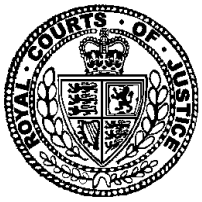

Neutral Citation Number: [2024] EWHC 661 (Ch)

Case No: CH-2022-000232

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22/03/2024

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

WINCHESTER PARK LIMITED

Appellant

- and -

1 PALACE GATE FREEHOLD LIMITED

Respondent

- -
- -

David Berkley KC (instructed by **Hill Dickinson LLP**) for the **Appellant**
Rupert Cohen (instructed by **Northover Limited**) for the **Respondent**

Hearing dates: 27 February 2024
Further written submissions: 5th and 7th March 2024

- -

Approved Judgment

This judgment was handed down remotely at 10am on Friday 22 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE ADAM JOHNSON

Mr Justice Adam Johnson:

Introduction

1. HHJ Parfitt made an Order in these proceedings on 30 November 2022, refusing the Defendant relief from sanctions and, in consequence, making a declaration in favour of the Claimant, to the effect that its owners – all tenants in premises known as 1 Palace Gate, London W8 – were duly entitled to exercise their right of collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993.

2. By this Appeal, the Defendant/Appellant seeks to argue that HHJ Parfitt was wrong to refuse relief from sanction, because he incorrectly exercised his discretion in applying the well-known test in Denton v. TH White [2014] EWCA Civ. 906, [2014] 4 Costs LR 752. The real nub of it is an allegation that the Judge wrongly exercised his discretion in considering the third stage of the Denton test – i.e., that part of the analysis which requires the Court to consider all the circumstances of the case. What is said is that the result achieved – the grant of the declaration the Claimant was seeking but without a trial – was draconian and disproportionate, given that the Defendant's failures were procedural only, and given that the Judge had other, less draconian options available to him, short of granting the declaration sought, which he did not, or did not adequately consider. It is also said that on one important point, the Judge was labouring under a misapprehension as to the facts, and that had he been aware of the true position, he would have made a different decision.

3. I have decided that the Appeal must be dismissed, for the reasons which I explain in detail below.

Background

The Practical Context

4. The procedural context is disclosure, and I am afraid that on any view of it, there was a serious failure by the Defendant/Appellant to comply with its disclosure obligations. I will come back to the specific matter of disclosure below. I will say something first about the practical and commercial context.

5. As I have already explained, the parties' dispute is a contest over ownership of the freehold interest in 1 Palace Gate. The Claimant is a company set up by the tenants of Flats 2, 3, 4 and 5. They wish to acquire the freehold, and intend to use the Claimant as the vehicle by which to do so.

6. The Defendant/Appellant (I will call it "*Winchester Park*") is the freeholder. It is incorporated in the Isle of Man.

7. It seems that the present issue is part of a longer story of disharmony between Winchester Park and the tenants of 1 Palace Gate. There was an earlier dispute about management of the building. In the event, the First-Tier Tribunal Property Chamber (Residential Property) made first a preliminary Order and then a final Order (in June 2017 and July 2018 respectively), appointing a Mr Michael Maunder Taylor, a

chartered surveyor, as manager under section 24(1) of the Landlord & Tenant Act 1987. Mr Maunder Taylor will become relevant below.

8. Against that broad background, on 14 September 2020, the Claimant served a notice under section 13 of the Leasehold Reform, Housing and Urban Development Act 1993, seeking to exercise the tenants' right of collective enfranchisement under that Act.

9. As matters developed in the proceedings, it became common ground that the question whether they had a right of enfranchisement turned on a single issue. That was the status of another property in 1 Palace Gate, referred to as Unit 6 or Flat 6. They key question was whether, as at the date of the Claimant's notice in September 2020, Unit 6 or Flat 6 was used for residential purposes or for commercial purposes. The significance of the point is that there is no right of collective enfranchisement if more than 25% of the space in 1 Palace Gate was used for commercial (rather than residential) purposes, and Winchester Park argued that it was, because Unit 6 or Flat 6 was an office, not an apartment. The Claimant said the opposite. Thus, the status and use of Unit 6 or Flat 6 in September 2020 became critical to the outcome of the parties' dispute.

10. Some indicators suggested commercial rather than residential use. For example, a Determination of the Leasehold Valuation Tribunal in October 2012 concluded that in the Tribunal's opinion, "*Flat 6 (Unit C) could never have reasonably been intended for residential use*".

11. Consistent with that, Unit 6 or Flat 6 was in fact let by Winchester Park in 2014 to an associated company, incorporated in Jersey, called Number One Group Capital Jersey, T/A Number One International (referred to as "*Number 1*"). The relevant lease referred to "*Unit 6*" (as opposed to "*Flat 6*"), and referred to the "*Permitted Use*" as "*use as an office*". Clause 20 contained a covenant by the tenant not to use Flat 6 other than for the *Permitted Use*.

12. I should mention that in the present proceedings, a Mr Alon Mahpud has claimed to be both the appointed and authorised agent of Winchester Park, and a director of Number 1, although the precise nature of the association between the two companies remains somewhat obscure.

13. In any event, other matters suggested that Unit or Flat 6 may have been used for residential purposes as at September 2020. Most importantly, in 2018, Number 1 entered into a three-year sub-lease of Unit or Flat 6, in favour of two individuals, Nikolina Lauc and Zak Pavlovski. The tenancy agreement they signed did not reflect the same restriction on use as the Lease entered into by Number 1, and indeed there is evidence that Unit or Flat 6 was made available by them via Booking.com and was listed on Tripadvisor as a residential space. At some point though this resulted in a disagreement, and certain documents now produced in the proceedings, and referred to by the HHJ Parfitt at [55]-[60] of his Judgment, suggest that by April 2020 Ms Lauc and Mr Pavlovski had relinquished possession and were asking for their deposit back, because they claimed to have discovered that Unit or Flat 6 was restricted to commercial use, which they said they had not been aware of at the time they became sub-tenants. Number 1's solicitors, however, CJJ law, resisted the idea that Ms Lauc and Mr Pavlovski had been misled.

The Disclosure Process

14. Having noted those points, I can come back to the disclosure process in the proceedings below, and to the more immediate background to the decision of HHJ Parfitt which is under appeal. I should mention at the outset that we are not here concerned with the operation of the Disclosure Pilot under PD 57D, which did not apply to the claim. Instead we are in the territory of standard disclosure under CPR, Part 31.

False Start

15. There was something of a false start in the sense that the parties agreed the terms of a Consent Order in early March 2022, providing for standard disclosure to be given by way of lists on 1 April, but by the time the Consent Order was sealed by the Central London County Court on 20 April 2022, the agreed date for exchange of lists had come and gone, and although the Claimant had provided its List, Winchester Park had declined to do so in the absence of a sealed Order. The Claimant responded aggressively, and on 28 April issued an application for an unless Order – i.e. requesting an Order that unless the Defendant provide its List within 7 days, its Defence be struck out.

The First List

16. On the following day, Winchester Park served a List of Document (the "*First List*"), signed by Mr Mahpud as Director of Number 1 and as appointed and authorised agent of Winchester Park, but this was obviously inadequate because the documents attached were mostly the pleadings and other public documents such as copies of Land Registry entries and FTT determinations. The only documents provided touching directly on the question of the use of Unit or Flat 6 were copies of the Defendant's 2014 lease with Number 1, and of the sub-tenancy agreement entered into by Number 1 in 2018 with Ms Lauc and Mr Pavlovski. Moreover, the Disclosure Statement in the standard form List of Documents was formally deficient, in the sense that although the boxes ticked and unticked on p. 2 gave the impression that documents had been collected from some electronic data sources including PCs and servers, the box on p. 1 setting out positive confirmation that a search for electronic documents had been carried out remained unticked, and the space provided for a description of any search of electronic documents was left entirely blank.

The Second List

17. Following correspondence the Defendant provided a further List (the "*Second List*") on 27 May 2022. This was again signed by Mr Mahpud. Six further documents were attached, none of them of immediately apparent significance, aside from a single email between Winchester Park (Ms Elizabeth Taylor) and Hamptons dated 3 July 2020. This concerned the deposit paid by Ms Lauc and Mr Pavlovski, but it increased rather than decreased the sensitivity on the Claimant's part, because it implied the existence of other communications between Ms Luac and Mr Pavlovski touching on their dispute in connection with Unit or Flat 6, which had not been disclosed. The same formal deficiencies with the Disclosure Statement remained.

Application for Specific Disclosure

18. Against that background, on 9 June 2022, the Claimant issued an application for specific disclosure. The draft Order attached proposed that this be on an unless Order basis. It is this application which later came on for hearing before HHJ Dight on 14 October 2022, and which gave rise to the unless Order which then resulted in the Defendant's Defence being struck out and the later hearing before HHJ Parfitt.

Order of HHJ Gerald

19. In the meantime, though, the Claimant's original unless Order application (referred to above at [15]), which had not yet been resolved, was dealt with on the papers by HHJ Gerald in the Central London County Court, resulting in an unless Order of his dated 8 July 2022. As I understand it, however, no point is made by the Claimant about any failure of the Defendant to comply with the unless Order of HHJ Gerald, and so I will say no more about it.

Hearing before HHJ Dight

20. A number of points of concern developed via correspondence in the period prior to the hearing before HHJ Dight. I will mention three. The first was the possible existence of further communications between Number 1 and Hamptons, the agents who had acted in connection with the sub-letting in favour of Ms Luac and Mr Pavlovski. In a Witness Statement dated 3 October, Mr Mahpud took the position that although he was a director of Number 1, it was a separate legal entity to the Defendant, Winchester Park, and so he was not able to hand over any of Number 1's documents in the absence of a Court Order. The second point was that the Claimant had initiated communications with Mr Maunder Taylor, the Court appointed manager of 1 Palace Gate appointed in 2017 (see above at [7]), and he had confirmed that he had engaged in communications with Winchester Park concerning the occupation of Unit or Flat 6. Such communications appeared relevant but had not been disclosed in either the First or Second List. The third point was that shortly before the hearing in front of Judge Dight (see Judgment of HHJ Parfitt at [31]), Winchester Park disclosed a 2021 Deed of Surrender, by which Number 1 surrendered to Winchester Park the 2014 Lease mentioned above. Neither had that been included in either the First List or the Second List.

Unless Order of HHJ Dight

21. It is clear from the transcript of the hearing before HHJ Dight that in the event, and no doubt in light of the points referenced above and similar matters, Winchester Park was content to agree to an Order reflecting the terms sought by the Claimant. The key point to note is that by paragraph 1 of HHJ Dight's Order, Winchester Park was required to undertake a number of steps in relation to disclosure by 29 October 2022. These were: (1) to carry out a reasonable search, to include a search of materials held by Number 1, for the categories of document set out in the Schedule to the Order; (2) to serve a new List of Documents, signed by someone with demonstrable authority to sign on behalf of Winchester Park (i.e., not Mr Mahpud); (3) to serve a Witness Statement from Mr Mahpud clarifying what his roles were in connection with Winchester Park and Number 1; and (4) to serve a further Witness Statement explaining (among other matters) *"[t]he Defendant's approach to disclosure and why the deed of surrender dated 1 October 2021 was only disclosed on 11 October 2022*."

22. The search categories in the Schedule included all communications with estate agents (para. (b)); all communications with Ms Lauc and Mr Pavlovski (para. (c); and all communications with Mr Maunder Taylor (para. (e)).

23. The Order of HHJ Dight then contained the following provision at para. 3:

> "*In the event that the Defendant fails:*
>
> *a. to comply with any of the provisions of paragraph 1 above by the date stipulated therein; or*
>
> *b. [omitted]*
>
> *the Defence be automatically struck out 5 minutes after non-compliance and the Claimant shall be at liberty to apply for a declaration that the participating tenants have a right to collective enfranchisement and the Defendant shall pay to the Claimant the costs of the actions, such costs to be the subject of detailed assessment if not agreed*".

24. It seems that by about this stage the trial date had been set and the trial was due to take place on 7 December 2022. HHJ Dight varied the existing directions for exchange of Witness Statements, so as to require them to be exchanged on 14 November 2022.

Mr Mahpud's Witness Statement and the Third List

25. In the event:

    i) On 26 October Mr Mahpud made a Witness Statement dealing with a number of matters. This dealt only briefly with "*the Defendant's approach to disclosure*". Mr Mahpud's main point was to observe generally that "*documents belonging to Winchester Park Ltd were searched and those that related to the issue of the Unit 6 were disclosed …*", but no details were given as to what exactly had been done.

    ii) A more detailed and complete List of Documents was provided on 27 October ("*Third List*"), which now listed in total some 349 documents or categories of documents; but the same formal deficiencies I have described in connection with the Disclosure Statement remained, i.e. although one could infer from the boxes on p. 2 that various electronic data sources *had* been reviewed, there was no positive affirmation that a search for electronic documents had been carried out and no details of any such search were given. The Disclosure Statement was now signed by a Ms Dermagray, a director of Winchester Park.

Claimant's Application for Declaration

26. The Claimant took the view that there had not been proper compliance with HHJ Dight's Order and so made an application dated 14 November 2013, supported by a Witness Statement of Ms Northover, seeking:

> *"A declaration that the participating tenants have a right to collective enfranchisement … because the Defendant failed to*

> *comply with the provisions of the Order of His Honour Judge Dight CBE … and its Defence was therefore automatically struck out at 4.05pm on 28 October 2022."*

27. Ms Northover's Witness Statement alleged that certain obvious categories of documents were still missing, for example communications between Number 1 and Ms Lauc and Mr Pavlovski before the start of their sub-tenancy, and later communications between the same parties after the dispute arose about return of the sub-tenants' deposit. In this regard Ms Northover had obtained copies of communications between Mr Pavlovski and Number 1's solicitors, CJJ Law, which I have referenced above (see at [13]) and which I will mention again further below (at [31(ii)]). Having set out her various points on disclosure, Ms Northover then said:

> "*The Claimant therefore respectfully applies for a declaration that the participating tenants have right to collective enfranchisement of the Premises and, further, that the Defendant should pay the Claimant's costs of this action*."

Winchester Park's Application for Relief from Sanction

28. On the following day, 15 November, Winchester Park issued its own application seeking relief from sanction. This was supported by a Witness Statement from its solicitor, Ms Thompson, who acknowledged that there had been a breach of HH Judge Dight's Order, but only of a limited kind: this was that, when the documents in the Third List were copied and provided to the Claimant, a number (18) were inadvertently missed in the copying process – with the consequence that they were listed but copies were not provided. This was rectified as soon as the problem was identified. Otherwise, however, Winchester Park took the position that the Order of HHJ Dight had been complied with. Ms Thompson said that was because:

> *"The Defendant maintains that it has conducted a reasonable search of the documents that it holds and has provided all the documents from that reasonable search and those that are within its control that it has asked third parties to search for."*

Further Documents are Disclosed

29. That was not the end of it, however. The hearing before HHJ Parfitt was on 1 December 2022. As noted, that was very shortly before the trial, which was scheduled for 7 December 2022. The Judgment of HHJ Parfitt records that, two days or so before the hearing, Winchester Park disclosed 40 or so further documents (see at [44]). Certain of these documents were to become a major focus at the hearing.

The Judgment of HHJ Parfitt

Denton Stage 1

30. HHJ Parfitt held (Denton Stage 1) that there had been a serious failure to comply with HHJ Dight's Order in relation to disclosure going beyond Winchester Park's failure to provide copies of the 18 documents missed out in its copying process. More particularly, HHJ Parfitt held that (1) the available evidence suggested that obviously

relevant documentation had *not* been disclosed in the Third List dated 27 October (see at [84]), and relatedly (2) no clear explanation had been given as to what searches Winchester Park had in fact been carried out (*ibid*.), and so the Court could have no confidence that disclosure had been properly carried out. At [80], the Judge raised a particular concern as regards electronic disclosure. He said:

> *"I am not satisfied that the Defendant has carried out a proper search of its electronic records. It seems to me if it had carried out a proper search of its electronic records then it would have said so in its various lists of documents, but none of them has said that an electronic search has been carried out."*

31. In forming his assessment on point (1) (i.e., his conclusion that apparently relevant documents had been missed from the Third List), the Judge relied on the following points in particular:

    i) First, an email exchange between Mr Mahpud and Mr Maunder Taylor, the appointed manager of 1 Palace Gate (see above at [7]), dating from September 2018. This exchange had been revealed among the 40 or so additional documents produced by Winchester Park shortly before the hearing. They show Mr Mahpud and Mr Mauder Taylor engaged in correspondence about arranging buildings insurance. Having been sent a buildings insurance schedule on 12 September 2018, Mr Mahpud responded on 13 September to say, "*Please note unit 6 is a commercial unit only and any reference to residential should be removed*". Mr Maunder Taylor replied to say that an inspection had noted "*a bed and bathroom facilities within unit 6*", and so insurers had been notified that it was "*office space with provision for some residential accommodation.*" Mr Mahpud's response made the point that the earlier assessment of the Kensington Planning Office had been that Unit 6 was "*purely commercial and can't be considered as residential*." Mr Maunder Taylor said, "*We've told insurers that it's offics space with a bed, shower and kitchenette facilities*." The Judge's conclusion as to this exchange was that, *"[i]t is impossible to see other than that it is something that should have fallen within the disclosure obligation*" (see at [52].

    ii) Second, the Judge relied on the email exchange I have already referenced above, in April 2020, between Mr Pavlovski, one of the sub-tenants of Unit or Flat 6, and solicitors acting for Number 1, CJJ Law (see above at [13] and [27]). This seems to have been uncovered as a result of the Claimant's inquiries. In his email Mr Pavlovski complains about having been misled into thinking that Flat 6 was available for residential use, when in fact use was restricted to commercial use and this had resulted in the neighbours complaining and a request for return of the deposit paid by Mr Pavlovski and Ms Lauc. In a reply dated 17 April 2020, however, CJJ Law disputed any allegation that Mr Pavlovski and Ms Lauc having been misled, and resisted return of the deposit. The Judge observed that these emails had not appeared in the Third List, and moreover Mr Pavlovski's email referred to two other documents – a letter and an earlier email from CJJ Law – and neither had they been disclosed. The Judge also noted that yet further communications which *had* been disclosed, and which dealt with the topic of the sub-tenant's deposit, appeared to signal the existence of others which had not been (see at [62]).

iii) Third, a further set of email exchanges in the period before 28 October – the date for compliance with HHJ Dight's Order – which showed Winchester Park in contact with solicitors acting for Mr Maunder Taylor, to ask for copies of communications exchanged with Mr Maunder Taylor, which prompted his solicitors to ask, "*Why can't Number One Group or its solicitor produce the correspondence in question*?" There was later correspondence about Winchester Park paying the costs associated with Mr Maunder Taylor's solicitors conducting a search, but this was only after the 28 October deadline for production of the Third List had already passed. On this point, the Judge thought it inadequate that apparently all Winchester Park had done was to contact a third party and make inquiries, because "*what they were obliged to do … [was] actually to search their own records, and in particular their electronic records and find the documents that they have in their possession*".

32. The Judge considered that these failures to comply with the Order of HHJ Dight were serious (see at [82]). That was mainly because of the crucial importance of the disclosure exercise in the context of the Claimant's claim, given the imbalance between the parties in terms of their access to potentially relevant documents: the nature of the central issue meant it was Winchester Park and Number 1 who would have the key documents, since they were parties to the December 2014 Lease, and who had been involved in arranging the controversial sub-tenancy to Ms Luac and Mr Pavlovski in 2018. The Judge thought that comprehensive disclosure of documents concerning these arrangements was critical to a fair trial of the issues. In the circumstances, however, and given that obviously relevant documents had been missed and no explanation had been given of what had been done or of how that had come about, the Judge held that the Court could have no confidence that the disclosure process had been properly carried out and that was a serious matter.

Denton Stage 2

33. As I read it, the Judge's reasoning at Denton Stage 2 (the reasons for the default) was that no good reason had been given. That followed from his conclusions at Stage 1, since the lack of any proper explanation as to what disclosure searches had been carried out meant it was not possible to say why some apparently important documents had been missed (see at [84]). The lack of any explanation at all meant that there was no evidence of any good reason for the default.

Denton Stage 3

34. The Judge then went on to consider "*all the circumstances of the case*" (Denton Stage 3 – and see also CPR, rule 3.9, which the Judge quoted at [85]). On this question, the Judge's assessment was:

i) Winchester Park's defaults had led to serious inefficiency and had resulted in a process which was "*the antithesis of efficient and proportionate litigation*" (see at [86]). This had caused the Claimant to have to incur additional and substantial costs ([87]).

ii) Winchester Park had been given a last chance to get its house in order by means of HHJ Dight's Order, but had failed to do so, thus jeopardising the trial date which was just days away ([88]).

iii) The Defendants had had every opportunity over a period of many months to comply with their disclosure obligations, but had failed to do so ([89]-[92]). The First List was hopelessly inadequate, and even now, there were obvious deficiencies (see at [92]). The upshot was that the situation "*wholly undermines the confidence that the Court can have that this would be a fair trial*" (*ibid*.)

iv) In summary: the integrity of the trial process was undermined; the result of Winchester Park's default was an inefficient and disproportionately expensive process; and all this had come about because of a failure to comply with Orders of the Court (see at [93]).

v) As against that, Winchester Park made a number of arguments, but the Judge found none of them persuasive. As to those arguments –

a) It was said that refusing relief from sanctions would give the Claimant a "*big windfall*", but the Judge did not consider that persuasive because it was often the case when there was an unless Order and in any event here, the sanction was not disproportionate since "*[t]he subject matter of this sanction and this unless order was of vital importance to the integrity of the process and the fairness of the intended trial, so I do not think there is any mileage in the big windfall point*" (see at [95]).

b) It was said that the Court could effectively mitigate the effects of Winchester Park's defaults by (for example) extending the time for trial, allowing cross-examination in relation to any missing documents, and drawing adverse findings. However, HHJ Parfitt did not think it "*fair to the Claimant to leave the Claimant with that as its protection in relation to the very real risk of injustice that has been demonstrated on the material before me all flowing from the Defendant's approach to disclosure*" (see at [96]).

c) It was said that the Claimant could be compensated in costs, but HHJ Parfitt did not consider that costs would adequately answer the problems created by the Defendant's own conduct (see at [97]).

35. The Judge's overall conclusion is then set out at [98] of his Judgment. He refused relief from sanction and granted the declaration sought. He said:

> *"For all those reasons I will not grant relief from sanction. The Defendant's Defence is struck out. In accordance with the order of HHJ Dight, the Claimant has applied, and I will grant a declaration that the participating tenants have a right to collective enfranchisement, and the Defendant shall pay to the Claimant the costs of the action. Such costs to be subject to a detailed assessment if not agreed."*

The Appeal

Grounds of Appeal

36. Permission was initially sought to appeal on 3 Grounds, but was given on only 1. Grounds 1 and 2, on which permission was refused, were in summary that (1) the Judge had erred in finding that no e-disclosure had been undertaken, when in fact it had; and (2) the Judge had erred in finding that Winchester Park had not disclosed all relevant documents in its possession, custody or control, when in fact it had.

37. Ground 3 is as follows:

> "*[1] The learned Judge erred in the exercise of his discretion, and his decision to refuse relief from sanctions (such that the Appellant's defence was struck out) will result in injustice. The learned Judge has made a declaration giving the Respondent a right to enfranchise, following a perceived case management failure. The Appellant has been deprived of a full trial to demonstrate that the Respondent has no right to that declaration in law.*
>
> *[2] The approach taken by the learned Judge was overly draconian and, even assuming the Judge was correct in his factual assessments (relevant to grounds 1 and 2 of this appeal), there were further options open to the Judge which were less draconian than refusing relief. The learned Judge ought to have granted relief and either allowed the Respondent to invite the court to draw adverse inferences in respect of any disclosure failings at the trial or, if the Judge considered that there was insufficient time between the date on which the late disclosure was supplied and the trial, the trial could have been adjourned with the Appellant being required to pay the costs thrown away*."

38. As I understand it, these two sub-paragraphs run together, and are essentially a challenge to the exercise of discretion by the Judge at Denton Stage 3. The first sub-paragraph is a reprise of the "*windfall*" argument run below (see at [34(v)(a)] above), i.e., the point that it was disproportionate and unfair for the Claimants to be given their desired first prize of a declaration as to their claimed right to enfranchisement, when the underlying default was procedural only. The second paragraph is a supplementary and complementary point, namely that there were other steps available to the Judge which he could and should have taken, which would have represented a fairer response given the nature of the default in question.

Application to Admit New Evidence on Appeal

39. Winchester Park made a further application during the hearing of the Appeal before me. This was an application to adduce into evidence a Witness Statement from their solicitor at the time of the disclosure exercise, Ms Thompson of Thompson Allen LLP. This

new evidence confirmed that a search for electronic documents *had* in fact been undertaken, and the failure to tick the box on the Disclosure Statement confirming that that had happened was the result of a technical error on her part. She gave information about the nature of the searches of electronic data undertaken by her client. This included her identifying (1) the email addresses searched, (2) the electronic devices searched, and (3) the keywords used in the searches.

Scope of Ground 3 and Proposed Application to Amend

40. I must also mention a point which arose during the course of the hearing itself, which is that I expressed some concern about the fact that the approach of HHJ Parfitt, once satisfied that he should refuse relief from sanction, had been to make the declaration sought by the Claimant immediately and with no obvious further consideration (see above at [35]). This was despite the fact that the sanction contemplated by the Order of HHJ Dight was not that the Claimant would automatically be entitled to its declaration, but only that it would be entitled to apply for one. The point arose from trying to understand the precise nature of Winchester Park's "*windfall*" argument, which I have referred to above. I drew to the parties' attention the Notes at para. 40.20.3 of the current version of the White Book, including the reference in Wallersteiner v. Moir [1974] 1 WLR 991 (C.A.), to the effect that the making of a declaration as to a party's rights is a judicial act which ought to be made only if the Court is satisfied by evidence, and not on default of pleading, or on admission, or by consent. This prompted some debate as to whether an objection to the approach taken by HHJ Parfitt in granting the Claimant its declaration was already implicit in Appeal Ground 3, and if not then what the approach of the Court should be to a proposed amendment to the Grounds of Appeal. In light of these matters I gave directions for the service of further written submissions by the parties, which were received on 5 March and 7 March 2024 (from the Appellant and Respondent respectively). The Appellant argued that the point was already covered by Ground 3, but that if it was not, then it should be permitted to raise it by way of amendment. The Respondent argued the opposite.

Discussion and Conclusions

The Judge's Exercise of Discretion

41. Leaving aside for the moment the question of the proposed new evidence (see [39] above), and the question of the Judge's decision to grant the declaration sought by the Claimants (see [40] above), I start by emphasising that permission to appeal was given only on Ground 3, not on Grounds 1 and 2 (noted above at [36]). Thus, the Appeal is in effect a challenge to an exercise of discretion by HHJ Parfitt, the precise context being the exercise of discretion in a matter of case management (see, for example, Chartwell Estate Agents Limited v. Fergies Properties SA & Anor [2014] EWCA Civ. 506, [2014] Costs LR 588). There being no appeal on Grounds 1 and 2, moreover, the exercise of discretion must be examined on the basis that the Judge was correct to find that Winchester Park has still not disclosed all relevant documents it had in its control as at the date of the hearing before him, albeit that the matter was just days away from trial.

42. It is of course very well settled that an appeal Court will be very slow to interfere with an exercise of discretion, particularly in the context of case management by the Court below. What is needed is to show that the Judge misdirected himself on the law, or

took into account irrelevant factors, or overlooked relevant factors, or that his decision was so extreme that it fell outside the generous ambit within which reasonable disagreement is possible, such that it can fairly be described as perverse (see, for example, The Commissioners of Police of the Metropolis v. Abdulle & Ors [2015] EWCA Civ. 1260 at [25], and Piglowska v. Piglowski [1999] 1 WLR 1372B-C, per Lord Hoffmann).

43. Here, there is no question that the Judge misdirected himself on the law. He set out in terms at [85] of his Judgment the text of CPR, rule 3.9, as follows:

> "*On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it do deal justly with the application, including the need –*
>
> *(a) for litigation to be conducted efficiently and at proportionate costs, and*
>
> *(b) to enforce compliance with rules, practice directions and orders*".

44. In Mr Berkley's Skeleton Argument, he suggested that the Judge had overlooked certain matters of importance, *viz*. the fact that Winchester Park's disclosure failings were not the result of deliberate suppression or destruction of documents, or of any determined resistance to disclosure, nor even of a totally cavalier approach to disclosure, but were really the result of a combination of poor management by the solicitor retained by the Appellant and a lack of any clear understanding of what steps had to be taken to conduct a reasonable search. Mr Berkley emphasised the lack of any agreed or directed search methodology and the role of the solicitor, and in effect suggested that the failings of the solicitor should not be visited upon the client. Mr Berkley further said that the Judge had failed to consider his broader powers and the likelihood that a fair trial might still be possible if other procedural responses were deployed (e.g., delaying the trial date in order to allow further searches to be undertaken, and/or inviting adverse inferences to be drawn given the absence of certain documents, and/or the making of appropriate orders for costs).

45. The short answer to these points, it seems to me, is that the Judge is bound to have had them in mind, insofar as they are justified and were relevant to the exercise of his discretion. They may not have been spelled out or referenced in terms in his Judgment, but they did not need to be because they are obvious points which the Judge must have been aware of. The Judgement, although very comprehensive, was delivered *extempore*, and allowance must be made for that, and the Judgment construed accordingly and in a common-sense way (see further below at [65]).

46. Turning back to the points made by Mr Berkley KC:

    i) It is true that HHJ Parfitt made no finding that there had been deliberate concealment or a determined resistance to disclosure by Winchester Park, but not having done so he did not need to say expressly that he was then going on

to exercise his discretion on the basis that neither deliberate concealment nor determined resistance had been shown.

ii) As to the Judge failing to have regard to the disclosure failings not being the result of a cavalier approach, I am not sure I agree with the premise of Mr Berkley KC's criticism, because it seems to me the Judge's overall findings *are* consistent with a somewhat cavalier approach to disclosure by Winchester Park. In my opinion however that was not an unfair or unwarranted finding given the procedural background I have explained and which the Judge also set out in some detail.

iii) As to the role of Winchester Park's solicitors, the Judge obviously knew that Winchester Park were represented by solicitors, and would have had well in mind the role played by solicitors generally in the conduct and management of disclosure. I do not think it correct to consider that the Judge simply disregarded such matters.

iv) As to the idea that there were no agreed or directed parameters for disclosure, that seems to me rather to miss the point of the Judge's main criticism, which is that the process for standard disclosure required Winchester Park *itself to describe* what searches it had undertaken, in particular for electronic documents; but having had three opportunities to do so, it had singularly failed to say what it had done, save for the somewhat perfunctory description set out in the Witness Statement of Mr Mahpud served in response to HHJ Dight's Order (see above at [25(i)]). That was still the position as at the date of the hearing before HHJ Parfitt, because the Third List still contained the formal deficiencies present in the First and Second Lists (see above at [16], [17] and [25(ii)]), and Winchester Park's position remained that it had complied with its duty to conduct a reasonable search, but without having explained why it maintained that was the case, and in circumstances where the further documents produced before the hearing and obtained by the Claimants suggested strongly it had not (see above at [31]).

v) As to the question of the Judge's powers and other procedural responses open to him, plainly he did not overlook such points because in his Judgment at [96]-[97] he referred expressly to extending the time for trial, allowing cross-examination on disclosure, drawing adverse inferences, and the making of appropriate costs orders.

47. In short, I do not see this as a case in which relevant matters were overlooked, or irrelevant matters were taken into account. Consequently, I think Mr Cohen was correct in his submissions to say that Winchester Park's challenge was really in the nature of a challenge to the Judge's overall evaluation – i.e., a submission that he had made a decision which was so extreme that no reasonable decision-maker could have made it. I think this is made plain by the terms of Ground 3, taken at face value: the gist of it is really the suggestion that the Judge's approach was entirely disproportionate and he could and should have chosen to do something else. This is really no more than a challenge to the exercise of balancing the available options which the Judge plainly carried out, and what is really being said is that the option he chose was one that no reasonable decision-maker could have settled on.

48. A challenge on this basis is necessarily difficult. It is not enough to show that someone else could, or even very likely would, have made a different decision. It must be shown that no reasonable person could have made the decision which was in fact made. The principle is illustrated by the Piglowska v. Piglowski decision I have referred to above, in which Lord Hoffmann cited the following statement of Asquith LJ in Bellenden (formerly Satterthwaite) v. Satterthwaite [1948] 1 All ER 343, at 345, which had earlier been expressly approved by Lord Fraser of Tullybelton in G v. G (Minors: Court of Appeal) [1985] 1 WLR 647, 651-652:

> *"It is of course not enough for the wife to establish that is court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to intervene."*

49. The present context is of course different, but the principle is equally applicable. The question therefore to address is whether the *"decision exceeds the generous ambit within which reasonable disagreement is possible".* In my opinion, it does not. Others may have responded differently, but I find it impossible to say that the Judge's decision to refuse relief from sanction was plainly wrong and effectively perverse.

50. The truth of it is that the Judge was presented with an unusual and, I think, rather extreme set of facts. The Claimant's case turned on a single issue – the use of Flat or Unit 6 in September 2020. There was some ambiguity as regards the issue, because although the permitted use of Flat or Unit 6 seems to have been limited to commercial use by Winchester Park's Lease with Number 1, other evidence such as the sub-tenancy with Ms Luac and Mr Pavlovski, and CJJ Law's attitude to their attempts to recover their deposit (see above at [31(ii)]), suggested differently. Trial of that issue was only days away. It had been well recognised for many months that disposal of the issue required the production of documents which only Winchester Park was in a position to provide. By the time of the hearing before HHJ Parfitt, Winchester Park had had three opportunities to provide disclosure by way of List, and to provide details of its searches by properly completing its Disclosure Statement, and had failed to do so. The inadequacies in disclosure, as the Judge held, were apparent from (1) the fact that further, and highly material, exchanges with Mr Maunder Taylor had been produced after delivery of the Third List; (2) the fact that highly material exchanges between CJJ Law and Mr Pavlovski again did not appear in the Third List; and (3) the fact that Winchester Park's own exchanges with Mr Maunder Taylor's solicitors indicated that they were relying on him to provide copies of relevant documents, which suggested they had not satisfactorily and thoroughly completed their own searches. The combination of (a) material documents having emerged which had not been disclosed, together with (b) Winchester Park's failure to describe adequately what it had done to search for documents, meant the Judge simply had no confidence that the disclosure exercise had been carried out properly and could be trusted to have produced everything (or at least the majority of things) likely to be relevant to the imminent trial. The problem was a serious one, because on one view of it the newly produced documents

not included in the Third List were supportive of the Claimant's case, and it was likely that there were more relevant but undisclosed documents in existence. All that had consequences for the fairness of the imminent trial process, which was only a few days away.

51. In such circumstances, it seems to me that the Judge was perfectly well entitled to come to the decision he did. In the circumstances as they stood before him, I do not consider that his response was so disproportionate or unfair that it can be described as plainly wrong or unprincipled. I would emphasise three points:

    i) The nature of the relevant sanction – i.e. the striking out of Winchester Park's Defence and it being at liberty to apply for the declaration it sought on an undefended basis – had already been considered during the hearing before HHJ Dight, and in fact as I have noted, the form of Order he made was effectively agreed between the parties. So I do not think it was open to Winchester Park to submit to the Judge that the form of sanction was *per se* unfair.

    ii) It might have had a point to make about proportionality had its defaults not been serious, but as I have noted, the Judge found that the defaults *were* serious, and in my opinion he was justified in doing so. In fact, I think he was justified in particular in stating expressly that the relationship between the defaults in question and the sanction *was* proportional, because the Court's disclosure Orders had been made precisely in order to ensure that Winchester Park's defence was advanced fairly by means of the Claimant having access to all relevant documents touching on the single disputed issue, and that not having been achieved, it was a proportionate response to debar Winchester Park from defending itself, which is what the Order of HHJ Dight contemplated.

    iii) As to the idea that the Judge wrongly overlooked other possible responses, as I have explained, he *did* consider them (see above at [46(v)]), but did not regard them (either al1 or in some combination) as adequate. Again I consider he was fully entitled to do so, because his view was that the possible need for them only arose at all as a result of Winchester Park's own repeated failure to do what it had been ordered to do which the Judge regarded as serious (see his Judgment at [96]-[97]). It seems to me that in doing so, the Judge was correctly placing particular weight on the two factors specifically referenced in CPR, rule 3.9, namely (a) the need for litigation to be conducted efficiently and at proportionate cost, and (b) the need to enforce compliance with rules, practice directions and orders. I think the Judge was effectively saying that other available responses would have increased cost and led to further delay, and would have attached insufficient weight to fact that Winchester Park's predicament only arose because of its own defaults, both historic and ongoing. Others might have taken a different view of such matters, but it seems to me that is irrelevant, because I think HHJ Parfitt was entitled to take the view he did.

52. Pausing there, I would hold that the Appeal should be dismissed. Do the other matters raised by the Appellant make a difference? I move on to consider them in turn.

The Proposed New Evidence

53. The power to admit fresh evidence on appeal is now referenced in CPR rule 52.21(2) ("*Unless it orders otherwise, the appeal court will not receive - … (b) evidence which was not before the lower court*".) It is well-settled, however, that in exercising its discretion, an Appeal Court should have regard to the factors identified in Ladd v. Marshall [1954] 1 WLR 1489, C.A. One such factor is that the evidence could not with reasonable diligence have been obtained for the purposes of the trial or hearing below. Another is whether the evidence is likely to have an important influence on the result. Finally it must be apparently credible.

54. In my opinion, the insurmountable obstacle here is that the fresh evidence is evidence that could have been available in the proceedings below. In fact, the point is more fundamental than that, because the evidence goes to the nature of the searches undertaken by Winchester Park of its electronic documents. That is just the material it was required to produce in its Disclosure Statement, and which on three occasions – corresponding to its First, Second and Third Lists – it had failed to produce (see above at [16], [17] and [25(ii)]). The opportunity to provide the Third List, pursuant to the Order of HHJ Dight, was intended to give Winchester Park one further and final chance to remedy its earlier deficiencies, and the need for a proper account to be given was emphasised by the requirement that Mr Mahpud provide a Witness Statement, setting out (amongst other things) its approach to disclosure (see above at [21]). It did not do so, and in fact maintained the position, prior to the hearing before HHJ Parfitt, that it had fulfilled its disclosure obligations and was in default only in the sense of it having failed to provide copies of 18 documents which had been missed in the relevant copying process (see above at [28]). The application for relief from sanction was put only on that basis.

55. In such circumstances, it seems to me that it would be wrong and unjust at this stage, on appeal, to permit the fresh evidence of Ms Thompson to be adduced, because that would be to allow Winchester Park now to do what it had failed to do in response to HHJ Dight's Order. It is not just a matter of the evidence being reasonably capable of having been adduced in the proceedings below: it was ordered to be produced and was not.

56. Part of Mr Berkley KC's argument was that the Judge had mistakenly assumed that *no* searches of electronic data had been carried out by or on behalf of Winchester Park. Mr Berkley submitted that that mistaken assumption needed to be corrected by means of the new evidence. I do not think the premise of the submission is correct, however. The Judge must have been aware that at least some review of electronic data had been carried out, because the various Disclosure Statements indicated that (for example) PCs and servers had been looked at (see [16] above), and the Third List included copies of many documents, including emails, produced from such electronic sources. Rather, the Judge's complaint was that one could not be clear precisely what had been done in order to find them, and whether it had been sufficiently organised and systematic to qualify as a proper and reliable search. I think this is made clear by the the Judgment at [19], where the point made by the Judge is that " *… the disclosure statement did not go into any detail as to the electronic search that was carried out …*", which is consistent with the idea that he thought something had been done, but could not be sure what.

57. Mr Barkley also said that, given that the discretion reflected in CPR 52.21(2) is a general one, I should not feel constrained by the criteria in Ladd v. Marshall, and instead should be guided more generally by the overriding objective to deal with cases justly. I agree with the general principle that I should seek to further to overriding objective, but fully stated the overriding objective is to "*deal with cases justly and at appropriate cost*". Doing so involves promoting the principle of finality in litigation, and that would not be achieved by admitting fresh evidence at this stage to provide the Court and the Claimants with information which could and should have provided long ago.

Scope of Ground 3 and Proposed Amendment

The Issues

58. As noted above, this point arose from a consideration of [98] of HHJ Parfitt's Judgment, where having refused relief from sanction, he went on immediately to say, "*I will grant a declaration that the participating tenants have a right to collective enfranchisement*." The concern I raised at the hearing was that the Judge may not properly have had in mind the nature of the sanction arising from HHJ Dight's Order, which was not that the declaration sought by the Claimant would automatically be available, only that it would be entitled to apply for one on the basis that Winchester Park was not advancing any defence – but it would still have to make good its entitlement on the evidence, and the Court would need to be satisfied that the claimed entitlement was made out. My concern arose in part from the documents I have referenced above which were the focus of HHJ Parfitt's Judgment, in particular those from Mr Maunder Taylor and the exchanges with CJJ Law, which were somewhat equivocal on the question of use of Unit or Flat 6 as at September 2020, and which at least on one view might be said to support an argument that Unit or Flat 6 was in use for commercial rather than residential purposes as at that time. In such circumstances, my anxiety arose from a concern that a declaration may have been granted in effect automatically, and without the evidence having been considered in order for the Court to assess whether in fact it was objectively justified. I was concerned to know whether this was said to be part of, or was related to, the "*windfall*" argument referenced in Ground 3 of Winchester Park's Grounds of Appeal.

59. In his written submissions filed after the hearing, Mr Berkley KC formulated the point in the following way:

> "*The Judge erred in making a binding declaration without any or any proper consideration of the merits in circumstances where an injustice was caused to the Appellant*".

60. The questions for consideration are (1) whether that challenge was already contained within existing Appeal Ground 3, and (2) if not, then whether permission should be granted at this stage to raise a new Ground of Appeal (or to amend Ground 3 accordingly).

61. What I propose to do is to set out in the next section of this Judgment my analysis of what the Judge did, and then to address these two questions in turn.

Discussion

62. On proper examination, I am satisfied that the Judge approached the matter of granting the Claimant its declaration in an entirely correct way. I come to that view for the following reasons.

63. To begin with, examining the reasoning in [98] of the Judgment in context, I am satisfied that HHJ Parfitt must have in mind the task he had to undertake. He recorded the effect of the sanction accurately (see above at [35]) – i.e., he said that the Defence was struck out, and then referred to the Claimant having "*applied*" for its desired declaration. That was the application made on 14 November 2022, referred to above at [26], and supported by the Witness Statement of Ms Northover. So I think HHJ Parfitt must have had in mind the correct procedural context, which was that an application for the desired declaration had been made which he had to dispose of.

64. I think what is also clear is that HHJ Parfitt felt able to make the declaration sought. Looking carefully at his Judgment, it seems to me that he did not do so automatically and without consideration, but instead must have been satisfied, given the materials he considered during the course of the hearing, that it was a declaration it was appropriate for the Court to make. The context, as Mr Cohen pointed out in his written submissions filed after the hearing before me, included the following:

i) During the course of the hearing the Judge was referred to the evidence necessary for him to form a judgment as to whether a declaration was justified. That included the Claimants' evidence, namely a witness statement of Mr Andrew Sehayek, together with the Defendant's evidence (a further witness statement of Mr Mahpud), and most importantly the Defendant's disclosure, which I have described above (including the Mauder Taylor emails and exchanges with CJJ Law).

ii) The argument before the Judge took place on the footing that if relief from sanction was refused, then the Judge would be fully entitled to make the declaration sought, without any further hearing at which the Defendant would be able to advance any case of its own and challenge the evidence via its own submissions. As I see it, that is the real nature of the "*windfall*" argument advanced by the Defendant's then counsel, Ms Anslow. For example, Ms Anslow submitted that:

> *"… it is quite a big windfall for the Claimant if they manage to get this, this declaration today without any kind of testing, because the, the Defendant's position is quite clear, and they, and they say the evidence is going to go in their favour, that this was a commercial property …".*

iii) I think it clear from the context that the "*testing*" Miss Anslow was referring to was the opportunity to advance its own positive case at a trial (Ground 3 refers to a "*full trial*"), which Winchester Park stood to lose if relief from sanction was refused. The "*windfall*" was not an automatic entitlement to the declaration sought without any judicial consideration, but instead the benefit to the Claimant of being able to press immediately for its declaration at the current hearing on an undefended basis – in effect, the ability to have a shot at an open goal - the

premise of the submission being that that was very likely to succeed, whereas if there was a trial then Winchester Park's ability to advance its own positive case by way of defence might at least give it a chance of achieving a different outcome.

iv) All that, however, is perfectly consistent with the idea that HHJ Parfitt proceeded on the footing that before granting the declaration sought, he had to be satisfied that it was a proper thing to do and was justified on the evidence before him, albeit on an undefended basis and without a "*full trial*". In my opinion, looking at the structure of paragraph [98] of his Judgement, HHJ Parfitt was saying that he was so satisfied. Moreover, I think he was entitled to be, because the evidence before him, although in some senses equivocal, was enough to justify the conclusion he came to, which essentially involved him reaching a decision on a disputed question of fact (i.e., whether Unit or Flat 6 was in use for commercial or residential purposes in September 2020).

65. It is true that these matters are not spelled out in terms in the Judgment of HHJ Parfitt, but the Judgment was delivered *extempore* and allowance needs to be made for that. As Lord Hoffmann put it in Piglowska v. Piglowski at p. 1372F-G:

> "*The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment … . These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how to perform his functions and which matters he should take into account*."

66. It seems to me that in this case, the Appeal Court must proceed on the basis that this experienced Judge was well aware of the exercise he had to conduct, and did so properly.

Ground 3 and the Proposed new Ground/Amendment

67. Mr Berkley did not press very hard the point that a challenge to the Judge's decision to grant a declaration was already contained within existing Ground 3. I think he was correct not to do so. Properly examined, Ground 3 is a challenge to the Judge's exercise of discretion as regards whether to grant or refuse relief from sanction, and does not embrace any challenge to what I consider was a separate decision by him, having refused relief from sanction, to grant the declaration sought by the Claimant.

68. The Court has a discretion to allow amendments to an Appellant's Notice out of time, but needs to consider a number of factors before doing so, including the question whether there is a real prospect of the amendment succeeding, the lateness of the application, the reasons for the lateness, the earlier history and the effect that the application would have on the litigants and the litigation generally (see Lighting and Lamps UK Limited & Anor v. David Clarke [2016] EWCA Civ. 5, at [32]). Here, the intended further Ground comes very late, but more significantly in my view, when properly considered it has no real prospect of success for the reasons explained above: the Judge, who was seised of the Claimant's application seeking a declaration, formed the view that in the absence of any positive defence at a trial, the declaration was one

he could properly make. That view seems not to have been contested, and in any event I consider it was a view the Judge was entitled to come to on the evidence before him, albeit that that evidence was somewhat equivocal. I therefore refuse Winchester Park's application to amend its Grounds of Appeal.

Overall Conclusion

69. The result is that the Appeal is dismissed.