June 2023 was out of date. However, he produced and relied on a document headed "After Visit Summary – Emergency" dated 22 June 2023 showing that on that date he was prescribed medication by the UCH Emergency Department. He also submitted that he if he had been given more time, he could have paid the balance of the £40,000 and that he had made offers to do so on 22 and 23 June 2023. At that point he referred me to the "without prejudice save as to costs" offer dated 22 June 2023.

102. To succeed on the third PTA Application Mr Whittaker has to satisfy the Court that there is a real prospect of persuading the Court that Deputy Master Bowles either took into account immaterial factors or omitted to take into account material factors or erred in principle or came to a decision that was impermissible when he refused an adjournment or an extension of time: see *Terluk v Berezovsky* (above). In my judgment, he has no real prospect of doing so for the following reasons:

    (1) The Master rejected Mr Whittaker's evidence in support of the adjournment on medical grounds. He was clearly entitled to take the view that it was inadequate and Mr Whittaker accepted that it was out of date. The additional document which he produced did not take the matter any further and was not, in any event, before the Court.

    (2) The Master weighed up whether to grant Mr Whittaker's application for a short extension of time for compliance with the May Order but decided that the balance came down against it for a number of reasons: first, the trial date was so close that even a short adjournment would cause prejudice; secondly, there was

no certainty that this would result in compliance with the April Order and that Mr Whittaker would not apply for a further adjournment; thirdly, although Mr Whittaker had raised the question of impecuniosity, there was no satisfactory evidence that he could not pay the costs order.

(3) All of these factors which the Master took into account were relevant and material and he clearly balanced them up carefully before reaching his decision. Mr Polley described the decision as "impeccable" and I agree. There is no prospect of Mr Whittaker demonstrating that it was impermissible and it follows that the decision must prevail.

(4) Moreover, the Master also recognised that no purpose would be served in extending time for compliance because Mr Whittaker was already debarred by the May Order from calling evidence to prove his case on causation, delay, waiver or estoppel. He did not rely on this factor in his decision but it would also have justified his decision (as Mr Polley submitted).

(5) Finally, Mr Whittaker accepted in terms in his Skeleton Argument that he had the sum of £65,000 available and could have paid the costs order in full before the hearing on 23 June 2023. When I asked him why he did not pay the costs before the hearing as he had been ordered to do, he had no real answer. It is clear that he chose not to do so but to try and negotiate terms with the Defendant.

(ii) Costs

103. I am also satisfied that Mr Whittaker has no real prospect of success in appealing the costs orders which Deputy Master Bowles made at the June hearing. Once Deputy Master Bowles had refused an adjournment and struck out the Claim, the Defendant was entitled to an order that Mr Whittaker pay the costs of the proceedings. For very similar reasons to those which I gave for refusing permission to appeal in relation to the costs element of the May and June Orders I am not satisfied that Mr Whittaker has any real prospect of challenging the order for costs which the Master made in relation to the hearing itself. Moreover, even if the Master granted his application for an extension of time, it is more likely than not that he would have ordered Mr Whittaker to pay the costs of the hearing as the price of the adjournment.

(iii) Summary Assessment

104. Finally, I am also satisfied that Mr Whittaker has no real prospect of success in appealing the summary assessment on the basis that the Defendant failed to serve its Statement of Costs in accordance with paragraph 9.5(4). He did not attend the hearing and did not make any submissions and it would have made no difference if he had been served with a copy. But in any event, I refuse permission to appeal because this issue is not of sufficient significance to justify an appeal for the reasons which I gave in relation to Appeal 127.

(4) CPR Part 23.11

105. I have refused all three PTA Applications and I have held that Mr Whittaker has no real prospect of persuading the Court that Deputy Master Bowles was wrong to refuse an adjournment or to extend time for compliance with the May Order. I therefore go on and consider whether, in the light of that conclusion, I should set aside the June Order under CPR Part 23.11 and order a re-hearing of the applications listed before the Court on 23 June 2023. For the following reasons I decline to do so:

(1) Although the Court has an unfettered discretion to exercise the power in CPR Part 23.11, I remind myself that the Court should only exercise it sparingly: see *Riverpath Properties Ltd v Brammall*. In my judgment, it would be wrong to exercise it in favour of Mr Whittaker in circumstances where permission to appeal against the June Order has been refused and the trial date has now been vacated.

(2) I have no confidence that Mr Whittaker would be able to comply with the May Order if the Court was prepared to extend time for compliance. Any extension is likely to be a short one and there was no evidence before me that Mr Whittaker had given full disclosure in accordance with the April Order and the May Order and that the Court can be satisfied that the Claim is ready for trial. Moreover, he has still not complied with paragraph 1 of the May Order or paid the costs of the three hearings as he was ordered to do and he is contesting all three statutory demands.

(3) The Defendant will suffer significant prejudice if the Court grants an extension and the Claim has to be re-listed for trial. It has lost the original trial date and wasted substantial costs in preparing for trial. There has been a subsequent delay of at least three months and there will be a further delay before the trial is re-listed for hearing.

(4) I am not satisfied that the overriding objective would be served by giving Mr Whittaker another bite at the cherry at the expense of the Defendant and other Court users. He was responsible for the Claim being struck out and the trial date being vacated. On his own evidence, he could have complied with paragraph 1 of the May Order but he chose not to do so and tried to haggle with White & Case. Court orders are to be complied with, he knew what the consequence would be if he failed to comply and he only has himself to blame that the Claim was struck out.

(5) But in any event, there is no point in re-listing Mr Whittaker's application for an extension of time for the reasons given by Deputy Master Bowles in his judgment at [25] to [28]. Mr Whittaker did not comply with paragraph 2 of the May Order and is debarred from advancing a positive case or calling evidence on the issues of causation, delay, waiver and estoppel. The Claim is almost bound to fail.

V. Stay of Execution

106. Because I have refused all three PTA Applications and dismissed the Set Aside Application, this would normally be the end of the road for Mr Whittaker and it would be unnecessary for me to consider any of the Six Stay Applications. However, because I propose to grant Mr Whittaker one last but brief opportunity to persuade me that I should grant permission to appeal against the April Order for reasons which I explain below, I go on to consider the Stay Applications briefly applying the principles which I have set out (above).

107. Mr Whittaker applied to stay the June Order in the Set Aside Application on the basis of personal hardship and in the Second Stay Application he also applied to stay the May Order for the same reason. In each of the Second to Sixth Stay Applications he applied to stay each of the three Orders because the Defendant had failed to serve its Statement of Costs in breach of paragraph 9.5(4). In his Skeleton Argument dated 31 August 2023

Mr Whittaker argued that the Court should grant a stay of execution of the April, May and June Orders on the basis it would have an "irrevocably damaging and detrimental impact" on his personal and financial circumstances and on the three appeals because enforcement would inevitably lead to his bankruptcy.

108. I am prepared to accept that Mr Whittaker will suffer irremediable harm if he cannot pay the costs orders and satisfy the Statutory Demands. On the other hand, if he has failed to give adequate disclosure of his financial circumstances or provide cogent evidence that he has no funds available to pay them, then the Court cannot be satisfied that he will fail to pay the sums due to avoid bankruptcy if it permits the Defendant to continue enforcement. In my judgment, Mr Whittaker has not given adequate disclosure of his financial circumstances or provided cogent evidence that he is impecunious to justify the conclusion that there is a real risk of irremediable harm. I say this for the following reasons:

(1) Mr Whittaker gave clear evidence that he was able to satisfy the costs element of the April Order before the hearing on 23 June 2023 and he was able to transfer £50,000 into his [REDACTED] account no. [REDACTED] from another account in his name. He also offered to pay £65,000 in full on 22 June 2023.

(2) Mr Whittaker now claims that he became impecunious by 21 July 2023 and he produced a number of bank statements to support this claim. But he has not disclosed the source of the £50,000 paid into account no. [REDACTED] or produced the bank statements for the other account in his name from which the relevant sums were transferred.

(3) Further, it was Mr Whittaker's case that he would have been able to raise £600,000 to pay for the shares in Dogwoof if the Court had made an order for specific performance in his favour. Mr Polley also took me to a loan agreement for that sum dated 11 December 2022 and made between First Weekend Club Ltd as borrower and Sze Lin Teo as lender. Mr Whittaker signed the agreement and he accepted that this loan had been made to enable him to purchase the shares and that it remained available (although the terms on which it could be utilised were opaque).

(4) Mr Polley also drew my attention to Mr Whittaker's fifth witness statement dated 12 June 2023 in which he stated that he was able to raise the necessary funds where his cash resources were insufficient to meet the liability and his Appellant's Notice in Appeal 149 in which he stated that if he paid the costs orders he would need to carry on representing himself and to release his valuation expert: "The payment of Costs, will create a hardship. If I pay both the Costs orders in full, I will not be able to continue with any legal representation, and a genuine claim with merit, will therefore be stifled."

(5) I accept that the costs orders may put Mr Whittaker in a difficult financial position. I also accept that using his available funds to comply with those orders may have had made it difficult (if not impossible) for him to continue funding the legal representation of the Claim. But this did not (and does not) entitle him to a stay of execution. A party does not suffer irremediable harm by having to represent himself and Mr Whittaker was fully able to do so at the hearing on 1 September 2023.

109. But even if I am wrong and there is cogent evidence to demonstrate that there is a significant risk of irremediable harm to Mr Whittaker if I refuse a stay of execution, I decline to exercise my discretion to grant a stay because I have refused permission to appeal. I have found that Mr Whittaker has no real prospects of success in relation to each of the appeals and for that reason the Defendant ought to be entitled to enforce costs orders which have been made in its favour. I am not prepared to grant a stay just as Lewison J was not prepared to do so in *Renewable Power & Light Plc v Renewable Power & Light Services Inc* (above).

110. Finally, I refuse to stay any of the April, May or June Orders on the grounds that the Defendant failed to comply with paragraph 9.5(4) and serve its Statement of Costs at least 24 hours before each hearing. For the reasons which I have given, I consider that at best this irregularity would justify a total reduction in the costs which the Court awarded to the Defendant of £1,000 to £5,000 on each occasion and that the prospect of such a reduction does not justify the costs of an appeal. I therefore refuse to exercise my discretion to stay the three orders for that reason.

VI. The First Contempt Application

111. Although Mr Polley submitted that the First Contempt Application failed to comply with the procedural requirements of CPR Part 81.4, it was not necessary for him to do so because it is not in fact a contempt application in which Mr Whittaker applies to commit the Defendant but an application for permission to make such an application. In case there was any doubt about this, Mr Whittaker stated in capital letters in the Application Notice that it was an application for leave to apply for an order for committal for contempt under CPR Part 81 and he gave the following reasons why the Court should grant permission:

> "Unauthorised Disclosure: Bertha UK Limited, herein referred to as the Contemnor, has made an unauthorised disclosure of confidential information related to ongoing court proceedings, in contravention of the principle of confidentiality.
>
> Breach of Court Order: The Contemnor disclosed information related to a court order (Paragraph 8 of the Order of Master Marsh on 20 April 2023), which is a violation of the principles enshrined in CPR 81.4.
>
> Collusion: acting in a concerted manner, with a deceitful intent, to manipulate legal proceedings to their advantage or to the disadvantage of others, infringing upon the principles of natural justice and fair play The details of the alleged contempt are as follows:
>
> (a) Nature of the alleged contempt: The alleged contempt in this case pertains to the unauthorised disclosure of confidential information from ongoing court proceedings. This was shared without permission with Ms. Anna Godas, an individual who, while being a shareholder in the company entangled in the case, is not part of the court proceedings as it is a shareholder action, hence rendering her an unauthorised third party in this context. Following the receipt of this information, Ms. Godas proceeded to send a harassing communication to me, exacerbating the situation, on 22 June 2023, 1 day prior to the Directions Hearing. As the Defendant is aware I have been receiving treatment for a Mixed Anxiety and Depression Disorder since around March 2021. On 22 June 2023 I suffered a panic attack intensity of the attack and subsequently was unable to attend the hearing on June 23rd, 2023.
>
> The nature and date of any order breached: The order breached pertains to the costs order made by the court on 20 April 2023. And a payment I made of £25,000 to the Defendant in relation to the Order. The contempt is constituted by the sharing of confidential information related to the court proceedings and a costs order by Bertha UK Limited with Ms. Anna Godas. This information was disclosed prior to 23 June 2023, without the necessary authorisation, thereby breaching the principle of confidentiality that is integral to the ongoing legal proceedings. The unauthorised dissemination of this sensitive information has interfered with the due process of the court proceedings. and compromised my rights.

> Furthermore, the suspicious and concerted actions of the involved parties strongly suggest collusion with the intention to undermine my legal position and unduly influence the course of proceedings. Such behaviour, I believe, is antithetical to the principles of justice and fair play that the court upholds."

112. In the Application Notice Mr Whittaker also identified the Defendant as the alleged contemnor, he stated that he believed that the application had a reasonable chance of success and he asked for permission to proceed with the application on the basis that the Defendant had interfered with or obstructed the course of justice. It is clear from this formulation that Mr Whittaker intended to apply for permission to make a contempt application under CPR Part 81.3 which provides as follows:

> "(1) A contempt application made in existing High Court or county court proceedings is made by an application under Part 23 in those proceedings, whether or not the application is made against a party to those proceedings.
>
> (2) If the application is made in the High Court, it shall be determined by a High Court judge of the Division in which the case is proceeding. If it is made in the county court, it shall be determined by a Circuit Judge sitting in the county court, unless under a rule or practice direction it may be determined by a District Judge.
>
> (3) A contempt application in relation to alleged interference with the due administration of justice, otherwise than in existing High Court or county court proceedings, is made by an application to the High Court under Part 8.
>
> (4) Where an application under Part 8 is made under paragraph (3), the rules in Part 8 apply except as modified by this Part and the defendant is not required to acknowledge service of the application.
>
> (5) Permission to make a contempt application is required where the application is made in relation to—
>
> (a) interference with the due administration of justice, except in relation to existing High Court or county court proceedings;
>
> (b) an allegation of knowingly making a false statement in any affidavit, affirmation or other document verified by a statement of truth or in a disclosure statement.
>
> (6) If permission to make the application is needed, the application for permission shall be included in the contempt application, which will proceed to a full hearing only if permission is granted.
>
> (7) If permission is needed and the application relates to High Court proceedings, the question of permission shall be determined by a single judge of the Division in which the case is proceeding. If permission is granted the contempt application shall be determined by a single judge or

> Divisional Court of that Division.
>
> (8) If permission is needed and the application does not relate to existing court proceedings or relates to criminal or county court proceedings or to proceedings in the Civil Division of the Court of Appeal, the question of permission shall be determined by a single judge of the King's Bench Division. If permission is granted, the contempt application shall be determined by a single judge of the King's Bench Division or a Divisional Court."

113. I refuse to grant permission and I dismiss the First Contempt Application. I do so primarily because the Court's permission to make the application is not required under CPR Part 81.3(5). Permission is not required to make a contempt application in relation to interference with the administration of justice in existing proceedings and the term "existing proceedings" is broadly applied: see the notes in the Supreme Court Practice (2023) Vol 1 at 81.3.4. Moreover, Mr Whittaker appears to have recognised this by issuing the Second Contempt Application.

114. But in any event, I would have refused permission for the reasons given by Mr Polley in his Skeleton Argument. Proceedings in open Court are not confidential and Mr Whittaker does not suggest that Deputy Master Marsh ordered the hearing on 20 April 2023 to be held in private. Moreover, the principle of open justice extends to the provision of Court documents to non-parties: see the notes in the Supreme Court Practice (2023) Vol 1 at 81.3.4. It would always have been open to Ms Godas to apply to the Court for a copy of the April Order and I see no reason why it would have been a contempt of court for the Defendant to supply it to Ms Godas directly.

VII. Totally Without Merit

(1) The PTA and Set Aside Applications

116. I am satisfied that the second and third PTA Applications and the Set Aside Application were totally without merit. Mr Whittaker failed to comply with the April Order and given the proximity of the trial, it was almost inevitable that the Court would impose an unless order to ensure that the trial date was kept. Mr Whittaker knew that the May Order provided for the Claim to be struck out if he failed to comply with the costs order, he had sufficient funds to do so but chose to try to negotiate with White & Case rather than comply with it. The medical evidence which he put before the Court was out of date (as he accepted) and it is wholly unsurprising that his last minute attempt to put

off the hearing or to extend time for compliance failed. The Set Aside Application was also hopeless once the trial date was vacated but also because he could not challenge (and wisely did not challenge) paragraph 2 of the May Order.

117. I am not convinced, however, that the first PTA Application was bound to fail and I have devoted most of this judgment to considering that application in detail. In particular, I am not convinced that an appeal against an order for indemnity costs and the subsequent summary assessment could not be challenged. I also refused permission to appeal because the first PTA Application was out of time and it is likely that an appeal court would have dismissed it if had been made promptly and within time. Moreover, if I had granted permission to appeal against the costs element of the April Order, I am not convinced that Mr Polley would have been able to persuade me that the May Order and the June Order could stand. Finally, these issues were not much ventilated at the oral hearing on 1 September 2023 and the parties understandably focussed on the June Order.

(2) The Stay Applications

118. I am also satisfied that the Second to Sixth Stay Applications were totally without merit. Mr Whittaker told me that he issued so many applications because he thought that it was necessary to make an application in each appeal and in the underlying proceedings. Whatever his reasons, he issued a raft of applications in which he duplicated and reduplicated a number of wild allegations. To relieve the pressure that he was putting on the Master at the end of a busy term, I listed an oral hearing in the vacation to deal with them all. This was not vacation business and Mr Whittaker effectively forced himself to the front of the queue at the expense of other court users. This is not acceptable conduct.

119. Indeed, it would have been enough to issue the First Stay Application to stay the June Order and if I had granted that application it would have held the ring until the determination of the PTA Applications. In any event, when I considered the applications in detail, they were hopeless. They were inconsistent with Mr Whittaker's position in the substantive Claim that he had funds available to complete the purchase of shares and the evidence that he had a line of credit and funds available on 23 June

which he chose not to use to comply with the May Order but transferred out of his bank account immediately after the hearing.

(3) The First Contempt Application

120. Finally, I am satisfied that the First Contempt Application was totally without merit. It was unnecessary and Mr Whittaker had issued the Second Stay Application immediately before the hearing on 1 September 2023. It was an obvious attempt to try and put pressure on both the Defendant and the Court. Mr Whittaker should think very carefully before he proceeds with that application.

VIII. Disposal

121. I have found that all of Mr Whittaker's applications were totally without merit apart from the First Stay Application and the first PTA Application. I will make an order recording this fact under CPR Part 52.20(6)(a) and I will direct that he may not request my decision on any of those applications to be reconsidered at an oral hearing. I will give such a direction because the PTA Applications were not formally listed before me and I gave no direction for an oral hearing of those applications.

122. I have also considered whether I should give the same direction in relation to the first PTA Application and the First Stay Application. But I have decided not to do so. Although Mr Whittaker told me that he was able to deal with those applications at the hearing on 1 September 2023 I am prepared to give him one last chance to renew those applications orally. It will also be necessary for me to approve a form of order and deal with costs. I could have dealt with them on paper. But I will list them for a consequential hearing with a time estimate of half a day (including judgment) at which I will also consider the costs of all of the applications which were before me and any outstanding applications which Mr Whittaker has made. Finally, I will also consider whether to make a civil restraint order and before I do so, I will give Mr Whittaker an opportunity to be heard on that issue.

123. I, therefore, dismiss all of the applications which I have itemised in section I (above) and I will direct a further hearing to be listed before me with a time estimate of half a day on a date to be fixed at a mutually convenient time. I also invite Mr Polley to

prepare a draft minute of order for that hearing including the order and directions which I have set out in section VII (above).