Neutral Citation Number: [2022] EWCA Civ 581

Case No: QB 2019 002602

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
FREEDMAN J
[2020] EWHC 2687 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 April 2022

Before:

LORD JUSTICE HOLROYDE
LORD JUSTICE STUART-SMITH
and
LORD JUSTICE WARBY

- -

Between:

CHAN MOK PARK	**Claimant/ Respondent**
- and -	
(1) HASSAN HADI **(2) HAIDER JALEEL ABED**	**Defendants /Appellants**

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- -

George Bompas QC and Elizabeth Walsh (instructed by **Sterling Winshaw Solicitors**) for the **Appellants**
Ryan Ross (**instructed pro bono through Advocate**) for the **Respondent**

Hearing date: 1 February 2022

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Judgment Approved

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 11:00 on Friday 29 April 2022.

Lord Justice Holroyde, Lord Justice Stuart-Smith and Lord Justice Warby:

1. The Claimant Chan Mok Park ("Mr Park") seeks damages for breach of a contract for the sale of the business of a public house ("the pub"). The Appellants Hassan Hadi and Haider Jaleel Abed (collectively, "the Appellants") applied to strike out his claim. On 4 June 2020 Lavender J adjourned that application and made an "unless" order ("the 4 June order") requiring Mr Park to take various steps by 18 June 2020. The adjourned hearing came before Freedman J ("the judge") on 28 July 2020. In his reserved judgment handed down on 12 October 2020, the judge granted Mr Park relief from sanctions for breach of the 4 June order and dismissed the Appellants' application. By permission of Coulson LJ, the Appellants appealed against that order. Their appeal was heard on 1 February 2022. At the conclusion of the hearing we dismissed the appeal, reserving our reasons. This is the judgment of the court explaining the reasons for our decision.

The facts:

2. It is sufficient for present purposes to give a brief outline of the relevant facts. In 2019, Mr Park was the sole shareholder and director of two companies: Montscot Pubs Limited ("MPL"), which held a lease of the pub premises from the relevant brewery; and The Hand Flower Kitchen Limited ("HFKL") which carried on the business. He offered the pub and the business for sale for £179,000. MPL was at the time in arrears of rent.

3. In early May 2019 there was a meeting between Mr Park and Mr Hadi. Mr Park's case is that they agreed to sell and buy the business for £170,000, with Mr Hadi paying a deposit of £30,000, paying the arrears of rent and paying the balance on completion of an assignment of the lease to Mr Hadi's company. In striking contrast, the appellants' case is that Mr Park agreed to sell the business for £40,000.

4. The two men met again in early June 2019 at the offices of Mr Park's solicitors. They have given conflicting accounts of what was agreed. There was however an exchange of correspondence on 6 and 7 June in which Mr Hadi's solicitors asked for confirmation of an agreement to the effect that Mr Hadi would take over MPL, the company which held the lease; Mr Hadi would provide his solicitors with £30,000, which the solicitors would pay to the freeholder in settlement of the outstanding rent; Mr Hadi would then apply for the lease to be assigned by the freeholder to his company, and would settle any debts owed to third parties by Mr Park's company; all debts owed by MPL, and all associated costs, "will be deducted from the previously agreed premium of £170,000"; and the net amount would be transferred to Mr Park's solicitors at the point of assignment of the lease. Mr Park's solicitors replied confirming that Mr Hadi would pay off the arrears owed to the landlord, and that sum, together with any other debts of Mr Park's company, "will be deducted from the agreed sale price (£170,000)". They required the balance to be transferred to them upon completion, without waiting until the assignment of the lease.

5. Over the following days, to put matters neutrally, Mr Abed became the sole director and shareholder of MPL and Mr Hadi made a payment to the landlord of either £36,664.59 (Mr Park's account) or £37,910.59 (Mr Hadi's account) to discharge the arrears of rent. The circumstances and details of these events are the subject of much dispute. There may also be a dispute as to whether (as the Appellants contend) Mr

Abed was the purchaser, with Mr Hadi merely acting on his behalf. It suffices for present purposes to note that, save for the discharging of the arrears of rent, neither of the Appellants made any other payment to or for the benefit of Mr Park.

6. Mr Park complains that his business worth £170,000 has been acquired for only £36,664.59. The Appellants contend that the agreed price was only £40,000, later reduced by agreement to the sum necessary to discharge the arrears. Matters are complicated by the fact that Mr Park had at all material times resided in a flat above the pub.

7. It will be apparent, even from that brief outline, that there are a number of important factual disputes between the parties.

Relevant features of the procedural history:

8. The claim was issued on a date which has not been identified. On 5 July 2019 Mr Park obtained a without notice injunction by which Mr Abed was restrained from interfering with Mr Park's residence. On 12 July the injunction was discharged pursuant to a consent order involving mutual undertakings. Mr Park was ordered to pay costs of £7,000 to Mr Abed, and to serve his Particulars of Claim by 19 July. The costs order has not been satisfied.

9. Particulars of Claim were served, and the Appellants filed a Defence and Counterclaim. No Defence to Counterclaim has been served. The Appellants applied to strike out the claim and/or for summary judgment. At the hearing of their application on 4 June 2020, Mr Park appeared in person, with the assistance of a McKenzie friend Mr Syed, to whom Lavender J gave limited permission to speak on Mr Park's behalf.

10. Lavender J adjourned the application to a hearing on 29 July 2020, and made an order which included the following recital:

> "AND UPON the Claimant being informed that, henceforth, there will be no further toleration of any failure on the part of the Claimant to comply with the court's order and/or the Civil Procedure Rules, which must be fully complied with."

11. The provisions of the order included the following:

> "2. Unless by 4.00pm on 18 June 2020, the Claimant:
>
> (i) Issues an application notice by Form N244 to amend his Claim Form and the Particulars of Claim and includes with the application a copy of the proposed amended Claim Form and Particulars of Claim;
>
> (ii) Files and serves a witness statement providing an explanation as to why he did not:
>
> a) file and serve a Reply and Defence to Counterclaim;
>
> b) issue an application before today's hearing to amend his Particulars of Claim;

c) file and serve any evidence in response to the Appellants' application before 4 June 2020;

(iii) files and serves a further witness statement giving evidence of his financial means and exhibits to this witness statement the following documentation:

a) a fully completed Form EX140 (Record of Examination) form;

b) copies of all statements for all and any bank or building society account to which the Claimant is a signatory as at the date of this order and for the period 17 April 2020 to 17 June 2020;

the Particulars of Claim be dismissed and he shall pay the Appellants' costs of the Claim (to be assessed if not agreed).

…

7. The Claimant do pay the Appellants' costs of the Appellants' application summarily assessed in the sum of £20,805."

12. In response to that order, Mr Park sent an email to the court at 3.55pm on 18 June 2020, to which he attached his application to amend the Claim Form and Particulars of Claim, two witness statements (one of which was unsigned, and neither of which contained a statement of truth in the terms required since 6 April 2020), a form EX140 relating to his means, and bank statements for one relevant account. The attachments did not include any bank statements relating to a relevant account held by HFKL.

13. Unfortunately, for technical reasons which are not said to reflect any fault on the part of Mr Park, one of the attachments could not be opened in the court office. Once that problem had been resolved, the documents were sent by email to the Appellants' solicitors at 4.33pm on 22 June.

14. By a letter dated 17 July 2020, the Appellants' solicitors asserted that service was defective because the email was sent days after the date specified in the 4 June order; it was sent outside court hours and was therefore deemed to have been served on 23 June, five days late; and in any event, service by email was not accepted by them, and was therefore not effective. On that basis, they contended that the Particulars of Claim stood dismissed and Mr Park must pay the costs of the claim.

The hearing before the judge:

15. The adjourned hearing came before the judge on 28 July 2020. As matters stood at the start of that hearing, there had been no application by Mr Park for relief from sanctions. Nor had he filed a witness statement explaining why he had not complied with the 4 June order. His McKenzie friend Mr Syed explained that he was working from home without appropriate office equipment and that Mr Park could not afford legal representation.

16. The judge identified the issues which he had to determine as follows:

i) Had the Particulars of Claim been dismissed due to the failure to obey the 4 June order?

ii) If Mr Park was able to proceed, should he be permitted to amend his claim form and Particulars of Claim?

iii) Should the Appellants be given judgment on the Counterclaim?

iv) Should permission to amend be made subject to a condition that Mr Park must satisfy the outstanding costs order (a sum in excess of £27,000) and pay £50,000 into court by way of security for costs?

17. Addressing those issues, the judge at [33] observed that in most circumstances an application for relief from sanctions would be required, but said –

> "In the particular circumstances of this case, I shall dispense with the need for a formal application because many matters for Mr Park and Mr Syed have been attended to, and there has been procured almost substantial compliance: see White Book vol 1 para 3.9.24."

18. The judge then considered the three-stage *Denton* test. He held, at [34], that the delay between 18 June and 22 June was neither serious nor significant: the relevant documents had been prepared by 18 June, and the default in service was not long, did not affect the Appellants' ability to prepare for the next hearing, and had not caused any prejudice. He went on to say –

> "If in fact the breach was serious or significant, whilst bearing in mind the difficult circumstances in which Mr Park and Mr Syed were operating, they do not provide a good reason for the default, but they provide significant mitigation."

The judge referred in this regard to the principle that a lack of legal representation does not usually excuse failure to comply with rules and orders.

19. The judge at [35] reached the following conclusion:

> "Considering all the circumstances of the case, looking at the matter as a whole, there was much to do to comply with the Order prior to 18 June 2020, and despite the handicap of not having a solicitor or barrister to act on his behalf, and with only the assistance of Mr Syed assisting without the benefit of an office, a lot was done. That included the preparation of an amended pleading, re-pleading much of the case. There was prepared a form about the financial circumstances of Mr Park and personal bank statements were obtained. Witness statements were prepared. In addition to this, there are peculiarities about the case that require examination to which I shall turn whilst looking at the application to amend. In all the circumstances, if the breach was serious or significant, it was not intentional or reckless or defiant, and it did not cause prejudice to the

> Appellants. Further, there was substantial mitigation for the default. Taking into account all the circumstances, the overall justice of the case is that it should not fail because of the late service and the method of service of the documents."

20. The judge noted that the failure to provide the bank statements of HFKL had not been mentioned by the Appellants' solicitors in their letter of 17 July 2020. Mr Syed had acknowledged that the need to serve copies of those statements had been overlooked. The judge said that the breach of the 4 June order in this regard did not appear serious or significant. If it was serious and/or significant, it was understandable that it had "got lost among the detail". In all the circumstances, he held, justice would be done by making a further order designed to procure the statements. He accordingly made such an order. He also ordered that Mr Park's witness statements must be re-issued, signed and with a statement of truth in the terms which had been required since 6 April 2020.

21. The judge said, at [39], that he had had regard to the recital to Lavender J's order (quoted above at para 10), but had provided relief –

> "… in view of all the circumstances of the case including the overall intention of Mr Park and substantial steps taken by Mr Park to procure compliance with the order of Lavender J, despite the errors referred to above."

22. The judge went on to address the other issues which he had identified, noting that it was a case in which the parties had made very serious allegations against one another. He dismissed the Appellants' applications to strike out the claim and for summary judgment, observing that there were a number of unanswered questions in respect of both parties' cases. He found that Mr Park had raised a case with a real prospect of success and therefore granted permission to amend the claim. He granted consequential permission for the Appellants to be able to amend their pleading, and directed that at that stage Mr Park must serve a Reply and Defence to Counterclaim.

23. The judge refused the Appellants' other applications, saying at [67] –

> "I do not regard the claim as being so improbable that an order for conditional leave is required. Again, it comes back to the apparent consensus in the correspondence of 6 and 7 June 2019 that any agreement should proceed on the basis of payment of £170,000, and yet the business being taken thereafter for a sum of about £36,000. All of this can only be determined satisfactorily at trial, and the trial should not be subject to a conditional leave order. I have also considered above the question of relief from sanctions."

He went on to say that he was satisfied – subject to what might be shown by the HFKL bank statements - that there was sufficient information before the court to show that Mr Park was not able to pay the previous costs orders. Although the court had the power to make discharge of those liabilities a pre-condition of granting permission to amend, he declined to exercise that power in circumstances where such a condition would prevent the amendment order from having any practical effect.

The grounds of appeal:

24. By their grounds of appeal, the Appellants challenged two aspects of the judge's order: first, the granting of relief from the sanctions contained in Lavender J's order; and secondly, the refusal to require payment of the outstanding costs orders as a condition of Mr Park being able to continue his claim.

25. We are grateful for the assistance we received from the written and oral submissions of counsel. Before we give a brief summary of those submissions, it is convenient to mention relevant provisions of the Civil Procedure Rules ("CPR") and some of the cases to which counsel referred.

The legal framework:

26. The CPR begin with the explanation at 1.1 that –

> "(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."

By CPR r1.2, the court must seek to give effect to that overriding objective when exercising any power given to it by the Rules.

27. Part 3 of the CPR contains rules about case management. The court's general powers of management are set out in rule 3.1. They include, by CPR r3.1(2)(a), a power to extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired). By CPR r3.3(1), the court may exercise its powers on an application or of its own initiative. When exercising its case management powers, the court is required by CPR r3.1A(2) to have regard to the fact that at least one party is unrepresented. However, as note 3.1A.1 in the White Book observes, that rule does not lower the standard of compliance with court orders which litigants in person are required to achieve.

28. By CPR r3.8(1) –

> "Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction."

29. By CPR r3.9 –

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction of 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;

> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence."

30. By CPR r32.6 –

> "(1) Subject to paragraph (2), the general rule is that evidence at a hearing is to be by witness statement unless the court, a practice direction or any other enactment requires otherwise.
>
> (2) At hearings other than the trial, a party may rely on the matters set out in –
>
> (a) his statement of case; or
>
> (b) his application notice, if the statement of case or application notice is verified by a statement of truth."

31. As is well-known, this court in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3296 set out a three-stage approach which a judge is required to take when considering an application for relief from sanctions. At [24], it was summarised as follows –

> "The first stage is to identify 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)]'."

32. As to whether a court can grant relief from sanctions without an application having been made, both counsel referred to three cases in particular.

33. In *Keen Phillips (a firm) v Field* [2006] EWCA Civ 1524,[2007] 1 WLR 686 it was held that a court has jurisdiction to extend time for compliance with a case management order even where the party in default has made no application pursuant to CPR rule 3.8 for relief from the sanction for non-compliance with the order. This is because the court's powers to extend time pursuant to rule 3.1(2)(a), and to act on its own initiative pursuant to rule 3.3(1), are not cut down by rule 3.8(1).

34. It may be noted that in that case the defaulting party (who had failed to comply with an "unless" order) had not issued an application notice seeking relief from sanctions, but it was held that there was nonetheless an application before the judge for an extension of time for compliance with the earlier order and therefore an application for relief from the sanction imposed by that order. Jonathan Parker LJ (with whom Moore-Bick LJ agreed) referred at [22] to a passage in the transcript of proceedings below which showed that counsel had been about to make an application when the judge intervened and went on to make an order extending time. Jonathan Parker LJ continued at [23]:

> "Given that the court has a general power to dispense with an application notice (see the Practice Direction supplementing CPR Part 23, paragraph 3(4)) it seems to me that it would be an unacceptably artificial approach to the application of the CPR to conclude that, in the circumstances revealed by the transcript, there was no application for an extension of time before the court."

35. In *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463, [2007] 1 WLR 1864 an order was made that unless the claimant gave disclosure of certain documents and provided security for costs by a specified time, the action would be dismissed and the claimant would be required to pay the defendants' costs. The claimant failed to comply with that order and judgment was given in the defendants' favour. An appeal by the claimant was dismissed. The court held that in accordance with CPR part 3, the sanction embodied in an "unless" order took effect without need for any further order if there was a failure to comply with it in any material respect. However, rule 3.8 gave the court –

> "… ample power to do justice … on the application of the party in default or, in an exceptional case, acting on its own initiative." (*per* Moore-Bick LJ at [30])

36. At [33], Moore-Bick LJ referred to *Keen Phillips*, in which, he said –

> "This court held that despite the wording of rule 3.8, which naturally assumes that the party in default will make an application for relief, the court has jurisdiction to act of its own initiative in an appropriate case. However, the jurisdiction is one which is likely to be exercised only rarely because it will usually be necessary for evidence to be placed before the court to enable it to consider the various matters to which rule 3.9 refers."

37. He went on to say, at [35] –

> "… the party in default must apply for relief from the sanction under rule 3.8 if he wishes to escape its consequences. Although the court can act of its own motion, it is under no duty to do so and the party in default cannot complain if he fails to take appropriate steps to protect his own interests. Any application of this kind must deal with the matters which the court is required by rule 3.9 to consider."

38. Both *Keen Phillips* and *Marcan Shipping* were recently considered and followed in *Boodia v Yatsyna* [2021] EWCA Civ 1705, [2021] 4 WLR 142. The court confirmed that it is not always necessary for a formal application for relief against sanctions to be made before the court has the power to grant such relief.

Summary of the submissions of the Appellants:

39. For the Appellants, Mr Bompas QC contended that Mr Park had failed in a number of respects to comply with Lavender J's order: the application for permission to amend

was not issued in time, because the document emailed to the court could not be opened and therefore could not be processed by the court until that problem had been resolved; witness statements were sent to the Appellants' solicitors by email, which did not constitute good service, and were several days late; one witness statement was not signed, and neither bore the correct statement of truth; and HFKL's bank statements were not provided.

40. Mr Bompas submitted that the judge was wrong to grant Mr Park relief from sanctions. He accepted that a court has power in an appropriate case to grant relief without a formal application having been made, and accepted that in the present case Mr Park made at least an informal application; but he relied on what was said in *Marcan Shipping* in support of a submission that it should only be in exceptional cases that relief is granted without a formal application, especially where an "unless" order has been breached. He submitted that the *Denton* framework, and the requirement to consider factors (a) and (b) in CPR r3.9(1), set the parameters within which the court must operate. He submitted that the judge had misdirected himself, had adopted a flawed approach and had exercised his discretion in a way which was not properly open to him.

41. Mr Bompas submitted that the judge should first have considered why it might be appropriate to grant relief from sanctions at all, when there was neither an application for relief nor any evidence in support of such an application. He submitted that the judge should have concluded that there was no evidence which would allow him to consider an application of his own motion, and no evidence to enable him to consider the matters identified in CPR r3.9. Mr Bompas acknowledged that courts may sometimes be prepared to accept facts put forward by counsel on the basis of clear instructions, but submitted that a witness statement should generally be required. In this case, he argued, the judge should at the least have required Mr Park to file a witness statement in support of the facts asserted on his behalf.

42. As to the judge's application of the *Denton* test, Mr Bompas submitted that he was wrong to find that there had been "almost substantial compliance" with the 4 June order: there had been multiple and serious failures, all in the context of an "unless" order which required scrupulous compliance; an oversight as to one of the requirements of the order should not be regarded as a good reason for non-compliance; the HFKL bank statements still had not been provided by the time of the hearing before the judge; and the two factors specifically identified in CPR r3.9(1) were important. Mr Bompas accepted that, if this court found that the judge had been correct in his ruling on the first of the three *Denton* stages, the second and third stages were likely to follow. He submitted, however, that in relation to the third stage, the judge had not expressly considered the specified matters and had not given proper weight to Mr Park's unexplained failure to comply with the "unless" order.

43. As to the second ground of appeal, Mr Bompas submitted that the correct approach was that stated by Sir Richard Field in *Michael Wilson and Partners Ltd v Sinclair* [2017] 5 Costs LR 877 at [29]. Sir Richard there stated six principles applicable when considering whether a party should be debarred by reason of his failure to pay a costs order. Mr Bompas relied in particular on two of those principles:

> "(4) A submission by the party in default that he lacks the means to pay and therefore a debarring order would be a denial of justice and/or in breach of Article 6 of ECHR should be

> supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness' financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.
>
> (5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering."

44. Mr Bompas submitted that Mr Park had adduced no cogent evidence that he lacked the means to pay the outstanding costs orders, notwithstanding that the 4 June order had required him to do so. He pointed out that the Form EX140, which had been used for convenience, does not require a statement of truth. Mr Bompas accepted however that the information provided on form EX140 showed that Mr Park was in receipt of Jobseeker's Allowance and had no capital or savings.

Summary of the submissions of the Respondent:

45. Mr Ross submitted that the Appellants had failed to surmount the high threshold of showing that the judge had exercised his discretion in a way which exceeded the generous ambit afforded to him. He submitted that the judge had made no error in considering whether to grant, or in granting, relief from sanctions. Nor had he made any error in his decision in relation to the costs orders. Mr Ross submitted that the case law established that relief from sanctions may be granted of the court's own motion, and that there are no special evidential requirements for doing so: it is a matter for judicial discretion, as both *Keen Phillips* and *Boodia* illustrate. Mr Ross suggested that in the passage from *Marcan Shipping* which we have quoted at paragraph 36 above, Moore-Bick LJ was not laying down any general rule. He accepted, however, that the granting of relief from sanctions without any application having been made will be rare. He further submitted that there is no mandatory requirement for evidence before relief can be granted, and in any event no requirement that evidence be in the form of a witness statement.

46. Mr Ross argued that there had been no wanton or deliberate non-compliance with Lavender J's order: the documents had for the most part been produced on time, and the short delay in filing and serving them did not impact on the Appellants' ability to respond. He pointed to a number of features in support of his submission that the judge was entitled to decide that he would consider granting relief notwithstanding the absence of any application: the delay in serving the documents had only been 5 days, over a weekend; Mr Park had faced the obstacles that he was not fluent in English and had had difficulties attending the bank as he had to do in order to collect statements; Mr Syed had faced difficulties because, for reasons related to the Covid-19 pandemic, he had not been working from his office; the serving of documents by email rather than post was a very modest breach of the 4 June order; and the failure to provide the HFKL statements had not initially been mentioned by the Appellants' solicitors, which suggested that it had not been particularly important. Mr Ross also pointed out that the

judge had not exonerated Mr Park, but rather had imposed a number of requirements upon him.

47. For similar reasons, Mr Ross submitted that the judge's exercise of his discretion to grant relief from sanctions did not go outside the generous ambit of that discretion. He argued that the judge had been entitled to find that the breaches of the 4 June order were neither serious nor substantial, and that it was therefore unnecessary for this court to consider the second and third *Denton* stages, though he accepted that the judge had not found there was good reason for any breach of the 4 June order.

48. As to the second ground of appeal, Mr Ross submitted that the judge was entitled to find that Mr Park could not pay the costs orders and that there were strong reasons not to require him to do so as a condition of continuing the claim.

Analysis:

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

50. We are satisfied that the judge's approach and decisions in the present case accorded with those principles. Mr Bompas fairly and properly accepted that Mr Park had made what amounted to an informal application at the hearing for relief from sanctions. This is not, therefore, a case in which the judge acted of his own initiative. Mr Park's failure to file an application notice did not occasion any real difficulty to the Appellants in opposing the informal application. The judge was entitled to find that he had sufficient evidence to enable him to determine that informal application, and it would have been a needless increase in costs and delay to adjourn so that a formal witness statement could be filed.

51. At the first of the three *Denton* stages, the judge was entitled, for the reasons he gave, to find that Mr Park's defaults in compliance with Lavender J's order were neither

serious nor significant. It is in our view impossible to say that his decision was not properly open to him, having regard in particular to the following points. Insofar as Mr Park had been late in filing and serving documents which had been prepared for filing within Lavender J's time limit, the delay was short; was to a substantial extent explained by a technical difficulty (in opening one of the attachments to an email) in respect of which Mr Park is not said to have been at fault; and caused no real prejudice to the Appellants. The deficiencies in the signature and verification of the witness statements could fairly and sufficiently be dealt with by the judge's order requiring that the statements be re-served in compliant form. The failure to obtain, file and serve bank statements relating to HFKL was due to an oversight rather than to a wilful disregard of Lavender J's order, and the judge accepted that both Mr Park and Mr Syed were working under difficulties. The Appellants were able to rely on the failure in support of their argument that Mr Park had not shown himself to be unable to pay the outstanding costs orders. The information provided by Mr Park in the Form EX140 is not said to have been false. It showed Mr Park to be substantially without means, and therefore provided sufficient information to achieve the purpose of Lavender J's order.

52. Given that the judge's decision on the first *Denton* stage cannot successfully be challenged, the remaining two stages can be addressed very shortly. At stage (ii), Mr Ross rightly concedes that the judge found that there was no good reason for at least some aspects of the default, though he accepted what he was told by Mr Syed as providing both an explanation and substantial mitigation. That was relevant to his decision at stage (iii), which again he was entitled to reach. We do not accept the Appellants' submission that the judge failed to give sufficient weight to factors (a) and (b) in CPR r3.9(1): they were, as always, important factors for him to consider, but they were not the only factors. Notwithstanding the recital which we have quoted at paragraph 10 above, and which the judge had well in mind, the judge was entitled to set the relatively venial deficiencies against the substantial compliance with Lavender J's order and to conclude that striking out the claim would be disproportionate and contrary to the overriding objective of dealing justly with the case. In that regard, it is to be noted that there has been no challenge to the judge's decision that the claim has a real prospect of success. We agree with the judge that this is a case in which the real issues can only properly be dealt with at a trial.

53. As to the second ground of appeal, the decisions whether to impose a condition requiring payment of the outstanding costs, or to require Mr Park to give security for costs, were matters for the judge's discretion. Given the evidence of impecuniosity provided by Mr Park in his answers on Form EX140, the judge was entitled to exercise his discretion in the way he did. We can well understand why the judge was not prepared to make a costs order which, on the evidence before him, would in practice have brought to an end a claim which he had held should continue.

54. It was for those reasons that we dismissed the appeal.