Neutral Citation Number: [2014] EWHC 2981 (Ch)

Claim No. HC13D00549
Appeal Ref: CH/2014/0061

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**
**ON APPEAL FROM THE SENIOR COURT COSTS OFFICE**
**COSTS JUDGE MASTER ROWLEY**

**IN THE MATTER OF**
**1,3 & 5 ARGALL AVENUE**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/09/2014

**Before** :

**THE HONOURABLE MR JUSTICE BARLING**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**NORAH CHRISTINA LONG** — **Claimant/ Appellant**

**- and -**

**(1) VALUE PROPERTIES LIMITED**

**(2) OCEAN TRADE LIMITED** — **Defendants/ Respondents**

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Mr Roger Mallalieu** of counsel (instructed by **Edwards Duthie Solicitors**) for the **Claimant**
**Mr Guy Holland** of counsel (instructed by **Groom Halliday Solicitors and Temple Cost Lawyers**) for the **First Defendant**
**Mr Donal Moran** Cost Lawyer (instructed by **London Solicitors LLP**) for the **Second Defendant**

Hearing dates: 16th and 17th June 2014

- - - - - - - - - - - - - - - - - - - - -

**Judgment**

**Mr Justice Barling:**

## Introduction

1. This appeal raises the following questions (i) whether a breach of the CPR has occurred here, (ii) if so, what is the applicable sanction, if any, for that breach, and (iii) whether relief from any such sanction should be granted. The hearing of the appeal took place before the recent decision of the Court of Appeal in *Denton v WH White Ltd & Others* [2014] EWCA Civ 906, which explains and clarifies the principles formulated in the well-known case of *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795, and provides further guidance as to the interpretation and application of CPR r.3.9 relating to relief from sanctions for breach of rules, practice directions and orders. In the light of *Denton* both sides have helpfully provided me with further written submissions as to the effect of that judgment in the context of the appeal.

## Background

2. The background facts are not in issue and can be briefly stated. In about 2011 a dispute arose over the use by the defendants of parking spaces adjoining property of which the claimant and her late husband were the lessees. The precise details of the dispute do not matter for present purposes. In letters before action, the claimant's solicitors informed the defendants that the claimant and her husband were represented under the terms of a conditional fee agreement (CFA) dated 12 October 2011 with success fee, and served on them a notice of funding of the claim (N251) as required by the CPR. The defendants were also informed that the claimant's counsel was acting under a CFA. It is accepted that these notices were served within the time stipulated in the CPR.

3. On 7 February 2013 proceedings were issued against the defendants in respect of the claim. Shortly afterwards the claimant's husband died, and the claim continued in the name of the claimant alone. Thereafter it was settled, and a consent order was made on 15th August 2013 requiring the defendants to pay the claimant's costs, those costs to be the subject of a detailed assessment on a standard basis if not agreed.

4. Under CPR r.47.7 the claimant had 3 months from the date of the consent order to commence detailed assessment proceedings. In fact proceedings were commenced after 2 months: it is common ground that on 17 October 2013 the claimant's solicitors served on the defendants the only two documents identified in r.47.6(1) as being required for the commencement of those proceedings, namely notice of commencement (Form N252) and the claimant's bill of costs.

5. The Practice Direction to Part 47 identifies certain further information which must be supplied by the receiving party to the paying party in certain situations. One of these is where the detailed assessment is in respect of both base costs and "an additional liability". "Additional liability" includes the percentage increase or success fee in a CFA (see Part 43.2(1) (l) and (o)). In the present case, the further information is identified in 47PD.32.5(1)(c) and (d), and consisted of a "statement of the reasons for the percentage increase or a copy of the risk assessment prepared at the time that the [CFA] was entered into", together with a copy of the CFA itself ("the Further Information"). It is not disputed that the Further Information was required to be supplied by the claimant by virtue of 47PD.32.7. However, one of the issues between

the parties is whether it was required to be supplied at the commencement of the detailed assessment proceedings, or could be supplied later.

6. By an oversight, the claimant's solicitors did not serve the Further Information on 17 October 2013, at the same time as they served the two documents identified in CPR r.47.6(1). Given that detailed assessment proceedings had begun on 17 October 2013, under r.47.9(2) the defendants had 21 days (ie until 7 November 2013) to file points of dispute. On 5 November the second defendant requested a 14 day extension to serve this document, and on 6 November the claimant agreed to extend time for both defendants. On 14 November 2013 points of dispute were served in which, for the first time, both the defendants alleged non-compliance with 47PD.32, and stated that accordingly the success fees of counsel and solicitors were not recoverable from the defendants.

7. The claimant's solicitors then served the Further Information on 22 November 2013, under cover of a letter of 20 November 2013. In that letter they apologised for the oversight but pointed out that a telephone call, email or fax to them would have resolved the omission immediately, that no prejudice had been caused to the defendants save for the cost of preparing points of dispute without the benefit of the Further Information, and that if the defendants were going to maintain the complaint the claimant would apply for relief from sanctions. With a view to resolving the matter without the need for such an application, the letter offered to provide time for the defendants to amend the points of dispute in the light of the Further Information. In the event, no agreement could be reached and so on 28 November the claimant issued an application for relief, which is the subject of this appeal.

8. I am told that together the success fees of counsel and solicitors amount to £48,462, comprised in a total bill of £131,937, which will go to detailed assessment.

**The Judgment of Master Rowley**

9. The application for relief was heard on 13 January 2014 by Costs Judge Master Rowley ("the Judge"). The case proceeded on the basis that if there had been non-compliance, the applicable sanction was under CPR r.44.3B(1)(d), which imposes an "all or nothing" penalty removing the claimant's right to recover *any* of the success fee from the defendants. Non-compliance was found and the application for relief was refused. The Judge granted permission to appeal.

10. Before the Judge the claimant's legal representative (not Mr Mallalieu, who appears for the claimant in this appeal) argued, first, that on the true construction of the relevant rules the claimant was not required to serve the Further Information at the same time as the detailed assessment proceedings were commenced, and was entitled to serve it later. The Judge did not expressly deal with that argument but must be taken to have rejected it, as he went on to apply the principles relating to relief from sanctions laid down by the Court of Appeal in *Mitchell*, and refused relief in the light of them.

11. The second limb of the claimant's argument before the Judge appeared to be as follows: although in the light of *Mitchell* it could not be submitted that the breach of the rules was "trivial" or that there was a "good reason" for it, nevertheless the Judge could and should grant relief on the basis that CPR r.3.9(1) requires the court to

consider "all the circumstances of the case, so as to enable it to deal justly with the application".

12. It is clear that the Judge reached the conclusion he did reluctantly. He was inclined to the view that the non-compliance here might have been regarded as trivial, but considered that *Mitchell* precluded that approach. It also precluded there being a "good reason" for non-compliance in this case. That being so the Judge clearly regarded himself as bound to refuse relief (see paragraphs 38-9 of his judgment). He did not go on to consider the factors in r.3.9, and in particular the requirement to deal justly with the application.

13. However, the Judge found that little prejudice had been caused by the claimant's omission, which the defendants could easily have resolved had they wished to do so. The default had been rectified "promptly" once brought to the claimant's solicitors' attention, and the application for relief had been made "extremely quickly".

14. Further, the Judge had "qualms" about the ease with which a breach of this requirement could occur, compared with the draconian nature of the sanction for the breach. In this regard he noted that on the defendants' interpretation of the CPR, if the Further Information was not served at the same time as the bill of costs, a breach would occur, and the sanction for that breach was to forfeit recovery of the *whole* of the additional liability in question, in this case the success fee under the CFA. The Judge contrasted that situation with the effect of a failure to serve notice of funding (N251) in due time. There the sanction was to lose the right to recovery for the period of default only: once the omission was rectified the position was restored. The Judge considered that this difference was particularly odd given that more prejudice was caused by a failure to serve N251, thereby leaving the other side in complete ignorance of the existence of a funding arrangement, than by a failure to supply details of a CFA whose existence is already known.

**The relevant provisions of the CPR**

15. Much of the argument before me has been centred on the interaction between, and the wording of, a number of provisions of the CPR and the relevant practice direction. It is convenient to set these out verbatim, so far as relevant. It will be noted that in certain cases the rules, in particular those which deal with CFAs, only remain operative while these specific funding arrangements, which were effectively discontinued with the abolition of the recoverability of success fees and "after the event" insurance premiums, work their way through the system. The main provisions are as follows:

> **The overriding objective**
> 1.1— (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate—
> (i) to the amount of money involved;
> (ii) to the importance of the case;

(iii) to the complexity of the issues; and
(iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases ; and
(f) enforcing compliance with rules, practice directions and orders.

**Application by the court of the overriding objective**
1.2 The court must seek to give effect to the overriding objective when it—
(a) exercises any power given to it by the Rules; or
(b)interprets any rule…

**Relief from sanctions**
3.9—(1) 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 to deal justly with the application, including the need—
(a) for litigation to be conducted efficiently and at proportionate cost; and
(b) to enforce compliance with rules, practice directions and orders.

**Commencement of detailed assessment proceedings**
47.6— (1) Detailed assessment proceedings are commenced by the receiving party serving on the paying party—
(a) notice of commencement in the relevant practice form; and
(b) a copy of the bill of costs.

[NB. Rule 47.7 provides for a period of 3 months from the date of judgment for commencing detailed assessment proceedings.]

**Points of dispute and consequence of not serving**
47.9—(1) The paying party and any other party to the detailed assessment proceedings may dispute any item in the bill of costs by serving points of dispute on—
(a) the receiving party; and
(b) ….
(2) The period for serving points of dispute is 21 days after the date of service of the notice of commencement.

**Detailed assessment hearing**
47.14— (1) Where points of dispute are served in accordance with this Part, the receiving party must file a request for a detailed assessment hearing within 3 months of the expiry of the period for commencing detailed assessment proceedings as specified—
(a) in rule 47.7; or
(b) by any direction of the court.
…..

**THE COSTS PRACTICE DIRECTION**

**Section 32 Commencement of detailed assessment proceedings: Rule 47.6**

32.2 A detailed assessment may be in respect of:

(1) …

(2) ….

(3) both base costs and additional liability.

……

32.3 If the detailed assessment is in respect of costs without any additional liability, the receiving party must serve on the paying party and all the other relevant persons the following documents:

(a) a notice of commencement;

(b) a copy of the bill of costs;

(c) copies of the fee notes of counsel and of any expert in respect of fees claimed in the bill;

(d) written evidence as to any other disbursement which is claimed and which exceeds £500;

(e) a statement giving the name and address for service of any person upon whom the receiving party intends to serve the notice of commencement.

…..

32.5 The relevant details of an additional liability are as follows:

(1) In the case of a conditional fee agreement with a success fee:

(a) ….

(b) ….

(c) where the conditional fee agreement was entered into on or after 1st November 2005…., either a statement of the reasons for the percentage increase or a copy of the risk assessment prepared at the time that the conditional fee agreement was entered into;

(d) if the conditional fee agreement is not disclosed ……[NB In the present case the CFA was disclosed]

……

32.7 If a detailed assessment is in respect of both base costs and an additional liability, the receiving party must serve on the paying party…. the documents listed in paragraph 32.3 and the documents giving relevant details of an additional liability listed in paragraph 32.5.

**PART 44 GENERAL RULES ABOUT COSTS [BEFORE APRIL 1, 2013]**

**Limits on recovery under funding arrangements**

44.3B— (1) Unless the court orders otherwise, a party may not recover as an additional liability—

(a) …….

(b) …….

(c) any additional liability for any period during which that party failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order;

(d) any percentage increase where that party has failed to comply with—

(i) a requirement in the Costs Practice Direction; or

(ii) a court order,

to disclose in any assessment proceedings the reasons for setting the percentage increase at the level stated in the conditional fee agreement;

(e) any insurance premium where that party has failed to provide information about the insurance policy in question by the time required by a rule, practice direction or court order.

…….

(Rule 3.9 sets out the circumstances the court will consider on an application for relief from a sanction for failure to comply with any rule, practice direction or court order.)

**Providing information about funding arrangements**

44.15—(1) A party who seeks to recover an additional liability must provide information about the funding arrangement to the court and to other parties as required by a rule, practice direction or court order.

…..

(The Costs Practice Direction sets out—

- the information to be provided when a party issues or responds to a claim form, files an allocation questionnaire, a pre-trial check list, and a claim for costs;
- …)

(Rule 44.3B sets out situations where a party will not recover a sum representing any additional liability.)

**The appeal**

16. Before me the claimant's case has been put slightly differently from the argument below. Mr Mallalieu, who appears for the claimant, relies upon three grounds of appeal:

(a) there was no breach of the CPR by the claimant in failing to provide the Further Information at the commencement of the detailed assessment proceedings;

(b) if, contrary to (a), the claimant was in breach, the applicable sanction was not to be found in r.44.3(B)(1)(d), which applies only where there has been a complete failure to serve the information in question, but rather in r.44.3(B)(1)(c);

(c) if there was a breach, and if the more severe sanction was applicable, the Judge ought to have found that the breach was trivial and/or ought in all the circumstances to have granted relief.

17. Ground (a) was argued in the court below. Ground (b) is new, and Mr Mallalieu seeks permission to raise it on appeal. As to (c) Mr Mallalieu has sought to withdraw the concession made by the claimant's representative at the hearing before the Judge, that the breach (if there was one) could not be characterised as "trivial" in *Mitchell* terms.

18. Mr Holland, who appeared for the first defendant, made no objection to the claimant raising ground (b), other than pointing out that permission to raise it was needed. It is clearly sensible for this point to be dealt with alongside point (a) as they are closely related: one deals with breach and the other with the sanction for that breach. I therefore give permission.

19. I also give permission to withdraw the concession and to argue ground (c). Mr Holland referred to dicta of the Court of Appeal in *Jones v MBNA International Bank Ltd*, (30th June 2000, unreported). There Lord Justice May said:

> "Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought….It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand."

The learned judge then stated that this general principle applied in all but exceptional cases. I was also referred to the Court of Appeal's judgment in *Slack & Partners Ltd v Slack* [2010] EWCA Civ 204.

20. That principle has no application here for a number of reasons. First, notwithstanding the concession the Judge dealt with the merits of the "triviality" argument, merely referring to the concession as reinforcing the view at which he had arrived (paragraphs 36 and 37 of his judgment). Second, the concession was only made in the course of argument before the Judge, and therefore had no effect on the other side's preparation for that hearing, which included covering this point. Third, the points made to the Judge by the claimant's representative seem to have included the same arguments concerning the nature and seriousness of the alleged breach of the CPR as would have been made in relation to "triviality". Fourth, Mr Holland does not submit that he is taken by surprise by reason of the claimant seeking to withdraw the concession on this appeal. Finally, as will be seen, the decision in *Denton* has re-interpreted the concept of "trivial" in such a way that it is unlikely any such concession would have been made below had *Denton* been available then.

**Ground (a): Was there a breach?**

21. As I have already said, it is common ground that the Further Information was required to be supplied by the claimant, by virtue of 47PD.32.7 combined with 47PD.32.5(1)(c) and (d). The question is whether, as the defendants contend and as the Judge must have accepted, this must be done at the time that the notice of commencement of detailed assessment proceedings (N252) is served, or whether, as the claimant submits, the obligation can be discharged, and any breach avoided, by provision of the Further Information at a later stage in the proceedings.

22. It is not in dispute that the notice of commencement was given on 17 October 2013 and that the Further Information was served on the 22 November 2013 in the circumstances I have outlined above (paragraphs 6 and 7).

23. Nor is it in dispute that the detailed assessment proceedings in this case were properly commenced when the two documents referred to in r.47.6(1)(a) and (b) were served on the defendants on 17 October 2013. Thus, the defendants do not argue that the proper commencement of proceedings under r.47.6 is dependent on the service of anything in addition to those two documents. Indeed, such an argument would hardly assist them as, if it were correct, the defendants' case that the claimant was in breach of the rules by failing to serve the Further Information at the same time as those two

documents might well founder: the relevant proceedings would very arguably only be commenced when all the required documents had been served; and provided that occurred within the 3 month period stipulated in r.47.7 (as in fact it did in the present case), there would arguably be no breach at all. Even where there is a breach by virtue of late commencement, r.47.8(3) appears to limit the sanction to the disallowance of interest otherwise payable under the Judgments Act 1838 or the County Courts Act 1984, except where there is misconduct of some kind.

24. In his skeleton argument Mr Mallalieu suggests that the Judge proceeded on the "false premise" that service of the Further Information was required in order properly to commence detailed assessment proceedings. I can see nothing in his judgment to substantiate that suggestion. On the contrary, the Judge appears to take as a "given" that proceedings were commenced on 17 October 2013 (see paragraph 1 of his judgment). Mr Mallalieu also appears to be mistaken in submitting that His Honour Judge Iain Hughes QC was acting on the same false premise in *Middleton v Vosper Thorneycroft (UK) Ltd* (Winchester County Court 2nd June 2009). I will refer to that decision again later.

25. At any rate, as I have said, both sides agree that proceedings were commenced on 17 October 2013.

26. The defendants' case is that although there is admittedly no *express* requirement, in 47PD.32 or anywhere else, to serve the Further Information at the same time as the commencement of detailed assessment proceedings, nevertheless that is to be implied.

27. In support of this implication Mr Holland submits that it is necessary to read CPR r.47.6, 47.7 and 47.9 with 47PD.32 and to consider the purpose of the rules within the detailed assessment process. He relies in particular on r.47.9, which requires the paying party to serve any points of dispute relating to the bill of costs within 21 days of service of the notice of commencement under r.47.6. If the points of dispute are served late, the paying party may not be heard at the detailed assessment unless the court gives permission: r.47.9 (3).

28. In the defendants' submission the purposes of the rules and practice directions are to ensure that (i) the detailed assessment process is commenced within a reasonable period, (ii) the paying party has an opportunity to understand and assess the merits of any justification put forward by the receiving party for any additional liability claimed, (iii) the receiving party is put on notice of any points of dispute in good time before the detailed assessment hearing, and (iv) the receiving party is able to assess the merits of the costs claim and make any appropriate offer of settlement. This, he submits, accords with the overriding objective by ensuring each party knows the other's case before the final hearing.

29. In order to achieve those purposes, it is necessary that the details of the additional liability required by 47PD.32 are served prior to the preparation of the points of dispute. If the claimant's argument, that there is no obligation to serve the material in question until the end of the assessment process, were correct, it would encourage receiving parties to provide the additional information only at the last possible moment, to the disadvantage of the paying party who would have much less time to prepare its arguments. There would also be undesirable amendments to points of

dispute, points of response etc with consequent delays, expense and inefficiencies – all at odds with the overriding objective.

30. In support of the defendants' case Mr Holland prayed in aid the decision in *Middleton* (above). There, on an appeal from a detailed assessment by the costs judge, the court held that the statement of reasons for the percentage increase (one of the elements of the Further Information in the present case) was required to be served at the same time as the commencement of the assessment proceedings. In so holding the court accepted the above arguments of Mr Holland (made in that case, as it happens, by Mr Mallalieu). The court also referred to the heading of the Costs Practice Direction, Section 32 (see above) as indicating that section 32 must be read with r.47.6. Before me, Mr Holland accepted that the heading could not be determinative, but he said it was relevant to the necessary implication.

31. In *Middleton* the learned judge also pointed out that in a case, such as the present, where the detailed assessment is in respect of both base costs and an additional liability, 47PD.32.7 requires the receiving party to serve the documents listed in paragraph 32.3 as well as those in paragraph 32.5 relating to the relevant details of the additional liability. The documents in 32.3 include the notice of commencement and the bill of costs ie the same documents as are required in order to commence the assessment process. The learned judge pointed out that it cannot have been the expectation that those documents should be served twice, and so it is logical to conclude that all the documents are intended to be served together at the commencement of the assessment. (See paragraphs 33-36 of that judgment.)

32. Mr Holland also drew my attention to the judgment of Mrs Justice Slade, sitting with assessors, in *Light On Line Ltd and Another v Zumtobel Lighting Ltd* [2013] 1 Costs LR 129, which involved *inter alia* the question whether there had been a breach of 47PD.32.5(2)(c), by virtue of a failure to serve an insurance certificate (the insurance premium being the additional liability claimed in that case) at the same time as the notice of commencement and bill of costs. The learned judge held that there had been a breach:

> "Although there was no breach of CPD 32.5(2)(c) in providing the redacted rather than the un-redacted insurance certificate there was a clear breach of the requirement of CPR 47.6 with CPD 32.4 and 32.5(2) to serve the insurance certificate with the Bill of Costs. The Notice of Commencement and Bill of Costs were served on 13 April 2011. The redacted insurance certificate…was not served until six months later, 18 November 2011." (Paragraph 69 of the judgment)

33. Although that case concerned an insurance premium as the additional liability, the conclusion in the citation above would equally apply to all parts of section 32. However, Mr Holland very properly accepted that the point with which we are concerned did not appear to have been the subject of any dispute and was therefore not argued in that case.

34. Mr Moran, who appeared for the second defendant, supported Mr Holland's submissions. In addition he stated that practitioners and litigants had always assumed that the additional material was required to be supplied at the commencement of the detailed assessment. The claimant's interpretation would give a receiving party an

unfair advantage over the paying party and would lead to more satellite litigation. It was very important that paying parties should be given full disclosure at the outset.

35. For the claimant Mr Mallalieu submits that in holding, (as he must be taken to have done) that the obligation was to provide the Further Information at the *commencement* of the detailed assessment proceedings, the Judge misinterpreted the relevant provisions of the CPR. Mr Mallalieu accepts that commonsense and the structure of the rules relating to detailed assessment proceedings suggest that the Further Information should be provided at or about the commencement of the proceedings, in time for the paying party to take account of it in any points of dispute. However, he submits that to point to what is good practice is quite different from saying that there is a rule to that effect – particularly a rule breach of which is visited by the draconian sanction for which the defendants contend. In that regard he points out that the claimant's primary argument (no such rule and therefore no breach here) is linked with its first alternative argument (if there is a breach, the wrong sanction has been applied).

36. He contends that there is simply no such rule to be found anywhere in the CPR or relevant practice direction, and that there can therefore be no breach provided that the documents in question are served in the course of the detailed assessment proceedings, as they admittedly were in this case.

37. These are powerful arguments – on both sides - and it is unsatisfactory that reliance should have to be placed upon an implication rather than an express provision in the context of a matter as important as this. Nevertheless, I have come to the conclusion that Mr Holland's arguments are to be preferred on this point. The rules for detailed assessment in a case where additional liability forms part of the claim would become very much less coherent, effective and fair if the claimant's argument were correct, for the reasons given by the court in *Middleton* and elaborated by Mr Holland.

38. It is further to be noted that at the stage when detailed assessment proceedings are commenced, the court itself does not yet have a role, and the procedural steps are determined by the parties. The court is not normally involved until some time later, after close of the assessment pleadings. If the additional material identified in 32.7 were required to be served only at some indeterminate time before the end of the entire assessment process, in many cases it would be necessary for the paying party to involve the court at a much earlier stage, in order to persuade it to make a specific order for disclosure. This, too, would add delay, expense and inefficiency to the assessment process, and would be wholly unacceptable.

39. In imposing an unequivocal obligation to supply the additional documents without expressing a time for that supply, but directly linking their supply with that of the documents in r.47.6, the drafters of the CPR and the practice direction clearly intended the additional documents to be provided at the same time as those specified in r.47.6. Any other interpretation would make a nonsense of the structure of the rules governing detailed assessment, and would have the undesirable effects I have identified.

40. In reaching this conclusion I have had regard to the express obligation on the court to give effect to the overriding objective when interpreting any rule (see above). The interpretation I prefer would much better serve that objective and virtually all the

specific factors referred to in CPR r.1.2 by, in particular, (i) enabling the court to deal with detailed assessments justly and at proportionate cost, (ii) ensuring that parties are on an equal footing (iii) saving expense (iv) ensuring the case is dealt with expeditiously and fairly, and (v) allotting an appropriate share of the court's resources.

41. I have also had regard to my conclusion on the claimant's first alternative point relating to the applicable sanction, to which I now turn. Had I reached a different conclusion in relation to that, it might well have affected the view I have taken here. I do not believe that one can entirely separate the rule from the penalty imposed for breach of the rule, particularly where the content of the rule has to be determined by necessary implication.

**Ground (b): What is the applicable sanction?**

42. The claimant contends that the applicable sanction for this breach is imposed by CPR r.44.3(B)(1)(c), and not by r.44.3(B)(1)(d). It is argued that by its terms the latter applies only where there has been a complete failure to serve the required information in the course of the assessment process, as distinct from late disclosure. This, the claimant submits, is clear from the wording: "…where that party has failed to comply with …a requirement…..to disclose in any assessment proceedings…" In the claimant's submission this interpretation is also consistent with the severity of the sanction, which is to render the *whole* success fee irrecoverable. Such a draconian – "all or nothing" - sanction could not be fair or proportionate for, eg, a very short delay in supplying the required details.

43. In this regard Mr Mallalieu relies upon the disquiet expressed by the Judge at what he clearly considered the disproportionate nature of the sanction for a breach such as the present, particularly when compared with the much less draconian sanctions imposed for breaches which by their nature are of a significantly more serious nature (see paragraph 14 above).

44. Mr Mallalieu points to r.44.3(B)(1)(c), which does not appear to have been drawn to the attention of the Judge. By contrast, this provides for a graduated sanction specifically referable to the period of default in the supply of required information. Thus, r.44.3B(1)(c) refers to a failure to provide information 'by the time required by a rule, practice direction or court order' – a failure to disclose 'on time' – and imposes a time-related sanction accordingly. R.44.3B(1)(d) makes no reference to any failure to disclose on time, because that is not what it is addressing. By the same token, it imposes a 'total' sanction, because it is directed at a 'total' failure to comply.

45. Mr Holland accepts that if applicable to late provision of the Further Information, r.44.3(B)(1)(d) may impose a harsh sanction. He makes two points: first, that is the intended result of the change in the approach to relief from sanctions, as explained by the Court of Appeal in *Mitchell*, although the principles in *Mitchell* would allow relief to be granted where the breach was trivial or there was a good reason for it; second, he submits that if the claimant is right, and the applicable sanction is under r.44.3B(1)(c), then that would not impose much of a sanction at all: little work would normally be done by the receiving party's legal representatives between the commencement of assessment and the receipt of points of dispute, and so the

disallowance of the percentage increase in respect of work done in that period would not be a significant penalty.

46. I do not find the latter argument convincing. It is not at all obvious that little or no work will be done by the receiving party at the stage in question; if a substantial dispute about costs is anticipated, a significant amount of work may be necessary even before the points of dispute are received. In any event the longer the breach lasts the more work is likely to have to be done, and the greater the penalty of disallowance.

47. Mr Holland also submits that r.44.3B(1)(c) only relates to failure to provide information about the fact there is a funding arrangement *in place at all*, ie to the situation prior to the service of N251, and has no application to the present situation, which is covered by r.44.3(B)(1)(d). He argues that if r.44.3B(1)(c) applied, this would render r.44.3B(1)(d) superfluous: a failure to provide the information at all within the proceedings would lead to a total disallowance under r.44.3B(1)(c) in any event, and r.44.3B(1)(d) would be otiose.

48. Mr Moran for the second defendant argued to the same effect. In his submission, r.44.3B(1)(c) only applies to the main proceedings and is *functus* once one reaches the assessment stage: thus here we are only concerned with r.44.3(B)(1)(d).

49. The problem with this last point is that there is nothing whatsoever in the wording of r.44.3B(1)(c) which would support a limitation of that kind. On the contrary, the wording used is about as wide as it could be: "failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order". No doubt this is apt to cover a failure to provide N251 in the context of the main proceedings, but why should it be limited to that situation? The wording is easily wide enough to apply also to defaults arising at the assessment stage, including situations such as the present. In the absence of some binding authority I would be reluctant to endorse an interpretation which imposes a limitation at odds with the ordinary, natural meaning of the words. No such authority has been drawn to my attention.

50. Further, as Mr Mallalieu pointed out, if r.44.3B(1)(c) cannot be applied to assessment proceedings, there would be no sanction at all for failure to supply that element of the Further Information identified in 47PD.32.5(1)(d). It will be recalled that this provision requires disclosure of the CFA itself or equivalent (paragraphs 5 and 15 above), whereas the sanction in r.44.3B(1)(d) is only applicable in respect of an "additional liability" consisting of a "percentage increase"; it therefore only applies to the information identified in 47PD.32.5(1)(c), and has no application to the information in 47PD.32.5(1)(d).

51. Mr Holland also argued that in the case of a success fee, the more general wording of r.44.3B(1)(c) should be taken to have been displaced by the tailored provision of r.44.3B(1)(d), which was specifically aimed at such fees.

52. There is another point, not raised by Mr Holland, with regard to the sanction in r.44.3B(1)(e) for failure to "provide information about the insurance policy in question by the time required by a rule, practice direction or court order". On the reasonable assumption that the obligation to serve the information at the commencement of the detailed assessment process also applies to (e), then the

sanction for even a short delay in supply is expressly to render the whole premium irrecoverable – ie "all or nothing", subject to an application for relief. Further, recourse to the sanction under (c) instead would not appear to assist there, as (c) is not so obviously applicable to a single, discrete item such as an insurance premium, and even if it does apply it, too, would seem to have the effect of disallowing the whole amount of the premium. The wording of (e) therefore lends some support to Mr Holland's argument that the sanction in (c) is dealing with a distinct situation and/or is displaced by the more targeted sanctions in (d) (and (e)).

53. As against these problems, the claimant's interpretation has the obvious merit not just of consistency with the extremely wide and non-specific wording of (c) but also of resolving the particular anomalies and lack of proportionality which troubled the Judge; it removes the glaring inconsistency between, for example, the treatment of a failure to serve N251 in time or the late commencement of detailed assessment proceedings, (proportionate and/or comparatively light sanctions) and the disproportionate sanction for the breach in this case if (d) were to apply (total disallowance of success fees).

54. It seems to me that whichever interpretation is adopted there will remain anomalies and uncertainties. The provisions as they currently stand are obscure, unnecessarily complex, and in need of rationalisation. Nevertheless, after some hesitation, I have concluded that the claimant is right on this point, and that the applicable sanction for a breach of this kind is to be found in r.44.3B(1)(c), and that r.44.3B(1)(d) is not yet engaged, there having been no failure to fulfil an obligation "to disclose [the relevant details] in any assessment proceedings …". I consider that this interpretation is likely to result in fewer anomalies and to give effect better to the overriding objective, to which the court is bound to have regard when interpreting these rules.

**Ground (c): Should relief from sanctions be granted?**

55. In case I am wrong about this I should deal with the claimant's second alternative submission, that if the more severe sanction under r.44.3B(1)(d) is applicable, the Judge ought to have found that the breach was trivial and ought in all the circumstances to have granted relief under CPR r.3.9 (the text of which is at paragraph 15 above). The sanction imposed by r.44.3B(1)(d) applies '[u]nless the Court orders otherwise'. Therefore the court has a discretion not to apply the sanction. It is common ground that that discretion must be exercised in accordance with r.3.9 and applicable case law.

56. As already mentioned, following the hearing of this appeal the Court of Appeal's decision in *Denton* was promulgated, and the parties have sent me written submissions about the effect of that case in the context of the present appeal.

57. In their joint judgment the Master of the Rolls and Vos LJ ("the Majority") said that the guidance in paragraphs 40 and 41 of *Mitchell* remains "substantially sound" but that it had been misinterpreted in certain cases and so they proposed to restate the required approach in a little more detail. They continued:

> "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages

rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]". We shall consider each of these stages in turn identifying how they should be applied in practice. We recognise that hard-pressed first instance judges need a clear exposition of how the provisions of rule 3.9(1) should be given effect. We hope that what follows will avoid the need in future to resort to the earlier authorities." (Paragraph 24)

58. In relation to the first stage, the Majority noted that the word "triviality" had given rise to difficulty, for example whether a substantial delay in compliance with the terms of a rule or order, which has had no effect on the efficient running of the litigation, is or is not capable of being regarded as trivial. (I interject to point out that this was almost exactly the issue confronting the Judge in the present case.) The Majority stated that:

> "it would be preferable if in future the focus of the enquiry at the first stage should not be on whether the breach has been trivial. Rather, it should be on whether the breach has been serious or significant. It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which "neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation". Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most useful measure of whether a breach has been serious or significant. But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example of such a breach is a failure to pay court fees. We therefore prefer simply to say that, in evaluating a breach, judges should assess its seriousness and significance. We recognise that the concepts of seriousness and significance are not hard-edged and that there are degrees of seriousness and significance, but we hope that, assisted by the guidance given in this decision and its application in individual cases over time, courts will deal with these applications in a consistent manner." (Paragraph 25)

59. The Majority said that if the breach was neither serious nor significant then relief would normally be given, and little time need be spent on the second and third stages. They added that the assessment of the seriousness and significance of the breach should not, initially at least, involve a consideration of other unrelated past non-compliance. That could be taken into account at the third stage. (Paragraphs 27-8)

60. The second stage was mainly directed to breaches which are serious or significant, and involved examining why the non-compliance had occurred. Here *Mitchell* had provided examples of good and bad reasons, but these were "no more than examples." Where there is a good reason for a serious or significant breach, relief is likely to be granted. (Paragraph 35)

61. The Majority were of the view that there had been a misunderstanding in relation to *Mitchell*:

> "31. The important misunderstanding that has occurred is that, if (i) there is a non-trivial (now serious or significant) breach and (ii) there is no good reason for the breach, the application for relief from sanctions will automatically fail. That is not so and is not what the court said in *Mitchell*: see para 37. Rule 3.9(1) requires that, in every case, the court will consider "all the circumstances of the case, so as to enable it to deal justly with the application". We regard this as the third stage.
>
> 32. We can see that the use of the phrase "paramount importance" in para 36 of *Mitchell* has encouraged the idea that the factors other than factors (a) and (b) are of little weight. On the other hand, at para 37 the court merely said that the other circumstances should be given "less weight" than the two considerations specifically mentioned. This may have given rise to some confusion which we now seek to remove. Although the two factors may not be of paramount importance, we reassert that they are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. That is why they were singled out for mention in the rule. It is striking that factor (a) is in substance included in the definition of the overriding objective in rule 1.1(2) of enabling the court to deal with cases justly; and factor (b) is included in the definition of the overriding objective in identical language at rule 1.1(2)(f). If it had been intended that factors (a) and (b) were to be given no particular weight, they would not have been mentioned in rule 3.9(1). In our view, the draftsman of rule 3.9(1) clearly intended to emphasise the particular importance of these two factors."

62. It was in this respect, namely in holding factors (a) and (b) to be of "particular weight", that the Majority differed from the third member of the Court of Appeal, Jackson LJ. He was of the view that while those factors must be considered in every case at the third stage, r.3.9 did not require either of them to be given greater weight than other factors – what weight they were afforded was a matter for the court in the light of all the circumstances (paragraph 85).

63. All three members of the Court emphasised the importance of a court having regard to all relevant circumstances, which would vary from case to case. These, as *Mitchell* had indicated, were likely to include the promptness of the application for relief, as well as any past or current breaches of the rules, practice directions etc.

64. The Majority expressed serious concern that misinterpretation of *Mitchell* was leading to decisions which were manifestly unjust and disproportionate, as well as to satellite litigation and non-cooperation between lawyers:

> "40. …Nor should it be overlooked that CPR rule 1.3 provides that "the parties are required to help the court to further the overriding objective". Parties who opportunistically and unreasonably oppose applications for relief from sanctions take up court time and act in breach of this obligation.
>
> 41. We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall

> strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by the new rule 3.8(4).
>
> 42. It should be very much the exceptional case where a contested application for relief from sanctions is necessary. This is for two reasons: first because compliance should become the norm, rather than the exception as it was in the past, and secondly, because the parties should work together to make sure that, in all but the most serious cases, satellite litigation is avoided even where a breach has occurred."

65. The Majority added that in the future courts would be more ready to penalise opportunism. Lawyers should bear in mind their duty to the court when considering whether to advise their clients to adopt an uncooperative attitude in unreasonably refusing to agree extensions of time and in unreasonably opposing applications for relief from sanctions. Heavy costs sanctions should be imposed on parties who behave unreasonably in this regard.

66. Lord Justice Jackson agreed with the judgment and findings of the Majority save in the single respect that I have described.

*Submissions and discussion: relief from sanction*

67. Mr Holland submits that here the breach was not trivial but both serious and significant. There was a delay of some 3 weeks in supplying the Further Information, which falls to be considered against the tight timetable set by the requirement for points of dispute to be served within 21 days of commencement of proceedings. The breach was also significant because it inevitably resulted in prejudice to the paying party by having to prepare amendments to the points of dispute. In relation to the second stage, the breach was caused by an oversight, which is not a good reason. As to the third stage, he submits that given the negative impact of the breach on the efficient conduct of the litigation and the serious nature of the breach itself, the decision of the Judge to refuse relief could not be said to be outside the scope of his case management powers.

68. In my judgment the breach here must be looked at in the context of the surrounding circumstances, which I have set out above at paragraphs 2-8 above and which, in essence, reflect the Judge's findings. From this it is clear that the claimant had commenced detailed assessment proceedings well within the 3 month limit imposed by the CPR. Once the breach was brought to the attention of the claimant it was remedied swiftly, and in the absence of any agreement by the defendants to resolve the matter without recourse to the court, the application for relief was also brought very quickly. Further, the defendants themselves, by seeking the claimant's agreement to an extension of the 21 days allowed for service of points of dispute, added significantly to the length of the default. It is not clear whether the defendants knew of the breach when the second defendant sought the extension of time on 5 November 2013. This seems likely, for they were certainly aware of it by 14 November when

they served their points of dispute. The defendants were, of course already aware as a result of the much earlier service of N251 that the claimant was funded by a CFA with success fees. Had the defendants wished to shorten the length of default and save the cost and delay of an amendment to the points of dispute, it was open to them to inform the claimant of its oversight before preparing and serving those documents, and to seek an extension of time to take stock of the Further Information when supplied. It is clear that the claimant would have agreed to such a request. I therefore do not understand why Mr Holland states that amendments were inevitable.

69. In the event the defendants preferred to take advantage of the claimant's oversight by choosing not to inform the claimant earlier, and going ahead with service of points of dispute (after obtaining an extension of time for that purpose) which they knew would require amendment once the Further Information was received. Thereafter they declined to cooperate with the claimant, and were unwilling to amend the points of dispute and avoid the need for an application for relief.

70. It is clear, as the Judge found, that there was no significant prejudice to the defendants, or to the efficient conduct of the assessment proceedings at proportionate cost, or to the court or to other litigants as a result of the breach itself. It is evident that in so far as there has been unnecessary cost, delay and use of the court's finite resources in hearing the application for relief from sanctions and this appeal, this is the result of what in my view was the unreasonable, opportunistic and non-cooperative approach of the defendants to the claimant's unfortunate oversight.

71. In my view when looked at in its context as discussed above, the breach here is properly regarded as "insignificant" and therefore "trivial" as those expressions are understood in the light of the guidance in *Mitchell* (see in particular paragraph 40 of the judgment of the Court of Appeal in that case). For the same reasons I consider the breach to be neither serious nor significant in the terms of the *Denton* guidance. It is clear that in view of the concession the Judge did not receive the assistance he should have done in regard to the meaning of "triviality". His instinct was to hold that the breach was trivial but he appears to have fallen into the error by attaching insufficient weight to the circumstances surrounding the breach as well as to the absence of any significant prejudice of any kind to anyone.

72. The Judge also appears to have fallen into the error identified by the Majority in *Denton*, in that having concluded the breach was not trivial, and that there was no good reason for it, he regarded the application for relief from sanctions as bound to fail (see paragraphs 38-9 of his judgment). He did not go on to consider whether that was the appropriate outcome in "all the circumstances of the case, so as to enable [the court] to deal justly with the application", as required by r.3.9. Had he done so he would almost certainly have granted the application, notwithstanding his finding that the breach was not trivial.

73. In view of the Judge's errors of approach it is open to me to exercise my own discretion in relation to the grant of relief. For the reasons I have given I consider the claimant's breach of the practice direction to be neither serious nor significant. Although overlooking the requirements of the practice direction is not a good reason for the breach, when all the relevant circumstances are considered - including the nature and effect (or rather lack of effect) of the breach, the defendants' conduct to which I have referred, the speed with which the claimant remedied the default and

applied for relief, and the need to enforce compliance with rules, practice directions and orders - the just disposal of the application requires complete relief from the sanction in question to be granted.

74. For the avoidance of doubt, I record that this would have been my conclusion even in the absence of the helpful guidance in *Denton*.

**Conclusion**

75. It follows that this appeal must be allowed, either on the basis that an incorrect sanction has been applied to the breach in question, or, if I am wrong about that, on the basis that relief from that sanction in its entirety should be granted by the court pursuant to CPR r.3.9.

76. I would also add that the defendants' behaviour here has been precisely the kind of opportunistic, and non-cooperative conduct in litigation condemned by the Court of Appeal in *Denton*. Had the defendants taken a different course the matter could probably have been completely resolved within the overall period of the extension of time which they applied for and were granted by the claimant, or very soon thereafter. This would have saved the parties and the court the time and expense of a lengthy hearing before the Judge and an even longer appeal hearing before me. That in turn has disrupted the assessment proceedings and significantly delayed their final resolution.