Neutral Citation Number: [2024] EWHC 95 (KB)

Appeal No: M23Q104

Claim No: K00MA466

IN THE HIGH COURT

MANCHESTER DISTRICT REGISTRY

KING'S BENCH DIVISION

BEFORE :

MR JUSTICE CONSTABLE

- -

B E T W E E N:

TAMESIDE CARAVANS AND STORAGE LIMITED

Applicant

- and -

VIAVECTO LIMITED

Respondent

- -

- -

Ian Skeate (instructed by direct access) for the Applicant

Rebecca Jones (instructed by JCP Solicitors Limited) for the Respondent

Hearing date: 18 January 2024

- -

JUDGMENT

This judgment was 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 14:00 on Tuesday 23rd January 2024.

MR JUSTICE CONSTABLE:

Introduction

1. This is an application by the Defendant/Appellant, Tameside Caravan and Storage Limited ('TCSL') for retrospective extension of time to file an Appellant's Notice. The proposed appeal is from an order dated 1 August 2023 (the "Order") made by His Honour Judge Sephton KC after a trial. The trial related to a commercial possession claim and related mesne profits. At the outset of the trial the Judge had (a) ordered that the TCSL was not entitled to advance a particular case relating to the form of statutory declaration at trial without amendment and (b) refused the application to amend, as being advanced too late and incapable of being accommodated without an adjournment, which he did not permit. The Judge then heard the case on the basis of the pleaded issues (as he saw them to be), the claim was successful and possession, and mesne profits, ordered.

2. By reason of the various facts and matters dealt with further in this judgment, TCSL filed the Appellant's Notice upon which it wishes to rely, including an application for retrospective permission to file an appellant's notice outside the 21-day period as prescribed by CPR 52.12(2), which was received by the Court on 14 November 2023, approximately three months late. The application, skeleton argument in support of the application and the draft skeleton argument in the appeal were settled by Mr Davin of Counsel, although TCSL was ably represented by Mr Skeate in oral argument today. I am grateful to him, and to Ms Jones representing Viavecto Limited ('Viavecto'), for their efficient and helpful submissions.

Background

3. Viavecto is the freehold owner of land at Tame Street, Stalybridge, Greater Manchester under Title Number GM857605 ("the Land"). On 13 April 2018, Mr James Coffey and Mr Buckley entered a commercial lease for the Land as tenants in a personal capacity with Viavecto's predecessor in title National Grid Property Holdings Ltd, as landlord. The lease was a three year lease, commencing on 24 May 2016 and expiring on 28 September 2019. It is common ground that the lease was excluded from the security of tenure provisions pursuant to sections 24 to 28 respectively of the Landlord and Tenant Act 1954 (the "Act"). On 28 June 2019, Viavecto purchased the Land. On 28 September 2019, the lease expired.

4. On 5 or 6 August 2020, Mr Coffey, on behalf of TCSL, and Mr Jason Deakin, on behalf of Viavecto, acting in their capacities as company directors, executed a lease dated 15 August 2020 (the "First Lease"). Whilst by clause 7, the First Lease purported to contract out of the security of tenure provisions by the Act, there was no declaration or statutory declaration identified for the purposes of the Regulatory Reform (Business

Tenancies)(England and Wales) Order 2003 ('the 2003 Order'), and so it is not in dispute that the First Lease not have excluded security of tenure.

5. No doubt because of this, on 6 August 2020, a further copy of the First Lease, also commencing 15 August 2020, but dated 6 August 2020 was executed ('the Further Lease'). Annexed to the Further Lease was a document signed by Mr Coffey ('the Declaration'), and witnessed by a solicitor and stamped with the solicitor's seal. The Declaration was in the standard form of a declaration as referred to in paragraph 3 of Schedule 2 of the Order ('a declaration'), rather than in form of statutory declaration as referred to in paragraph 4 of Schedule 2 of the Order ('a statutory declaration'). As such:

   (1) at paragraph 3 it declared that, '*The landlord has, not less than 14 days before the tenant enters into the tenancy…served a notice in the form …. set out in Schedule 1 to the* [Order]'

   (2) moreover, it did not contain the following words:

   '*AND I make this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declaration Act 1835.*

   DECLARED at ……..this ……day of……..

   Before me

   (signature of person before whom declaration is made)

   A Commissioner for oaths or A solicitor empowered to administer oaths or (as appropriate)'

6. It did however say, in manuscript, 'Before:….', providing the name, signature and seal of the solicitor/commissioner for Oaths. It also contained the 'Important Notice' which makes clear that if the prospective tenant had not received at least 14 days' notice about the loss of statutory rights, '*you will need to sign a "statutory" declaration". To do so, you will need to visit an independent solicitor [or someone else empowered to administer oaths]*'. The 14 day notice is the notice referred to at section 38A(3) of the Landlord and Tenant Act 1953 (a 's38A(3) Notice').

7. On 29 October 2020, following a terminal diagnosis, Mr Coffey died. Mr Buckley became (and remains) the sole director and shareholder of TCSL.

8. On 28 March 2022, Viavecto served a letter dated 26 March 2022 ('the Break Notice'), stating that pursuant to clause 9.1 of 'the Lease', 6 months' notice of termination was given and that the Lease would determine on 2nd October 2022. TCSL did not, and has not, vacated the Land.

9. On 3 February 2023 Viavecto brought a claim for possession of the Land and mesne profits. TCSL served a Defence and Counterclaim dated 22 March 2023 as a litigant

in person. TCSL then served an Amended Defence (drafted by TCSL's then solicitors) and discontinued its Counterclaim.

10. The proper characterisation of the contents of the Defence forms part of the subject matter of the prospective appeal against the decision of the Judge to require amendment to the Defence on the first day of trial. I shall deal further with this question when considering all the circumstances (including the strength of the prospective appeal) in the context of the application before me. However, it is plain that the issues raised in the Defence included (at least, and in the Claimant's eyes, at most):

    (1) whether the Further Lease was entered into between the parties or that it had any effect. It was contended by TCSL that the First Lease was the lease entered into between the parties and remained in full force and effect (paragraph 8(b) of the Amended Defence), and TCSL relied upon the admission of Viavecto in the Reply that that First Lease exhibited or referenced no statutory declaration (paragraph 8(d)). It was contended that TCSL had relied upon the First Lease, that it had not been surrendered and remained the governing instrument between the parties. On this basis, '*the Defendant benefits from security of tenure*';

    (2) If the Further Lease was, in truth, a variation then it was not legally binding absent consideration (paragraph 8(n));

    (3) Mr Coffey lacked capacity when signing the Further Lease and/or the Further Lease was procured through 'undue pressure' such that the Further Lease was voidable and should not be enforced (paragraphs 8(o) to (u));

    (4) The Break Notice was ineffective (paragraph 8(e)).

11. Disclosure and witness evidence took place and the matter progressed to trial. Both sides served their Skeleton Arguments on 31 July 2023, the eve of trial. The Skeleton Argument of Viavecto identified and addressed the issues from the pleadings for determination, as set out above. TCSL's Skeleton Argument, drafted by Mr Barraclough of Counsel (who had not settled the Amended Defence), contended that:

    (1) the Declaration was void because (a) it did not operate as a declaration as no s3A(3) Notice had been served; (b) it did not operate as a statutory declaration as it was not in the prescribed form and omitted the relevant wording set out above;

    (2) the Further Lease was in truth a variation (rather than a surrender and re-grant) to the First Lease, such that the purported statutory declaration was made out of time because it was not made before the Defendant entered into the First Lease;

    (3) Mr Coffey had no capacity; and

    (4) the Break Notice was ineffective.

12. Ms Jones, on the first day of trial, argued that points (1) and (2) were new and ought to have been pleaded. Mr Barraclough resisted this on the basis that the issues were solely questions of law which need not be pleaded. In the Judge's first judgment, he ruled that an amendment would be required. Mr Barraclough then applied for an amendment, which was resisted. In his second judgment, the Judge refused the application given that it was too late, and would require an adjournment. The Judge's third judgment followed the trial of the action, limited to the original pleadings (as construed by the Judge in his first judgment). The defence (issues (3) and (4) in paragraph 11 above) failed, and the Judge ordered possession and mesne profits.

13. The prospective appeal which underlies the application for a retrospective extension of time argues that the case management decision requiring an amendment to argue points (1) and/or (2) above, and the subsequent refusal of permission to amend were a serious irregularity.

The Events after the Trial

14. I have read the witness statement of Mr Buckley, relied upon by TCSL.

15. Mr Buckley relates that, after the trial, he took the view that TCSL had lost the because of the failure of its solicitors to plead points in the Defence that would have otherwise allowed Mr Barraclough to advance winning arguments. Mr Buckley based his view on the comment by the Judge at one point that "*These are matters which if established would give the defendant extremely good arguments to defend the claim*." It would be fair to point out that this observation preceded the application to amend, during which in argument Ms Jones expanded upon the potential arguments which may defeat the points raised, in the context of prejudice. Following these arguments, the Judge's observation was much more muted, although he concluded that there was '*some merit*' in the 'new' points that '*may*' constitute a complete Defence.

16. Mr Buckley took the view that he could not instruct his existing solicitors on account of a conflict of interest and his potential professional negligence claim against them. In submission Mr Skeate suggested that the solicitors told Mr Buckley that they could or would not act, but that is not what Mr Buckley says. Instead, the thrust of Mr Buckley's evidence seems rather more to suggest that Mr Buckley himself took the view that they should not act for him, and effectively dis-instructed them. Either way, the principal point relied upon by Mr Skeate is that immediately following the trial, TCSL were no longer legally represented.

17. Mr Buckley states that Mr Barraclough did not accept direct access instructions. There is no evidence to suggest that Mr Barraclough was asked to act, if necessary through alternative solicitors, and no obvious reason why he would have refused to do so. There is also no evidence that Mr Buckley sought to instruct replacement solicitors prior to the expiry of the 21-day period. In paragraph 12 of his witness statement, he states in terms that '*apart from the logistics of locating and instructing another firm of solicitors to deal with the appeal within the time available, I was concerned about any legacy*

conflict of interest issues in trying to re-instruct Mr Barraclough.' Mr Buckley states that the main reason he did not instruct another firm before the expiry of the period was that, based on the content of the trial judge's decisions, he felt that he had enough information at the time to prepare an appellant's notice himself.

18. Mr Skeate's submitted that the difficulty Mr Buckley faced was with the non-availability of replacement instructing solicitors. This is based upon paragraph 18 of Mr Buckley's statement which states '*Unfortunately despite trying several solicitors we were unable to find one to assist us within the time needed, and a personal friend advised us to try the direct access*'. It is clear, however, from paragraph 17 that the search for instructing solicitors had only commenced after he had sent the appellant's notice to Manchester County Court, when the Appeal was already more than a week out of time. There is no evidence that he tried to instruct alternative solicitors within the 21-day period. Mr Skeate was very clear that the issue was not related to the ability to fund alternative solicitors.

19. Having decided to prepare the documentation himself, Mr Buckley completed an appellant's notice dated 14 August 2023 on behalf of TCSL. The grounds of appeal within section 5 were threefold: (1) the existence of contempt of court in relation to falsifying documents, and a failure on the part of the Court to address this. This failure was said to have allowed this to form the main part of the Claimant's argument; (2) after '*misrepresentation*' by Viavecto's legal team, this was not put into a proper defence until the skeleton argument. TCSL considered that the Judge had been misled by Viavecto's argument that TCSL's points raised in the skeleton argument were late and prejudicial, as the Claimant knew from the start that the case was based on the legality of the documents; and (3) TCSL has evidence to support a conflict of interest in respect of its legal team. Section 7 of the document sought a stay which also related to the 'reported contempt of court' which had not been dealt with in the first hearing; it indicated that the Judge had considered the case would have merit if the argument had been allowed; and time was sought to find new representation because of the conflict of interest. None of these grounds raised a proper or arguable basis of appeal.

20. The form of Appellant's Notice used by Mr Buckley was Form N164, for small claims cases, rather than Form N161, for multi-track cases. This, it is said, came to Mr Buckley's attention when direct access counsel was instructed in October 2023. The (incorrect) Form N164 was then wrongly sent to the Royal Courts of Justice, the incorrect appeal centre. It was returned, and then sent immediately to the Manchester Civil Justice Centre, from where the (original) appellant's notice was filed on 30 August 2023, and issued on 12 September 2023. Whilst Mr Buckley summarises the position (at paragraph 16 of his witness statement) as having filed an appellant's notice in time, but on the wrong form to the wrong Court, this ignores the fact that the content of what was filed also failed to disclose any valid ground of appeal. As Mr Buckley acknowledges (at paragraph 15(c) of his witness statement), '*the Grounds of Appeal should have been prepared on a different basis*'.

21. Mr Buckley blames the failures on being a litigant in person, which he attributes to a '*direct result of the trial judge's decisions which meant that the Company lost the trial*

due to failings by its legal team'. Mr Buckley explains that, after sending in the notice to Manchester Civil Justice Centre, he started looking for legal representation in September 2023. Documents were sought and received from his previous solicitors that month, and a transcript was ordered and received by 2 October 2023. The draft Application for Permission to Appeal which included the present application for retrospective permission to file an appellant's notice outside the 21-day period as prescribed by CPR 52.12(2) was stamped and received by the Court on 14 November 2023, some six weeks after all the relevant material had been received by Mr Buckley.

The Applicable Principles

22. In the case of R (Hysaj) v Secretary of State for the Home Department [2013] EWCA Civ 133, the Court of Appeal gave guidance as to the approach that should be taken to applications for extensions of time for filing a notice of appeal following the decisions of this court in Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537, [2014] 1 WLR 795 and Denton v T.H. White Ltd, Decadent Vapours Ltd v Bevan and Utilise T.D.S. Ltd v Davies [2014] EWCA Civ 906, [2014] 1 WLR 3926. There is no dispute that the principle applicable to relief from sanctions apply. As set out in Hysaj, the most relevant parts in Mitchell can be summarised as follows:

> (1) if the failure to comply with the relevant rule, practice direction or court order can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly;
>
> (2) if the failure is not trivial, the burden is on the defaulting party to persuade the court to grant relief;
>
> (3) the court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted, but merely overlooking the deadline is unlikely to constitute a good reason;
>
> (4) it is necessary to consider all the circumstances of the case before reaching a decision, but particular weight is to be given to the factors specifically mentioned in rule 3.9.

23. This was amplified in Denton, in which the now well understood approach was explained as follows:

> *24. 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)]".*

24. At paragraph 44 of Hysaj, the following guidance was provided specifically for cases involving litigants in person:

> '*At the time when the decisions which they now seek to challenge were made Mr. Benisi and Mr. Robinson were both acting in person. It is therefore convenient to consider whether the court should adopt a different approach in relation to litigants in person. The fact that a party is unrepresented is of no significance at the first stage of the enquiry when the court is assessing the seriousness and significance of the failure to comply with the rules. The more important question is whether it amounts to a good reason for the failure that has occurred. Whether there is a good reason for the failure will depend on the particular circumstances of the case, but I do not think that the court can or should accept that the mere fact of being unrepresented provides a good reason for not adhering to the rules. That was the view expressed by the majority in Denton at paragraph 40 and, with respect, I entirely agree with it. Litigation is inevitably a complex process and it is understandable that those who have no previous experience of it should have difficulty in finding and understanding the rules by which it is governed. The problems facing ordinary litigants are substantial and have been exacerbated by reductions in legal aid. Nonetheless, if proceedings are not to become a free-for-all, the court must insist on litigants of all kinds following the rules. In my view, therefore, being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules'*

25. There have been a number of cases in which the extent of tolerance or latitude which litigants in person may be afforded has been considered, which all make it clear that such latitude which may exist will operate at or close to 'the margins'. So, in Tinkler v Elliott [2012] EWCA Civ 1289, a case which preceded Hysaj, a litigant in person applied under CPR rule 39.3 to set aside a judgment given at a hearing at which he had not attended. One issue which arose was that of promptness in applying. Maurice Kay LJ (with whom Munby and Lewison LJJ agreed) said:

> "*32. I accept that there may be facts and circumstances in relation to a litigant in person which may go to an assessment of promptness but, in my judgment, they will only operate close to the margins. An opponent of a litigant in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person. It seems to me that, on any view, the fact that a litigant in person "did not really understand" or "did not appreciate" the procedural courses open to him for months does not entitle him to extra indulgence. Even if one factors in Mr Elliott's health problems, the evidence shows that between April and July 2010 he was active in this litigation. The fact that, if properly advised, he would or might have made a different application then cannot avail him now. That would be to take sensitivity to the*

difficulties faced by a litigant in person too far. In my judgment, this is where Sharp J went wrong. She regarded this to be 'a special case on its facts' but it could only be considered such if one goes too far in making allowances for a litigant in person. For these reasons, I do not consider that it was open to her to find the promptness requirement satisfied."

26. In Nata Lee Ltd v Abid [2014] EWCA Civ 1652, a boundary dispute, Briggs LJ (with whom Moore Bick and Underhill LJ J agreed) said:

> "*53. I make it clear at the outset that, in my view, the fact that a party (whether an individual or a corporate body) is not professionally represented is not of itself a reason for the disapplication of rules, orders and directions, or for the disapplication of that part of the overriding objective which now places great value on the requirement that they be obeyed by litigants. In short, the CPR do not, at least at present, make specific or separate provision for litigants in person. There may be cases in which the fact that a party is a litigant in person has some consequence in the determination of applications for relief from sanctions, but this is likely to operate at the margins*."

27. In Barton v Wright Hassall LLP [2016] EWCA Civ 177, [2018] UKSC 18, Lord Sumption (with whom Lords Wilson and Carnwath agreed) said:

> "*18. Turning to the reasons for Mr Barton's failure to serve in accordance with the rules, I start with Mr Barton's status as a litigant in person. In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: R (Hysaj) v Secretary of State for the Home Department [2015] 1 WLR 2472, para 44 (Moore-Bick LJ); Nata Lee Ltd v Abid [2015] 2 P & CR 3. At best, it may affect the issue 'at the margin', as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given to some other, more directly relevant factor. It is fair to say that in applications for relief from sanctions, this is mainly because of what I have called the disciplinary factor, which is less significant in the case of applications to validate defective service of a claim form. There are, however, good reasons for applying the same policy to applications under*

CPR rule 6.15(2) simply as a matter of basic fairness. The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take."

28. Mr Davin, in his skeleton argument and largely adopted by Mr Skeate, relied upon the summary in EDF Energy Customers Ltd v Re-Energized Ltd [2018] EWHC 652, in which HHJ Paul Matthews sitting as a Deputy Judge of the High Court considered the foregoing, and other, authorities and set out at [37] the following four principles which could be derived from the authorities:

"*(1) There is a general duty on tribunals to assist litigants, depending on the circumstances, but it is for the tribunal to decide what this duty requires in any particular case and how best to fulfil it, whilst remaining impartial.*

(2) The fact that a litigant is acting in person is not in itself a reason to disapply procedural rules or orders or directions, or excuse non-compliance with them.

(3) The granting of a special indulgence to a litigant in person may be justified where a rule is hard to find or it is difficult to understand, or it is ambiguous.

(4) There may be some leeway given to a litigant in person at the margins when the court is considering relief from sanctions or promptness in applying to set aside an order."

29. Although Mr Davin placed emphasis in his written submission on '*general duty on tribunals to assist litigants'*, Mr Skeate was realistic that this 'principle' did not relate to the situation in which a litigant in person has failed to have complied with a rule or order. Indeed, it may not be appropriate to describe the provision of assistance by a Court of Tribunal as the subject of a 'duty' at all. I note that in the case from which the HHJ Matthews must have derived this aspect of his summary (Drysdale v Department of Transport [2014] EWCA Civ 108), and which concerned an employment tribunal claim, the Court of Appeal referred only to the '*long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case*', noting at the same time that it remained essential that, '*The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all time be, and be seen to be, impartial as between*

the parties, and that injustice to either side must be avoided.' It is clear from the context of that case that the assistance referred to by HHJ Matthews relates to the allowance in making case management decisions and in conducting hearings referred to by Lord Sumption in the quote from Barton above, in respect of which he then observed that such 'assistance' will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. That this is so largely for a number of good reasons: upholding the general framework applicable to all, the 'disciplinary' factor, and (particularly in the context of time limits relating to appeals) the entitlement to certainty and finality. Thus, I would respectfully decline to endorse principle (1) as set out at paragraph [37] of EDF, at least insofar as it may be said to apply generally in the context of relief from sanctions for non-compliance with a rule or order of the Court by a litigant in person.

30. Mr Davin also emphasised the third principle, namely '*The granting of a special indulgence to a litigant in person may be justified where a rule is hard to find or it is difficult to understand, or it is ambiguous.'* Lord Sumption in Barton identifies that unless the rules and practice directions are '*particularly*' inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take. The only other references to complexity or difficulty of understanding rules in the cases reviewed in EDF was generally in acknowledging (by Moore-Bick LJ in Hyjas and by Maurice Kay LJ in Tinkler, the relevant passages of which I have set out above) the existence of that potential complexity or difficulty in understanding for a litigant in person. The authorities, however, are clear that this of itself is unlikely generally to be a relevant factor. In each of the passages which refer to that complexity or difficulty, the Court of Appeal continues immediately by stating that being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules. Generally, therefore, the complexity of the litigation or difficulty of understanding the rule or order will not amount to a good reason for a litigant in person to justify a serious and substantial failure to comply with a rule, but it may be that particular obscurity or inaccessibility of the rule or order in question may be an example of the type of case which is 'at the margins'.

Application of the Principles to the Facts

Is the failure a serious and significant one?

31. The overall delay to the service of a compliant notice of appeal (both procedurally, in relation to the Form used, and in relation to the substance of the appeal) was a delay of some 3 months. Mr Skeate adopted and advanced Mr Davin's written position, and averred by Ms Jones, that the Court should look at this overall period when considering the first stage of the *Denton* test. As such, it accepts that the failure is a serious and significant one. Mr Skeate argues, however, that the fact of the failed earlier attempts including the attempts to articulate grounds of appeal, are to be taken account of at the third stage, when considering all the circumstances of the case.

Is there a good reason for delay?

32. Mr Davin's skeleton argument first suggests that the CPR may be said to present a litigant in person seeking to appeal with a '*labyrinthine set of provisions to navigate*'. This is, for the reasons set out above, not of itself, likely to be relevant except in the case of particular obscurity. The starting point is that Mr Buckley was well aware of the need to appeal within 21 days. Mr Skeate accepted this, but relied upon the potential complexity of the rules in relation to the appeal centre to which the appeal ought to have been sent. In this regard, I do not accept that the relevant rules are inaccessible or obscure. A litigant in person would be expected to read the relevant Practice Direction, 52B. This is readily available online. It is very clear. Paragraph 1 makes clear it relates to appeals from the County Court to the High Court. Paragraph 2, and the short table at the end of the Practice Direction, makes clear that Manchester is the appropriate Appeal Centre (and that the RCJ was only applicable to the South Eastern Circuit). There is nothing 'particularly' obscure or inaccessible about these rules.

33. Mr Skeate further relied upon what was termed, in Mr Davin's skeleton argument, the 'entire transaction of events'. This transaction of events was back to Mr Buckley's belief that his trial solicitor was to blame for his loss at trial because of a failure to plead certain points, and that Mr Buckley was '*circumstantially deprived of that option because of a conflict of interest that he was essentially led to believe existed with his legal representatives, as a direct result of the nature and contents of the judgments handed down by the learned judge at trial*'.

34. This analysis does not bear scrutiny.

35. The starting point is that Mr Buckley may well have come away from the trial considering that, but for the failure to have pleaded the points identified by Mr Barraclough in his Skeleton Argument, he may not have lost the trial. He may additionally have considered, therefore, that his legal representatives were or at least may be, to blame. There is nothing particularly unusual about this possibility, and should plainly not affect compliance thereafter with rules relating to appeal. Moreover, it is wrong to suggest that it was the nature and content of the judgment which itself impacted on the actions then taken by Mr Buckley.

36. Mr Buckley's assumption that a conflict of interest had arisen was not, or certainly not necessarily, justified. This is because it is generally as much in the (potentially negligent) legal representatives' interests to have the order refusing the amendment successfully appealed as it is in the lay client's interests to achieve the same end. The interests are often generally aligned. There may, of course, be situations where this is not the case (e.g. where there is a dispute between representatives and client as to why the issue was not pleaded in the first place), but there is no evidence that this was the case here. Even these issues may often be capable of being put to one side pending any appeal, in which both client and representative share the same interest. It appears that Mr Buckley simply assumed the existence of a conflict without, it seems, even discussing the point with his existing solicitors.

37. Even if there was a real or justifiably perceived conflict with his existing solicitors (or he had legitimately lost confidence in them), there is no suggestion in the evidence that there was any such issue with Mr Barraclough, his counsel, who had, most probably, identified the 'new' points taken in the Skeleton Argument. Mr Barraclough was aware of all the issues, no doubt was in possession of all the relevant documents, and was plainly best placed to advise on the prospects of appeal and settle any Notice. Mr Buckley's evidence is that he thought it too difficult to attempt to instruct existing Counsel with new solicitors within the 21 days, but he offers no sensible basis for why this might have been so.

38. Mr Buckley's decision not to instruct different solicitors straight away (whether or not retaining Mr Barraclough) was seemingly based on his own belief that he was able to submit a timely appeal identifying proper grounds of appeal. This is not a case of impecuniosity driving TCSL to act in person through Mr Buckley: TCSL was represented at trial, and later TCSL instructed new counsel in order to advise and settle the appeal documents, it is just that it did not do so until October, long after the original (procedurally and substantively) non-compliant Notice had been submitted. It is clear that if TCSL had instructed new solicitors immediately, the serious and substantial delay would not have occurred. A large part of the overall delay was due to the fact that the original appeal notice disclosed no sensible grounds of appeal, no doubt because Mr Buckley did not understand what might, or might not, amount to a valid ground of appeal, and he did not take the advice he later sought. It is of note that, unsurprisingly, the Judge considering the original application for stay accompanying the Notice stated that '*the prospects of success on appeal do not appear strong*'. Paraphrasing the words of Maurice Kay LJ from Tinkler, the fact that, if properly advised, he would have made the substantive application he has ultimately advanced, and in time, cannot avail him now.

39. The matters that led Mr Buckley to take the steps he did on behalf of TCSL were, therefore, entirely based upon his own assumptions, and without the benefit of legal representation on the basis of a conscious decision not to retain his existing solicitors, or to instruct new solicitors within the 21 days' window and/or instruct Mr Barraclough. Hysaj at [43] states in terms that the inability to instruct legal representation through lack of funds does not amount to good reason for failures resulting from acting as a litigant in person. A person who has the funds but takes a (misguided but deliberate) decision not to instruct legal representatives should not be in any better position. Concluding that the significant and serious non-compliance was caused by a 'good reason' for the purposes of the second test in *Denton* in circumstances where the same facts would not remotely have amounted to a 'good reason' had the same happened with TCSL legally represented, would be an indulgence significantly beyond any available tolerance 'at the margins'.

40. Therefore, there is no good reason for the delay.

The Circumstances of the Case

41. I accept that, as Mr Skeate submits, even if an application fails to meet the first and second *Denton* tests, this is not fatal to the application and it is always necessary to consider all the circumstances of the case. Indeed, in Hysaj, the first of the three appellants succeeded notwithstanding failing to satisfy the first two steps. In that case, the two factors within the wider consideration (in a case where it was not possible to make a judgment in respect of the merits of the substantive appeal either way) were (a) that the appeal raised a point of considerable importance both to the parties and those in similar positions and to the wider public and it is one which in the public interest needs to be decided as soon as reasonably possible, and (b) the fact that the delay in filing a notice of appeal had not prejudiced the respondent. I will consider the extent to which these are present in this case, before turning to the wider considerations which *Denton* makes clear are factors which may be considered in all the circumstances of the case.

42. In terms of specific and wider importance, I accept that this matter, which involves the possession of the Land on which Mr Buckley operates a business, is one of considerable importance to TCSL. However, matters of litigation are almost always of considerable importance to the parties. I also accept that the effect of TCSL losing possession of the Land is likely to affect third party traders who use the storage facilities and trade from the Land. That said, the evidence before the Court in relation to this is extremely thin: a single sub-paragraph at [29] of Mr Buckley's statement, which touches briefly upon the inadequacy of damages which might be awarded in any action Mr Buckley pursued successfully against his initial legal representatives.

43. The extreme prejudice Mr Skeate argues will result from an inability to bring the appeal is based upon the assumption that, but for the inability to appeal, TCSL will have lost the significant benefit of a lease with security of tenure for many years into the future and upon which the business has relied and would continue to rely. This is clearly an overstatement of the position. First, the previous leases TCSL had both with Network Rail and with Viavecto prior to entering the Further Lease in 2020 were already excluded from the security of tenure provisions. TCSL had, therefore, always been operating on the basis that the landlord had the right to exercise a break clause. The Judge at trial concluded that the Further Lease which governed the relationship between the parties from 2020 onwards was valid, that Mr Coffey had capacity to sign it (on the basis of Mr Buckley's evidence that '*There was nothing wrong with his mental state*'), and that the Break Notice was valid. These findings have not been appealed. The 'new' point in the Skeleton Argument raised an extremely technical argument about the form (rather than substance) of the Declaration. It may or may not have turned out to be a good technical point, but it remains the case that if suddenly TCSL found itself with a lease which benefited from security of tenure, that would have come about completely by luck rather than design. TCSL would (by virtue of the technical point) be in a much better position than it had been during previous years of operation of its business. Second, the Further Lease was for three years, and ended in August 2023, some time ago now. But for this litigation, it is clear that the parties would have engaged in the relevant process pursuant to section 25 of the Act in circumstances where it is plain from the evidence served by Viavecto in the trial below (referred to at paragraph 33 of the Judgment) that it wished to use the land for its own business. There is no knowing

what the outcome of that process would be. However, there is plainly a very real prospect that (but for this litigation), Viavecto would have validly terminated the lease by now in any event. Therefore, approaching the question of prejudice to TCSL on the basis of that, by disallowing the opportunity to appeal, TCSL will lose the clear benefit of a lease with security of tenure for many years in the future, upon which the business had been built and upon which it relied, would be wrong.

44. I have considered, as I should, the factors set out in 3.9(1), namely the need for litigation to be conducted efficiently and at proportionate cost, and to enforce rules. To a large extent, these factors in a case such as this feed into the general approach set out above to restrict the tolerance allowed to a litigant in person to that which might operate at the margins.

45. The question of promptness overlaps with the consideration of whether there was a good reason for the delay. TCSL realistically accepts (at paragraph 25(d) of its Skeleton Argument) that the application for relief had not been made promptly. Whilst I accept Mr Skeate, in seeking to mitigate this, is correct that this case is distinct from those in which an applicant has taken no step whatsoever to comply with a rule of which they were aware (in that Mr Buckley clearly made efforts in August 2023 to submit an appeal); and I also accept that this is not a case where any rules were deliberately flouted. This must be weighed against Mr Buckley's conscious decision to act without the benefit of legal representation in circumstances where there was no funding issue and (contrary to the submission of Mr Skeate, as I have found above), there is no evidence for the surprising proposition that there were simply no solicitors willing or available to assist in initial period. Moreover, a further delay of some 6 weeks after receiving all the necessary material at the beginning of October cannot be regarded as 'prompt' and there is no particular explanation in relation to this.

46. In terms of the prejudice to Viavecto, there is force in the submission of Mr Skeate that the prejudice to Viavecto is limited to the general delay and absence of finality that they would otherwise enjoy absent the provision of relief. But this does not mean that there is no prejudice.

47. Finally, in the context of consideration of the merits of the case, Mr Buckley's witness statement expressly requests at [26] that the Court should consider the merits of the appeal when deciding the application, which he believes are strong. Indeed, at one point Mr Skeate suggested that I may be able to deal with the substantive question of permission as part of this application (although he did not press me to do so). Guidance on the extent to which such consideration should be embarked upon was also provided in Hysaj at paragraph 46 in the following terms:

> '*Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage*

argument directed to them. Here too a robust exercise of the jurisdiction in relation to costs is appropriate in order to discourage those who would otherwise seek to impress the court with the strength of their cases.'

48. I have been able to form a view without much investigation. I do not consider that the merits of the appeal are strong. Indeed, I consider that the merits are very weak. In my judgment it is strongly arguable that the central points raised by Mr Barraclough in the Skeleton Argument on the eve of trial relating to the validity of the Declaration were new points which ought properly to have been pleaded, and the claim that the determination to this effect by the trial Judge was a serious irregularity is very weak.

49. It is plainly correct, as advanced by Mr Barraclough in the trial below and in Mr Davin's skeleton argument on appeal, that a defendant is only required to plead facts and not law in their Defence. It is also the case, however, that where a defendant denies an allegation, they must state their reasons for doing so (CPR16.5(2)).

50. Here, the Claimant pleaded the existence of the Further Lease, and asserted that before it was entered into, an agreement was entered into excluding the protected tenancy rights had been effected, as referred to in Clause 7 of the Lease. This was an express reference to the Declaration, which was appended to the pleading as EXH3 (paragraph 10 of the Particulars of Claim).

51. The Amended Defence denied this plea explicitly at paragraph 10. This was not a bare denial: the positive case advanced to justify this denial was that (in the terminology of this Judgment) the First Lease, which on the basis of the preceding paragraphs TCSL averred was the instrument which governed the parties' relationship, included no valid provision excluding security of tenure. The positive case for the denial of exclusion of security of tenure was explicitly advanced on the basis of the assertion that the First Lease continued to govern the parties' relationship, for the reasons set out in paragraph 8.

52. No positive case was advanced that the Declaration did not constitute a statutory declaration because it was made using the wrong form and/or missed essential wording. Moreover, the only fair reading of the Defence is that TCSL accepted that, if the Further Lease was itself valid (which it denied for the reasons in paragraph 8), there was no issue that the Declaration annexed to the Further Lease *was* a statutory declaration. For example, the Defence stated:

(1) At paragraph 8(g), (in respect of knowledge of the Further Lease), '*Mr Coffey had not referred to signing any other versions nor to making a statutory declaration….'*

(2) At paragraph 8(q), (in respect of lack of capacity), '*…the Claimant appears to have approached Mr Coffey, requiring him to sign* [the Further Lease] *and a statutory declaration….*'

(3) At paragraph 8(r), (in respect of lack of capacity): '*Mr Coffey could not have understood the implications of signing* [the Further Lease] *and the statutory declaration as had he done so, he would not have signed such documents…*'

53. The suggestion that the argument advanced in the Skeleton Argument on the eve of trial was a pure issue of law which did not need to be pleaded is simply wrong. Each argument involved a mixture of fact and law, and the facts had to be pleaded as part of the positive case supporting the denial that Viavecto had successfully excluded security of tenure.

54. In relation to the invalidity of the Declaration taking effect as a declaration, the key factual allegation was that no s3A(3) Notice had been served. Validity of the document is not discernible merely as an exercise in construction. TCSL (in its Skeleton Argument for trial) positively averred that Declaration was invalid as a declaration because no s3A(3) Notice had been served not less than 14 days before the tenancy was entered into. That (factual) averment needed to have been pleaded, to enable the Claimant to investigate whether that is factually correct, or not. Moreover, given that the Declaration was arguably signed and witnessed as a deed, the Claimant was entitled to consider whether, for example, an estoppel by deed arose (where the deed stated made clear a s3A(3) Notice *had* been served more than 14 days previously) to prevent as a matter of law the assertion that no such document had been served, or estoppel more generally.

55. In relation to the invalidity of the Declaration as a statutory declaration, the critical factual allegation relied upon was the use of the wrong form which did not contain a particular form of words, such that it was (as a matter of fact) a declaration rather than a statutory declaration.

56. It was of course not necessary for TCSL to plead the legal argument, or authorities, that substantiated its asserted conclusion that, in light of the use of the wrong form, the Declaration was merely a declaration rather than a statutory Declaration or the legal argument that, thereby, no security of tenure was not excluded. However, pursuant to basic rules of pleading, which are grounded in fairness, TCSL plainly needed to identify, so that the Claimant could properly understand the case it would have to meet, that it denied that the statutory declaration was valid not just because it was annexed to the Further Lease which was itself invalid, but because (even if the Further Lease was valid), it was not in fact a statutory declaration because, as a matter of fact, the wrong form had been used. The suggestion that such a case could fairly have been advanced at trial with no notice as a pure issue of law is wrong.

57. The Judge was, therefore, more than justified in concluding that the new point ought to have been pleaded.

58. Having so found, the Judge was also well within his case management powers to determine, on the application to amend, that allowing the amendment would be prejudicial absent an adjournment, and that no such adjournment could be allowed. In light of the allegations made, Viavecto was entitled to time to investigate what potential answers to the new allegations existed. This might involve questions of fact relating to the service of documents which could constitute a section 38A(3) notice, the issue of estoppel, or the circumstances in which the wrong form had been used. This in turn

may include the parties' knowledge and/or acquiescence in this fact and any discussions at the time, particularly given that the declaration was being witnessed by a solicitor which (in substance) is the key difference a declaration and a statutory declaration.

Conclusion

59. In light of the serious and substantial breach, without good reason, and having considered all the circumstances of the case, the application retrospectively to extend time for permission to appeal is refused.