[2025] EWHC 1639 (Ch)

IN THE HIGH COURT OF JUSTICE **BL-2021-BHM-000065**
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
BUSINESS LIST (ChD)

Priory Courts
33 Bull Street
Birmingham

Before HIS HONOUR JUDGE RAWLINGS

IN THE MATTER OF

(1) MIDLAND PREMIER PROPERTIES LIMITED
(2) SANMAN PROPERTY MANAGEMENT LIMITED **(Claimants)**

-v-

(1) RAKESH SINGH DOAL
(2) 2020 LIVING LIMITED
(3) SAMUEL GINDA
(4) TAYLOR GRANGE 2 LIMITED
(5) TAYLOR GRANGE DM LIMITED
(6) TGDM ONE LIMITED **(Defendants)**

Mr D Lewis appeared on behalf of the Claimants

MR S ATKINS KC and Ms E Livesey appeared on behalf of the 2nd – 6th Defendants

Hearing 8 May 2025

Handed down on 30 June 2025

INTRODUCTION

1. By application notice dated 25 March 2025 ("the Application") the 2nd to 6th Defendants seek orders:

(a) under CPR 3.1(7) that the unless order dated 31 July 2024 ("Unless Order") and Debarring Order dated 13 September 2024 ("Debarring Order") be varied so that they only debar them from taking part in the liability trial and not any hearing thereafter; or

(b) that they be granted partial relief from the sanctions set out in paragraph 2 of the Unless Order and paragraph 16 of the Debarring Order that their defences are struck out and they are debarred from defending the claim (both as to liability and quantum) ("the Sanction") so that they are only debarred from taking part in the liability trial and not any hearing thereafter; or

(c) that the Debarring Order is varied under CPR 3.1(7) with the consequence that a re-trial of the Liability Trial that took place between 15 and 16 October 2024 is directed.

2. This is my judgment in relation to the Application.

BACKGROUND

3. The general background to this matter is set out in paragraphs 17 – 55 of the judgment handed down by me on 24 December 2024 ("Liability Judgment") and further relevant background for the period between 24 December 2024 and 24 January 2025 is contained in a judgment which I handed down on 11 March 2025 ("March Judgment"). I do not propose to repeat the background contained in those judgments. What I have set out below is a brief summary of the background which is most relevant to the Application.

4. On 22 February 2023 District Judge Phillips directed that there should be a split trial.

5. On 31 July 2024 I made the Unless Order, by which the 2nd – 6th Defendants were required to take certain specified steps in relation to disclosure, by specified dates and if they failed to do so, the Unless Order provided that the Sanction would apply.

6. On 13 September 2024, by the Debarring Order, I declared that the Sanction had been triggered by the Defendants failing to comply with the Unless Order, so that the defences of the 2nd - 6th Defendants had been struck out and they were debarred from defending the 2nd Claimant's claims. I refused an application by the 2nd - 6th Defendants for relief from the Sanction. The 2nd - 6th Defendants sought permission to appeal against my refusal of their application for relief from the Sanction. One of the grounds of appeal, for which permission was sought, was that, even if it was not appropriate to grant relief from the Sanction in full, I ought to have considered granting partial relief so that the 2nd - 6th Defendants were not debarred from defending the issue of quantum ("Quantum Issue"), including taking part in the quantum trial ("Quantum Trial"), even if they were debarred from defending the issue of liability ("Liability Issue") including taking part in the liability trial ("Liability Trial").

7. Between 15 and 16 October 2024 the Liability Trial took place, to determine, amongst other matters, whether the 2nd - 6th Defendants were liable to pay damages to the 2nd Claimant in respect of its claims that they: (a) had all engaged in an unlawful means conspiracy; and (b) procured that the 2nd Defendant breached its contract with the 2nd Claimant (in the case of the 3rd - 6th Defendants). As a result of the Debarring Order, for

all material purposes the 2nd - 6th Defendants were prevented from taking part in the Liability Trial.

8. On 24 December 2024 I handed down the Liability Judgment in relation to the Liability Trial determining that the 2nd - 4th Defendants and 6th Defendant had engaged in an unlawful means conspiracy and that the 3rd - 4th and 6th Defendants had induced the 2nd Defendant to breach its contract with the 2nd Claimant. I found that the 5th Defendant was not liable to the 2nd Claimant in relation to either claim.

9. On 5 January 2025 Nugee LJ gave permission for the 2nd - 6th Defendants to appeal against the Debarring Order/refusal of their application for relief from the Sanction.

10. By an Application Notice dated 17 January 2025 ("the January Application"), the 2nd - 4th and 6th Defendants applied amongst other matters for:

    (a) a declaration that paragraph 16 of the Debarring Order, when properly construed, applied only to the Liability Trial so that the Defendants were not debarred from defending the claim and from participating in any future hearing after the Liability Trial concluded; alternatively

    (b) that the Debarring Order should be varied so as to clearly state that the Defendants were not debarred from defending the claim after the Liability Trial and from participating in future hearings; alternatively

    (c) that the Defendants be granted relief from the Sanction, on the basis of a material change in circumstances, since the previous application for such relief.

11. The January Application was heard on 23 January 2025. I reserved judgment and my reserved judgment (the March Judgment) was handed down on 11 March 2025. By order of 11 March 2025, I dismissed the January Application, pursuant to the March Judgment.
12. By the Application, the 2nd - 6th Defendants seek orders that I have summarised in paragraph 1 above. The Application was heard by me on 8 May 2025.
13. For the remainder of this judgment I will refer to the 2nd - 6th Defendants as "the Defendants" and to the 2nd Claimant as "the Claimant", as these are the only parties to whom this judgment is relevant.

REPRESENTATION

14. Before me, at the hearing on 8 May 2025:
    (a) the Defendants were represented by Mr Atkins KC and Ms Livesey; and
    (b) the Claimant was represented by Mr Lewis.

THE EVIDENCE

15. The Application is supported by a witness statement of Andrew Little ("Mr Little"), the Defendants' solicitor, a partner in Hill Dickinson LLP, dated 25 March 2025, in which, in summary he says:
    (a) Hill Dickinson only came on record as acting for the Defendants on 8 January 2025, it would not have been sensible for the Defendants to change solicitors before this time, because appeals were being prepared against the Debarring Order and against the result of the Liability Trial up to that point;

(b) the CMC, for the Quantum Issue had not been listed when Hill Dickinson came onto the record;

(c) the Claimant pressed for the CMC to be listed on 23 or 24 January and Hill Dickinson asked that it be listed 4 weeks after 13 January, so that they would have time to prepare for the hearing and make what became the January Application;

(d) when the CMC was listed for 23 January, Hill Dickinson asked the Claimant to agree to an adjournment, but they refused;

(e) as a consequence of (a) – (d) and the time available on 23 January being insufficient to deal with all of the applications that were listed to be heard on that date, the Defendants' counsel decided to restrict the grounds on which the January Application sought to establish that the Debarring Order did not prevent the Defendants from contesting the Quantum Issue, by not applying under CPR 3.1(7) to vary the Unless Order/Debarring Order; and

(f) it was in that context that Hill Dickinson wrote to the court, on 31 January 2025 making further submissions after the conclusion of the hearing on 23 January.

16. The Application is opposed by the witness statement of James Woolstenhulme ("Mr Woolstenhulme") of 8 April 2025, in which, in summary he says:

(a) the Liability Trial took place on 15 and 16 October 2024 and therefore there was a three month gap between the end of the Liability Trial and the date fixed for the CMC, allowing the Defendants ample time to change legal advisers. Whilst Mr Little refers to work done in connection with appeals against the orders of 13 and 23 September 2024, that work was completed by 30 October 2024. In those

circumstances, January 2025 was not the soonest that the Defendants could have sensibly changed legal representatives, as Mr Little suggests;

(b) dates of availability for the CMC had been given to the court, including dates in January 2025 and so it was entirely possible that the hearing of the CMC would be listed in January, at some point after 13 January 2025 and the Defendants' solicitors should have been prepared for that to happen;

(c) on 15 January 2025, Hill Dickinson wrote to his firm to ask whether they agreed that the Debarring Order did not prevent the Defendants from defending proceedings from then on. His firm responded to say that it was clear from the terms of the Debarring Order that the Defendants were debarred from defending the whole proceedings;

(d) written submissions were filed by the Defendants' solicitors on 6 March 2025. Those submissions assert that the court did not consider previously whether the Defendants should be debarred from defending after the Liability Trial, because the issue was overlooked by the parties and the court, in genuine error when the Unless Order and Debarring Order were made and that it is clear that the Claimant had also overlooked the issue. The orders are plain on their face and it is difficult to see how the Defendants could have overlooked their effect and he notes that, in applying for permission to appeal against my judgment of 13 September 2024 (which resulted in the Debarring Order and order refusing the Defendants' application for relief from the Sanction) the Defendants said that I should have considered granting relief on a partial basis, so that the Defendants were not debarred from defending the Quantum Issue; and

(e) the Defendants have still not complied with the Unless Order and continue to produce documents which ought to have been captured by the searches and

disclosed in advance of the Liability Trial. In a letter of 5 March 2025, the Defendants' solicitors requested that the Claimant agrees to certain payments being made to third parties out of the funds frozen by a freezing order. In support of that request the solicitors sent copies of documents relating to the 6th Defendant's liability to those third parties which ought to have been disclosed prior to Liability Trial. In particular the agreement between the 6th Defendant and Skybridge Property Ltd which was disclosed on 5 March 2025 ought to have been disclosed before the Liability Trial. The Defendants' previous solicitors, who were specifically asked to disclose any written agreement with Skybridge, stated that no such written agreement existed.

THE ARGUMENTS FOR EACH SIDE IN SUMMARY

17. Mr Atkins says that:

(a) in the March Judgment, I recognised that it is both unfair to the Defendants and unsatisfactory for the court (in determining the Quantum Issue at the Quantum Trial) for the Defendants to be debarred from defending the Quantum Issue. He also says that my judgment proceeds on the basis that I would have granted the Defendants partial relief from the Sanction, to enable them to defend the Quantum Issue, if I had felt that was something that I had a discretion to do;

(b) whilst the Claimant says that it is abusive for the Defendants to seek relief or partial relief from the Sanction, for reasons that he expanded upon, particularly in oral argument, it is not, he says, an abuse;

(c) the unfair and unsatisfactory nature of the Sanction as it is set out in the Unless Order, can be cured by one or more of five routes:

(i) because the parties and the court overlooked the issue of whether it was fair and proportionate for the Sanction to apply to the Quantum Issue, the court is not reconsidering that issue but considering it for the first time;

(ii) there was a manifest mistake, made in the Unless Order and the Debarring Order, in that no thought was given to the justice and proportionality of the Sanction extending to the Quantum Issue;

(iii) the facts and arguments on which the decisions to make the Unless Order and the Debarring Order were made were innocently misstated, in that neither party put before the court what the true extent of the Unless Order and Debarring Order, as drafted were;

(iv) the Claimant wrongly misrepresented to the court, when seeking the Debarring Order, that it was ready for the Liability Trial, but it was not as it was not in a position to put its case as to the correct counter-factual scenario to be adopted in valuing the Claimant's loss for the Hotel Site ("the Counterfactual Issue"), which the directions order of DJ Phillips of 22 February 2023 directed to be dealt with at the Liability Trial. Mr Atkins says that, as a result of the Claimant misrepresenting the true position, I could go as far as granting relief against the whole of the Sanction and order a retrial of the Liability Issue and if not that, then I should grant partial relief from the Sanction so that the Defendants can defend from now on; and

(v) CPR 3.1(7) and 3.9 should be read consistently with Section 3 of the Human Rights Act 1998 ("HRA") in order to prevent an unlawful restriction of the Defendants' rights under Article 6 of the European Convention on Human Rights ("ECHR").

18. Mr Lewis says that:

(a) the Application is an abuse of the process of the court, because the Defendants should have taken the points which they now seek to take in the Application on at least two previous occasions and in the absence of a significant change of circumstances/new facts, it is abusive for the Defendants to seek to take those points now;

(b) the application under CPR 3.1(7) requires, in accordance with the Court of Appeal authority in *Tibbles v SIG Plc [2012] EWCA Civ 518* there to have been a material change of circumstances since the Unless Order or the Debarring Order were made or that the material facts on which those orders were made were misstated, to justify the court now varying either of those orders and there has been no such material change/the facts were not misstated;

(c) a second application under CPR 3.9, for relief from sanctions requires the applicant to show a material change of circumstances or that the facts upon which the original application for relief was refused have been misstated. Neither of those circumstances apply here; and

(d) an order striking out a claim and debarring a defendant from defending a claim does not breach the defendant's Article 6 rights if those powers are exercised fairly and they were exercised fairly in this case.

19. I will deal first with Mr. Lewis' assertion that the application is abusive, thereafter I will consider the merits of the Application itself.

IS THE APPLICATION AN ABUSE?

20. Mr Atkins, in his skeleton argument, at the end of his submissions that the Application is not abusive, says "the court is fully empowered to make orders to ensure the fairness of its own process and indeed parliament has said by HRA S6 that it must do so." As I have already noted (see paragraph 17 (c) (v) above) Mr Atkins also argues that, in considering the Application itself CPR 3.1(7) and 3.9 should be read consistently with Section 3 of the HRA in order to prevent an unlawful restriction of the Defendants' rights under Article 6 of the ECHR. I have considered that submission in some detail in paragraphs 68 - 71 below, where I conclude that the Court of Appeal and Supreme Court have determined how CPR 3.1(7) and CPR 3.9 are to be interpreted consistently with Article 6 of the ECHR. Equally, in my judgment, the House of Lords and the Supreme Court have determined how the courts should determine whether or not a claim or application is abusive (see paragraphs 21 – 23 below). In my judgment, if I apply those principles wrongly then, on appeal, my decision will be overturned, but I do not, as Mr Atkins appears to suggest, have to consider separately whether the correct application of those principles would be incompatible with the Defendants' Article 6 rights.

THE RELEVANT LEGAL PRINCIPLES

21. Mr Lewis and Mr Atkins agree that the leading authorities on abuse of process, where the alleged abuse is the raising of claims that could have been raised in earlier proceedings (or as here raising in a subsequent interlocutory application points that could have been raised in a prior interlocutory application that seeks similar relief) are *Johnson v Gore Wood & Co* [2002] 2 AC 1 and *Koza Ltd and another v Koza Altin Isletmeleri AS* [2021] 1 WLR 170. *Johnson v Gore Wood* concerns bringing a claim in later proceedings which could have been raised in earlier proceedings and *Koza* concerns raising points in a subsequent interlocutory application, in the same proceedings, that could have been raised

in an earlier interlocutory application for substantially the same relief. The abuse is often referred to as the rule in *Henderson v Henderson* which is the first reported case in which the "rule" was set out.

22. *In Johnson v Gore Wood* in his opinion at paragraph 30 Lord Bingham said:

> *"The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against*

whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

23. In *Koza* at paragraph 42, Popplewell LJ said:

"The Henderson and Hunter principles apply to interlocutory hearings as much as to final hearings. Many interlocutory hearings acutely engage the court's duty to ensure efficient case management and the public interest in the best use of court resources. Therefore the application of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. This is not a departure from the principle in Johnson v Gore Wood & Co [2002] 2 AC 1 that it is not sufficient to establish that a point could have been taken on an earlier occasion, but a recognition that where it should have been taken then, a significant change of circumstances or new facts will be required if raising it on a subsequent application is not to be abusive. The dictum in Woodhouse v Consignia plc [2002] 1 WLR 2558 that the principle should be applied less strictly in interlocutory cases is best understood as a recognition that because interlocutory decisions may involve less use of court time and expense to the parties, and a lower risk of prejudice from irreconcilable judgments, than final hearings, it may sometimes be harder for a respondent in an interlocutory hearing to persuade the court that the raising of the

point in a subsequent application is abusive as offending the public interest in finality in litigation and efficient use of court resources, and fairness to the respondent in protecting it from vexation and harassment. The court will also have its own interest in interlocutory orders made to ensure efficient preparations for an orderly trial irrespective of the past conduct of one of the parties, which may justify revisiting a procedural issue one party ought to have raised on an earlier occasion. There is, however, no general principle that the applicant in interlocutory hearings is entitled to greater indulgence; nor is there a different test to be applied to interlocutory hearings. In every case the principles are those identified in paras 30–40 above, the application of which will reflect that within a single set of proceedings, a party should generally bring forward in argument all points reasonably available to him at the first opportunity, and that to allow him to take them serially in subsequent applications would generally permit abuse in the form of unfair harassment of the other party and obstruction of the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions."

24. Mr Atkins emphasised the following principles from Popplewell LJ's judgment in *Koza*:

    (a) because interlocutory decisions may involve less use of court time and expense to the parties and a lower risk of prejudice from irreconcilable judgments than final hearings, it may sometimes be harder for a respondent to persuade the court that the raising of a point in a subsequent application is abusive; and

    (b) the public interest in finality of litigation is not absolute and is to be balanced against public and private interests such as the efficient use of the court's resources and the overriding objective.

25. Mr Lewis says:

(a) in *Johnson v Gore Wood*, Lord Bingham said that: "*It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. Those* words were considered by the Court of Appeal in *Koza and the Court of Appeal* said that *"….the application of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. This is not a departure from the principle in Johnson v Gore Wood & Co [2002] 2 AC 1 that it is not sufficient to establish that a point could have been taken on an earlier occasion, but a recognition that where it should have been taken then, a significant change of circumstances or new facts will be required if raising it on a subsequent application is not to be abusive";* and

(b) whilst the Defendants suggest that a more forgiving test is applied in the context of interlocutory hearings for procedural orders, the Court of Appeal made clear in *Koza* that there is no such lower test. In any event this was not, as the Defendants suggest, a procedural issue to ensure efficient preparation of the case for trial, but a contested application for relief from the Sanction which the Defendants are attempting to relitigate.

26. I consider that the following principles can be drawn from the judgments in *Johnson v Gore Wood* and *Koza* which are relevant in this case*:*

(a) the Claimant bears the burden of proving that it is abusive for the Defendants to issue the Application insofar as it seeks, for the first time, an order varying the Unless

Order/Debarring Order under CPR 3.1(7) and/or for the third time an application for relief from the Sanction under CPR 3.9;

(b) the test is whether, in making the Application, the Defendants are misusing or abusing the process of the court and this involves the balancing of public and private interests;

(c) interlocutory decisions may involve less use of court time and expense and a lower risk of prejudice from irreconcilable judgments than final hearings and so it may sometimes be harder for respondent to persuade the court that the raising of a point in a subsequent interlocutory hearing is abusive as offending the public interest in the finality of litigation, efficient use of court resources and fairness, protecting the respondent from vexation and harassment;

(d) the court will have its own interest in interlocutory orders to make sure that preparations for trial are orderly and efficient which may justify revisiting a procedural issue which a party ought to have raised on a previous occasion; but

(e) an applicant in an interlocutory hearing is entitled to no greater indulgence than an applicant in a final hearing and there is not a different test, they should generally bring forward all points reasonably available to them at the first opportunity, allowing them to take the points serially in subsequent applications would generally be abusive.

27. I will deal separately and at some length with what Popplewell LJ, in paragraph 42 of his judgment in *Koza* said about the difference between a situation where a party could have taken a point in a previous interlocutory hearing and a situation in which they should have done so and what I consider he meant by what he said.

28. In simple terms, in *Koza*, the claimants sought a declaration that using the first claimant's funds to pay the costs of an arbitration would not be a breach of an undertaking which had been given to the court to use the first claimant's funds only in the ordinary course of its business. At first instance the judge made a negative declaration that use of the first

claimant's funds to discharge costs of the arbitration would be a breach of the undertaking. On appeal, the Court of Appeal reversed that negative declaration, but refused to make the positive declaration that the claimants sought. The defendant then sought an injunction to restrain the first claimant from using its funds to discharge costs of the arbitration. At first instance a deputy judge granted the injunction sought. The claimants appealed that order, including on the ground, rejected by the deputy judge, that the defendant should have, by cross application, sought an injunction, at the hearing of the claimants' application for a declaration and it was abusive for it to issue that application thereafter.

29. On appeal, Popplewell LJ, having reviewed the authorities and concluded that there was not a tension between them, as the first instance judge had suggested there was, set out the principles at paragraph 42 of his judgment that I have quoted in full, in paragraph 23 above. Popplewell LJ went on to find that, although the defendant, in that case, could have cross applied for an injunction on the hearing of the claimants' application for a declaration, it could not be said that it should have done so. This was because, on the evidence, the defendant had not acted unreasonably in assuming that, if the first claimant did not get the positive declaration that it sought then it would not use its funds to discharge the costs of the arbitration and when it subsequently became apparent that the first claimant intended to use those funds in that way, in spite of not obtaining the declaration that it had sought, on the basis that the claimants were at risk as to whether the use of the first claimants funds in that way breached the undertaking or not, the defendants sought an injunction to restrain it from doing so.

30. At paragraph 42 his judgment Popplewell LJ at first says that it will "often" be abusive, if a point is open to a party to take on an interlocutory application and is not taken for them to take the point at a subsequent interlocutory hearing in relation to the same or similar

relief absent a material change of circumstances or new facts. However, in explaining why that was not a departure from the principle in *Johnson v Gore Wood*, (that whether or not it is abusive has to be considered in all the circumstances of the case) Popplewell LJ says that it is a recognition that where a point "should" have been taken then a significant change of circumstances or new facts will be required if raising it on a subsequent occasion is not to be abusive. In *Koza,* Popplewell LJ says, at paragraph 43 (applying the principles that he sets out in paragraph 42) that the critical question was whether the injunction application should have been brought on hearing of the claimants' application for a declaration and he says "if it should, then I would regard the bringing of it in a separate and subsequent application as an abuse…" and if not he would not regard it as an abuse. He then goes on to explain that he did not consider that it could be said that the defendant should have brought the injunction application on hearing of the claimants' application because it acted reasonably in assuming that the claimants would not use the first claimant's money to fund the arbitration regardless of the result of its application for a declaration. So he appears to treat the word "should" in that case as meaning did the defendant have a good excuse for not cross applying for an injunction, at the hearing of the claimants' application for an injunction.

31. I am not however satisfied that Popplewell LJ did mean that, if a party does not have a good excuse for not raising a point at a previous interlocutory hearing that they could have raised at that hearing, that it necessarily follows that raising the point at a subsequent hearing is abusive. I find this because:

    (i) Lord Bingham in *Johnson v Gore Wood* said that: "*It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a*

broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before…". Lord Bingham seems to be using the word "should" not in the sense of – does not have a good excuse for not having done so, but looking at all the circumstances of the case should the party have done so;

(ii) In *Woodhouse v Consignia plc [2002] 1 WLR 2558* (the case which Popplewell LJ said did not create a tension with other authorities he referred to) the Court of Appeal said:

> *"The application of 8 November 2000 was undoubtedly a "second bite at the cherry". It was supported by evidence that was available at the time of the first application. There was no good reason for the failure to place that evidence before the court on the first occasion. We accept that the fact that the evidence relied on in support of the application that was made on 8 November could and should have been put before the court in support of the earlier application is material to the exercise of the discretion conferred by CPR r 3.9(1);* and

(iii) the Court of Appeal in *Consignia* went on to overturn the decision, not to allow the claimant to make a second application to lift the stay finding that it would be a disproportionate penalty for the claimant to lose his right to damages, due to an error by his legal representative. The Court of Appeal treated the fact that the claimant in that case was applying for the same relief a second time and producing evidence on the second occasion that he ought to have produced on the first occasion, as important factors against granting the order but as not decisively

establishing abuse. The fact that, if the stay were not lifted, the claimant would be denied the right to pursue his personal injury claim and this was a disproportionate penalty for the error of the claimant's legal representative outweighed those factors.

32. I proceed therefore, on the basis that, if I find that the Defendants have no good excuse for not including the CPR 3.1(7) application in the January Application, this is an important factor in favour of a finding that including that application in the Application is abusive, to be considered alongside all the other relevant circumstances in deciding whether it is abusive, not a decisive factor.

THE PARTIES' CASES ON ABUSE

33. Mr Atkins says that:

(a) whilst the Defendants could have applied under CPR 3.1(7) in the January Application and pursued that application at the hearing on 23 January 2025, it cannot be said that the Defendants should have done so, because:

(i) the Defendants had insufficient time to prepare for the hearing on 23 January 2025;

(ii) at the time of the January Application, the Defendants had only just changed their solicitors;

(iii) there was a lack of court time available on 23 January to deal with all of the applications which had been listed to be heard on that date and in light of that lack of time the Defendants decided to reduce the number of applications made in the January Application to fit within the time available;

(iv) even if the Defendants had applied, as the Claimant suggests that the Defendants should have done, to adjourn the hearing of the January Application, because the time available on 23 January was insufficient to deal with it, this would not have led to an

application under CPR 3.1(7) being dealt with any more efficiently than it was by the Defendants issuing the Application separately. There would have had to be 2 hearings in any event; and

(v) the Claimant obtained a costs order in its favour at the 23 January hearing which it may well not have obtained if the Defendants had pursued an application under CPR 3.1(7) at that hearing; and

(c) the court has its own interest in ensuring that the Quantum Issue is fairly and efficiently determined. In the March Judgment I accepted that it was unsatisfactory for the court and unfair for the Defendants that they should be debarred from defending the Quantum Issue. The overriding objective and Article 6 of the ECHR are engaged, says Mt Atkins, and I should ensure that there is a fair trial of the Quantum Issue, it cannot be an abuse of the court's process to invite it to ensure that that happens.

34. Mr Lewis says that this is the third round of applications that the Defendants have made to try to deal with the same issue. The Claimant will suffer prejudice if the Defendants are allowed to proceed with the Application:

(a) the Claimant has been harassed by being required to respond to three applications seeking, in essence, the same relief;

(b) the Claimant has incurred irrecoverable costs in doing so;

(c) a significant amount of court time has been wasted; and

(d) the Unless Order was made on 31 July 2024, Mr Atkins has accepted that, by 11 September 2024, he had appreciated that the Sanction contained in the Unless Order may debar the Defendants from defending the Quantum Issue, but no application was made to vary the Unless Order, under CPR 3.1(7), until 25 March 2025.

35. Mr Atkins responded that, at the time he became aware of a possible issue about the wording of the Unless Order, the Defendants were already fully engaged in: (a)

responding to an application to increase the limit on the freezing order made against the Defendants; and (b) providing disclosure for and preparing for the trial. In any event the need for a Quantum Trial was contingent upon the Claimant succeeding at the Liability Trial. Once judgment on the Liability Issue was handed down, on 24 December 2024, and it was therefore clear that the Quantum Trial would take place, an application was brought at the CMC, on 23 January 2025. The Claimant would have been no less vexed had the Defendants applied to vary the Sanction before the Liability Trial.

IS THE APPLICATION AN ABUSE? – MY DECISION

36. I have already addressed Article 6 of the ECHR and have concluded that, provided that I apply the principles set out by the House of Lords in *Johnson v Gore Wood* and by the Court of Appeal in *Koza*, my decision will be compatible with Article 6. There is no additional test of whether or not my decision is compatible with Article 6, after I have applied those principles.

37. Mr Atkins says that the Court of Appeal in *Koza* said that a respondent may find it harder to persuade the court that the raising of a point in a subsequent interlocutory application is abusive as offending the public interest in the finality of litigation, efficient use of the court's resources and fairness to the respondent. He went on to describe interlocutory hearings as "knockabout applications" where the court has its own interest in ensuring the efficient and just disposal of the claim.

38. I accept that the Court of Appeal, in *Koza* did say that a respondent may find it harder to prove abuse in relation to interlocutory hearings, as opposed to final hearings that determine claims, but it also said that there is no separate test for interlocutory hearings. In this case a day of court time has been involved in dealing with each of the January Application and the Application (although the January Application was not the only matter dealt with at the hearing on 23 January). The costs incurred by the parties in

connection with the January Application and the Application are undoubtedly lower than those for an entire claim, but they are not inconsiderable costs. For the Application, the Claimant has produced a cost schedule for just over £30,000 and the Defendants a cost schedule for just over £70,000.

39. I do not accept that the January Application or the Application should be regarded, for the purpose of considering whether the Application is abusive, in the same way as case management directions or that the hearings of those applications could be properly described as "knockabout" hearings as Mr Atkins suggests. Neither application concerned case management directions, for example directions in relation to factual or expert evidence or disclosure, where directions may be refined or altered over time (regardless of whether there has been a material change of circumstances, or new facts) to promote the efficient and just disposal of the case. Instead there was a binary answer (yes or no) to both applications and neither concerned merely the efficient or just preparation of a case for trial but the important question of whether the Defendants could defend the Quantum Issue at all.

40. I find that the Defendants should have included, in the January Application (if not earlier) an application to vary the Unless Order/Debarring Order under CPR 3.1(7), for the following reasons:

    (a) the Defendants knew, as long ago as 11 September 2024, that the Sanction for which the Unless Order provided, at least arguably did bar the Defendants from defending the Quantum Issue and, when the Debarring Order was made, on 13 September 2024, that the Defendants, at least arguably were then debarred from defending the Quantum Issue;

    (b) the general rule is that a party should bring forward every point reasonably available to them that they knew or ought to have known of , on the first occasion;

(c) the Defendants say that they chose not to include, in the January Application, an application to vary the Unless Order/Debarring Order under CPR 3.1(7);

(d) In my judgment the Defendants do not have a good excuse for not including the application under CPR 3.1(7) in the January Application, notwithstanding what Mr Little says in his witness statement and Mr Atkins said in his submissions about why it was not included. I find this because:

(i) whilst Mr Atkins says that the Defendants' new solicitors had very little time to prepare the January Application, so that it would be heard at the CMC, very little additional time would have been involved in including a CPR 3.1(7) application in the January Application. I say this because *Tibbles*, the leading authority on the principles to be applied in considering a CPR 3.1(7) application (which I deal with at length below) makes it clear that in circumstances such as the present any application under CPR 3.1(7) should be made promptly and largely on the evidence that was before the court when the original order, which it is sought to vary, was made. That very little additional evidence would have been required to support the January Application, had an application under CPR 3.1(7) been included in it is borne out by the content of Mr Little's witness statement, made in support of the Application. Whilst that witness statement is 31 paragraphs long almost all of those paragraphs address the reasons why the CPR 3.1(7) application was not made earlier, in the January Application (evidence that would not have been required if it had been included in the January Application); and

(ii) Mr Atkins says that, because there was insufficient time available on 23 January 2025 to deal with all the applications that had been listed to be dealt with on that date, the Defendants decided not to include a CPR 3.1(7)

application in the January Application. He goes on to say that, if a CPR 3.1(7) application had been included, then inevitably it would have had to be adjourned to a later date and two hearings would therefore have been necessary, even if the CPR 3.1(7) application had been included in the January Application. I do not accept that is a good excuse, it appears that the Defendants made a tactical choice because of the lack of time available on 23 January, to include in the January Application only those grounds which they thought held out the best prospect of their obtaining an order which would allow the Defendants to defend the Quantum Issue. Those grounds failed and now the Defendants seek to advance the other grounds that they knew of before issuing the January Application, but chose not to deploy. Given that the general rule is that a party should bring forward all points in support of the relief that they seek on the first occasion, I do not accept that a tactical choice not to advance some of those points (even if based on a perceived lack of time at the hearing) is a good reason not to do so. Mr Atkins acknowledged that the Defendants could have asked for an adjournment on 23 January if there was insufficient time to deal with all the January Application, had it included an application under CPR 3.1(7).

41. Mr Lewis says that this is not simply a case where the Defendants have applied twice for substantially the same relief, they have in fact applied three times for an order providing them with relief from the Sanction or to vary the Sanction, in one form or another and the Claimant has had to respond to each of these applications. I consider that the following criticisms can fairly be made of the way in which the Defendants have approached seeking relief from the Sanction or a variation of the Sanction that enables them to defend the Quantum Issue, in whole or in part:

(a) Mr Atkins says that even if the CPR 3.1(7) application had been included in the January Application, there would still have had to be two hearings, because, in those circumstances, the January Application would have had to be adjourned part heard. I accept that but, nonetheless, the Claimant was entitled to expect that the Defendants would bring forward all of the grounds on which they sought to persuade the court that the Defendants should be allowed to defend the Quantum Issue in one application; and

(b) in my judgment, the Claimant was also entitled to expect that the Defendants would make an application dealing with the Sanction, once it was triggered, swiftly and comprehensively, but they did not do so, in a number of ways:

(i) at the hearing on 2 September 2024 Mr Atkins, for the Defendants, applied for full relief from the Sanction or in the alternative for partial relief, on the basis that the Defendants would be debarred from defending some but not all of the claims. He did not suggest that I might grant partial relief from the Sanction on the basis that the Defendants would not be debarred from defending the Quantum Issue, although he ought to have realised that the Sanction did debar the Defendants from defending the Quantum Issue;

(ii) Mr Atkins accepts that he realised on 11 September, 2 days before I handed down my judgment in relation to the applications I heard on 2 September, that the wording of the Sanction at least may mean that the Defendants were debarred from defending the Quantum Issue, as well as the Liability Issue. Mr Atkins applied, on 13 September 2024, for permission to appeal against my refusal to grant the Defendants relief from the Sanction, amongst other grounds, on the ground that I ought to have considered granting partial relief

to the Defendants, so that they were not debarred from defending the Quantum Issue;

(iii) notwithstanding that Mr Atkins had applied for permission to appeal on the ground that I ought to have considered granting partial relief, so that the Defendants would not be debarred from defending the Quantum Issue, no application was issued for partial relief from the Sanction, variation of the Unless Order/Debarring Order or other application aimed at ensuring that the Defendants would not be debarred from defending the Quantum Issue, until 15 January 2025, over 4 months later;

(iv) the Defendants offer, as an excuse, as to why an application was not made before the Liability Trial, that the Defendants were fully engaged in dealing with an application to amend the freezing order made against them and in dealing with disclosure and preparations for the Liability Trial. I do not accept that these are good excuses, in particular, as I have said elsewhere, an application under CPR 3.1(7) to vary the Unless Order/Debarring Order would have required little preparation, because hardly any evidence would be needed to support it. Whilst the Defendants did change solicitors in January 2025, this does not explain why an application was not made by the previous solicitors before then. Mr Atkins also says that having to deal with the Quantum Issue at all was contingent upon the Claimant succeeding at the Liability Trial, but I do not accept that that is a legitimate excuse for delaying making an application, the aim of which was to ensure that the Defendants were not debarred from defending the Quantum Issue, until after the result of the Liability Trial was known; and

(v) when eventually the January Application was issued, the Defendants made a choice not to include an application under CPR 3.1(7) in it. I have already concluded that they did not have a good excuse for not doing so.

Conclusion is the Application Abusive?

42. Having spent some time discussing matters relevant to determining whether, in all the circumstances the Application is abusive, I have come to the conclusion that, balancing the public and private interests, the Claimant has discharged its burden of proving that it is abusive, for the reasons that follow.

43. The public interest is in the finality of litigation and the efficient use of court resources. I also need to consider the private interests of the parties. The Claimant has an interest in not being vexed or harassed by having to deal with applications seeking substantially the same relief, on more than one occasion and to be entitled to proceed with the certainty of knowing whether or not the Defendants will be entitled to defend the Quantum Issue (subject to the appeal) and to act accordingly. The Defendants' interest is in being able to defend the Quantum Issue and they point to my findings, in the March Judgment, that I would have granted the Defendants partial relief from the Sanction so that they were not debarred from defending the Quantum Issue, had I been asked to do so on 2 September 2024, because it was unfair and disproportionate for the Defendants to be debarred from defending the Quantum Issue, when their breaches of the Unless Order really only impact the Liability Trial. Both parties have an interest in not expending more than is reasonably necessary on the litigation.

44. Mr Atkins refers to the overriding objective in CPR 1.1, to deal with cases justly and at proportionate cost. Strictly speaking CPR 1.1 says that the overriding objective applies to the rules of the CPR, nonetheless, Lord Millett in *Johnson v Gore Wood* described the rule in *Henderson v Henderson* as a procedural rule, rather than a rule of substantive law

(page 59 A-E). In light of that, I proceed on the basis that the overriding objective should be taken into account in determining whether, in all the circumstances, the Application is abusive. CPR 1.2 says that dealing with cases justly and at proportionate cost includes, so far as practicable: (a) ensuring the parties are on an equal footing and can participate fully in the proceedings; (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 the case is dealt with expeditiously and fairly; and (e) allocating to it an appropriate share of the court's resources, whilst taking into account the need to allot resources to other cases.

45. I start with the general principle that the Defendants should have brought forward in the January Application all of the points reasonably available to them to persuade me, on 23 January 2025, to grant an order which would achieve the objective of the January Application, namely that the Defendants would be allowed to defend the Quantum Issue.

46. The Defendants do not say that there has been any material change of circumstances, or that the Defendants have become aware of facts, since 23 January 2025, that are material to the Application. It follows that, in accordance with the guidance given by the Court of Appeal in *Koza* it would, "often" or "generally" be regarded as abusive for the Defendants to include, in the Application, as they have, an application that they could have included in the January Application (the CPR 3.1(7) application).

47. I have found that the Defendants have no good excuse for not including an application under CPR 3.1(7) in the January Application. This is a strong factor in favour of finding that the Application is abusive. In addition and exacerbating that point, I have found that the Defendants should have realised, when they made their first application for relief from the Sanction in August 2024, that the effect of the Sanction was to debar the Defendants

from defending the Quantum Issue and therefore a CPR 3.1(7) application, if it was going to be made at all, should have been made at that point (to vary the Unless Order) and if not then, then when the Defendants did realise that the Sanction did or at least may debar the Defendants from defending the Quantum Issue, on 11 September 2024 (to vary the Unless Order and the Debarring Order). Instead the Defendants waited until 15 January 2025 to issue an application (other than their appeal of my order of 13 September 2024) which sought to deal with the issue and then chose not to include in it an application under CPR 3.1(7), leading to the Application being issued on 25 March 2025, which did include an application under CPR 3.1(7).

48. The public interest in the finality of litigation and efficient use of court resources (replicated, in the latter case, by the overriding objective factor of allotting to this case an appropriate share of the court's resources) favours a finding that the Application is an abuse, because the Defendants' failure to bring forward all their points/grounds in one early application tends to prolong the litigation and increases the amount of court resources used on this case, thereby reducing the court resources available to deal with other cases. Whilst the court time involved in dealing with the three applications (August 2024, January 2025 and March 2025) because these are interlocutory applications and interlocutory decisions is less than it would be where separate claims are made and therefore the public interest is less prejudiced as a consequence of that, nonetheless court staff and judicial time has been wasted by the same relief being sought in three separate applications, rather than one.

49. The private interest of the parties in not spending more than is necessary on the litigation (and the CPR 1.2 factors of saving expense and dealing with the case in ways that are proportionate) are promoted by the parties being required to include in one application all of the points in support of the relief sought, rather than being allowed to seek

substantively the same relief in consecutive applications. The prejudice to the parties is less than for a final decision, where the expense involved will be a lot higher, but nonetheless, not inconsiderable sums of money have been spent which would not, in my judgment, have been spent if the Defendants had sought their relief in one application.

50. The Claimant's private interest in not being vexed or harassed by having to deal with three applications over a 9 month period, rather than one application over a much shorter period is engaged and favours a finding that the application is abusive.

51. The Defendants' interest is in being able to participate and put its defence forward in respect of the Quantum Issue (reflected in the overriding objective factors of ensuring that the parties are on an equal footing and can participate fully in the proceedings and ensuring the case is dealt with fairly). I would agree that these are important factors and indeed in *Woodhouse v Consignia* the Court of Appeal took the view that the claimant, in that case, should be entitled to make a second application to lift a stay, because, even though it was "a second bite at the cherry", it was a disproportionate penalty for the claimant to lose his right to damages due to what was called a pardonable mistake by his solicitor.

52. Notwithstanding the serious consequences for the Defendants of their being denied the opportunity to defend the Quantum Issue (and my comments, in the March Judgment, that it was disproportionate and unfair for the Defendants to be debarred from defending the Quantum Issue and that I would have granted the Defendants partial relief from the Sanction, to enable them to defend the Quantum Issue, if I had been asked to do so, at the hearing on 2 September 2024) this interest of the Defendants is outweighed by the interests of the Claimant and the public interest. This is particularly so, given my finding that the Defendants have no good excuse for not raising, in a single application, in August 2024, all their points as to why partial relief from the Sanction should be granted, or

failing that shortly thereafter. Instead they have made three applications over a period of over 6 months to seek to obtain that relief.

53. Strictly speaking, as I have found that the Application is abusive, it is not necessary for me to deal with the merits of the Application, but for completeness I will do so.

THE APPLICATION

54. The approaches of Mr Atkins and Mr Lewis to the Application are very different:

    (a) Mr Atkins concentrates on the five routes, by which he says the Application might be granted. Mr Atkins says that four of those five routes fall under the exceptions to the general rule set out *Tibbles* (the remaining route being Section 3 of HRA);

    (b) Mr Lewis says that, whether the application is made under CPR 3.1(7) or CPR 3.9, the Defendants must show that there has been a material change of circumstances, since the Unless Order/Debarring Order were made or that the facts on which those orders were made were misstated to the court. Mr Lewis says that, as the Defendants cannot show either of those two things, the Application must fail; and

    (c) the Defendants cannot show that there has been a material change of circumstances, because I found, in the March Judgment, that there had been no material change of circumstances since the Unless Order/Debarring Order had been made, in rejecting the January Application to vary the Debarring Order.

55. I will approach the question of whether I should grant the Application on its merits in the following order:

    (a) I will set out the legal principles applying to an application to vary an order made under CPR 3.1(7). In doing so I will spend some time analysing the Court of Appeal decision in *Tibbles*, given that it is common ground that *Tibbles* sets out

the current guidance on the use of CPR 3.1(7) to set aside or vary an order under CPR 3.1(7);

(b) I will set out the legal principles applying to a second (or third) application for relief from the same sanction under CPR 3.9;

(c) I will consider Mr Atkins' point that CPR 3.1(7) and CPR 3.9 should be interpreted and applied consistently with Section 6 of the HRA (which Mr Atkins presents as one of his five routes by which he says I might grant the Application, but which I consider, if correct, to be a general principle applying to CPR 3.1(7)/CPR 3.9;

(d) I will then consider the four remaining routes that Mr Atkins says are available to the Defendants, as exceptions to the general rule that it is necessary for the Defendants to show a material change of circumstances since the Unless Order and Debarring Order were made or that material facts were misstated, to obtain an order varying them under CPR 3.1(7); and

(e) if I find that any of Mr Akins four routes are available, I will decide whether the legal principles set out in *Tibbles* are met in relation to that route or routes

PRINCIPLES APPLYING TO VARYING AN ORDER UNDER CPR 3.1(7)

56. CPR 3.1(7) provides: *"A power of the court under these Rules to make an order includes a power to vary or revoke the order."*

57. Both counsel agreed that the Court of Appeal in *Tibbles* set out the principles that apply to an application under CPR 3.1(7). In that case the claimant brought a low value personal injury claim which was allocated to the small claims track. On the claimant's application, by consent, the claim was reallocated to the fast-track by order dated 11 December 2008, but that order did not say how the costs up to the date of the order would be dealt with.

Subsequently the District Judge that made the order on 11 December 2008, varied it, on the claimant's application, to make it clear that costs incurred prior to the date of the order were to be treated as fast track costs (substantially increasing the costs that the claimant could recover). A County Court Judge reversed that order, finding that the District Judge had no jurisdiction to vary his previous order of 11 December 2008. The Court of Appeal dismissed the second appeal, agreeing with the County Court Judge's order.

58. The basis on which the District Judge considered that he had jurisdiction to vary his previous order of 11 December 2018 was that the parties had not brought to his attention, on that occasion, the provisions of the CPR and relevant practice direction and had they done so he would have considered what the appropriate order to make in respect of the pre-reallocation costs was. He applied the test "should the court order have been made in the first place, knowing what I know now". The Circuit Judge overturned that decision, he did not consider that the District Judge had jurisdiction under CPR 3.1(7) to vary the previous order on the basis that the parties or one of them had failed to appreciate the consequences of failing to make an order specifying how the pre reallocation costs were to be treated.

59. Rix LJ reviewed the previous authorities on CPR 3.1(7):

(a) the first authority was *Lloyds Investment (Scandinavia) Ltd v Ager-Hansen [2003] EWHC 1740 (Ch).* In that case Patten J refused to vary a previous order made by a Deputy High Court Judge setting aside a default judgment on terms that the defendant paid a sum of money into court. Patton J said that, whilst it was not intended to be an exhaustive definition of the circumstances in which the power under CPR 3. 1 (7) could be exercised, the applicant had to show either a material change of circumstances or that the judge that made the original order was misled, in some way, innocently or otherwise, as to the correct factual position. It was not, he said, open to a party to the earlier application to seek to re-argue the application by relying on submissions and

evidence which were available to him at the time of the earlier hearing but which, for whatever reason, he or his legal representatives chose not to deploy;

(b) In *Calder v Williams [2006] 1 WLR 1945* Dyson LJ endorsed Patten J's approach, he said that the two circumstances outlined by Patten J were the only ones in which the power to revoke or vary an order already made should be exercised under CPR 3.1(7). However later in his judgment, Dyson LJ said that the jurisdiction to vary or revoke under CPR 3.1(7) should not "normally" be exercised unless the applicant is able to place material before the court whether in the form of evidence or argument which was not placed before the court on the earlier occasion;

(c) In *Edwards v Goulding [2007] EWCA Civ 416* a Master made an order, the effect of which, was to do the opposite of his intention, which was clear from his judgment, to leave the question of limitation to be canvassed later in the proceedings. The Master varied his previous order to be consistent with his intention. Buxton LJ said that the rule was very wide and appeared to give a broad discretionary power but it must not be used as a substitute for an appeal. There must be additional material before the court in the form of evidence or possibly argument, although he reserved the question of whether additional argument alone would be enough. The case before the court considering an application of CPR 3.1(7) must be essentially different from a simple error that could be righted on appeal. Use of the CPR 3.1(7) power was appropriate, in that case, on the basis that the Master intended to keep the limitation issue alive but his order had the opposite effect;

(d) In *Roult v North West Strategic Health Authority [2010] 1 WLR 487* a settlement of a medical negligence claim was approved by the court. The claimant sought to revise the schedule to the approved order to provide for private rather than local authority care for the claimant. The judge decided that he had no power to reopen the order. Hughes LJ

said that CPR 3.1(7) could not be used by a judge to, in effect hear an appeal from himself. For case management decisions the grounds for invoking the rule generally had to fall into two categories: (a) erroneous information provided when the order was granted; or (b) subsequent events destroying the basis on which the order was made. The exigencies of case management may well call for a variation in case management planning from time to time in light of developments. It did not follow that even where one of those two categories was present a party was entitled to return to a trial judge and ask him to reopen a decision. In particular it did not follow where the judge's order is a final one disposing of the case in whole or in part and especially so if the final order was a settlement agreed between the parties;

(e) In *Simms v Carr [2008] EWHC 1030 (Ch)* Morgan J found that a Master did not have power to revoke his previous order for security for costs on the basis of new information that he was not aware of the first time round. The new information was not material to the decision and could have been correctly stated the first time round;

60. In *Kojima v HSBC Bank plc [2011] 3 All ER* 359 Briggs J (as he then was) found that the jurisdiction did not extend to a final order. He went on however to comment (obiter) on what he said was a tension between: (a) Patten J's view in *Lloyds Investment (Scandinavia) Limited* that a party will be excluded from seeking to revoke an order where he has chosen not to present materials on the first occasion; and (b) Morgan J's view in *Simms v Carr* that a party would be precluded from using CPR 3.1(7) if the materials were available for use on the first occasion, whether or not a party chose by conscious decision not to deploy them. Briggs J said that if it had been necessary to do so, he would have concluded that whereas a conscious choice not to deploy relevant material (evidence or argument) would generally present an almost insuperable barrier to an applicant for revocation under CPR 3.1(7) the failure to do so, otherwise than through conscious choice (for example because

of the absence of legal representation at the material time) would be a relevant negative factor against the exercise of the discretion but by no means an insuperable hurdle, if other relevant considerations militated in favour of exercise of the discretion.

61. Having reviewed those authorities, Rix LJ said, at paragraph 39, that:

" in my judgment this jurisprudence permits the following conclusions to be drawn:

(i) …. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites of the cherry and the need to avoid undermining the concept of appeal, push towards a principled curtailment of an otherwise apparently open discretion….

(ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, jurisprudence has laid down further guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only: (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.

(iii) It would be dangerous to treat these primary circumstances, originating with Patten J in this court, as though it were a statute. That is not how jurisprudence operates, especially where there is a warning against the attempt at exhaustive definition.

(iv) Thus there is room for debate in any particular case as to whether and to what extent, in the context of principle (b) in (ii) above, this statement may include omission as well as positive misstatement, or concern argument as distinct from

facts. In my judgment, this debate is likely ultimately to be a matter for the exercise of discretion in the circumstances of each case;

(v) Similarly, questions may arise as to whether the statement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or unknown, knowable or unknowable. These as it seems to me, are also factors going to discretion: but where the facts or arguments are known or ought to have been known as at the time of the original order it is unlikely that the order can be revisited and that must be still more strongly the case where the decision not to mention it is conscious and deliberate;

(vi) Edwards v Goulding [2007] EWCA Civ 446 is an example of the operation of the rule in a rather different circumstance, namely that of a manifest mistake on the part of the judge in the formulation of his order. It was plain in that case from the master's judgment itself that he was seeking a disposition which would preserve the limitation point for future debate, but he did not realise that the form which his order took would not permit the realisation of his adjudicated and manifest intention; and

(vii) The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation."

62. Rix LJ went on at paragraphs 41 and 42 to say as follows:

(a) Paragraph 41 – *"Thus it may well be that there is room within CPR 3.1(7) for a prompt recourse back to a court to deal with a matter which ought to have been dealt with in*

an order but which in genuine error was overlooked (by the parties and the court) and which the purposes behind the overriding objective, above all the interests of justice and the efficient management of litigation, would favour giving proper consideration to on the materials already before the court. This would not be a second consideration of something which had already been considered once (as would typically arise in a change of circumstances situation) but would be giving consideration to something for the first time. On the basis, the power within the rule would not be invoked in order to give a party a second bite of the cherry, or to avoid the need for an appeal, but to deal with something which, once the question is raised, is more or less obvious, on the materials already before the court"; and

(b) Paragraph 42 – *"I emphasise however the word "prompt" which I have used above. The court would be unlikely to be prepared to assist an applicant once much time had gone by. With the passing of time is likely to come prejudice for a respondent who is entitled to go forward in reliance on the order that the court has made….."*

63. Rix LJ asked himself what the District Judge might have done if asked by the claimant on the day after he made the order of 11 December 2008 to vary that order to provide that costs pre-reallocation should be fast track costs. He said that there would have been no new material, just a belated realisation of the effect of CPR 44.11 and acknowledgement that it had been overlooked in the order made the previous day. Rix LJ took the view that it would have been a permissible use of CPR 3.1(7) to vary the order made the previous day, however the claimant had let 14 months go by before applying to vary the order and the following matters militated against exercising the discretion under 3.1(7): (a) the delay in making the application, even after final judgment had been obtained; (b) there was inevitably prejudice to the defendant from the delay and the District Judge had been wrong to suggest that the defendants had suffered no prejudice; (c) the case fell outside the two categories identified

by Patten J in that there was no change of circumstances and no misstatement of any kind. At its highest the order had been made in ignorance of CPR 44.11 and its effect. However it was the responsibility of each party to look after their own interests, unless litigants in person were involved, where things might operate differently; (d) the question was not merely, what the right order was when the original order was made but what should be done at the time of the hearing of the application to vary, bearing in mind any change of circumstances, new evidence and any explanation offered for it and especially any prejudice; and (e) the application did not fall within the spirit of the circumstances in which rule 3.1(7) may be invoked, the circumstances of the case did not support the granting of such a very late application.

PRINCIPLES RELATING TO A SECOND APPLICATION FOR RELIEF FROM SANCTIONS UNDER CPR 3.9

64. Counsel agree that the leading authority on the legal principles applying to a second application for relief from sanction under CPR 3.9 is the Supreme Court decision in *Theravarajah v Riordan [2015] UKSC 78* (the leading judgment being given by Lord Neuberger).

65. In *Theravarajah* the claimant issued proceedings for breach of a share purchase agreement. The claimant successfully obtained a freezing order against the defendants which required them to disclose information concerning their assets. When that requirement was not complied with an unless order was made, which provided that the defendants would be debarred from defending unless they disclosed details of their assets. The claimant applied for a debarring order on the basis that the defendants had not complied with the unless order and the defendants cross applied for a declaration that they had complied with the order, or

alternatively for relief from the sanction under CPR 3.9. The claimant's application was granted and the defendants' application for relief refused. The defendants then made a second application for relief from sanction, on the basis that they could now disclose the required information. The second application was granted, at first instance, but the Court of Appeal reversed that order.

66. At first instance the Deputy Judge had found that, if it was necessary, to show, when the second application for relief from sanctions was made, that there had been a material change of circumstances, then the fact that since that application had been heard, the defendants had now substantially complied with their disclosure obligations was a sufficient change of circumstances. The Court of Appeal allowed the appeal on the basis that the first application for relief had been rejected and therefore CPR 3.1(7) applied the Deputy Judge could not therefore have granted the second application for relief unless there had been a material change of circumstances and the mere fact that the defendants had now substantially complied with their disclosure obligations did not amount to such a material change of circumstances. Lord Neuberger found that the Court of Appeal was right to hold that CPR 3.1(7) applied to the second application for relief because, on a proper analysis, it was an application which invited the judge to "vary or revoke" the previous order. Upholding the decision of the Court of Appeal, Lord Neuberger went on to say:

(a) at paragraph 18: *"However, even if that were not right, it appears to me that, as a matter of ordinary principle, when a court has made an interlocutory order, it is not normally open to a party subsequently to ask for relief which effectively requires the order to be varied or rescinded, save if there has been a material change of circumstances since the order was made……Accordingly, even if CPR 3.1(7) did not apply to the second*

relief application, it appears clear that the defendants would have faced the same hurdle before the deputy judge…"; and

(b) at paragraph 19*: "There was no question of the facts having been misstated by Hildyard J or of a manifest mistake in formulating his order. Accordingly unless (perhaps) they could show that this was not a "normal" case, the defendants had to establish a material change of circumstances since the hearing before Hildyard J before the deputy judge could properly consider the second relief application on its merits…".*

67. Given that Lord Neuberger (with whom the other members of the Supreme Court agreed) took the view that a second application for relief from the same sanctions under CPR 3.9 was to be treated as an application under CPR 3.1(7) to vary the previous refusal of relief, I will apply the guidance set out in *Tibbles* in deciding whether or not to grant the Application which is made under CPR 3.1(7) and CPR 3.9. Mr Atkins did not, in any event, advance a separate case under CPR 3.9, he confined his submissions to CPR 3.1(7).

SECTION 6 OF THE HUMAN RIGHTS ACT 1998 ("HRA")

68. Mr Atkins says that:

(a) Section 3 of the HRA requires the court to interpret CPR 3.1(7) and CPR 3.9 in a manner which is compatible with the defendant's rights under the ECHR;

(b) Article 6 of the ECHR provides, where relevant that: *"in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair trial and public hearing within a reasonable time by an independent impartial tribunal established by law".* Mr Atkins says that the court must always consider, therefore, whether a fair trial is possible and have regard to the defaulting

party's ECHR Article 6 rights of access to the court, and whether (in this case) the remedy of strikeout of the Defendants' defences and debarring them from defending, will be proportionate and fair in all the circumstances of the case;

(c) I should interpret CPR 3.1(7) and CPR 3.9 consistently with Article 6, taking into account the conclusion in my judgment of 11 March 2025 that it will be unfair for the Defendants to be debarred from defending the Quantum Issue; and

(d) Mr Atkins accepted that there are established curtailments of the Article 6 rights, he referred me to the decision of Calver J in *Active Media Services Inc v Burmester, Duncker & Joley GMBH and others [2021] EWHC 232 (Comm).* In that case Calver J, at paragraph 307 said: *" The court must always consider, therefore, whether a fair trial is possible and to this end have regard to the defaulting party's ECHR Article 6 rights of access to the court and whether the remedy of a strike out would be proportionate and fair in all the circumstances of the case…."*

69. Mr Lewis says:

(a) Article 6 rights are subject to procedural orders and sanctions which the court may impose;

(b) in Patel v Mussa *[2015] EWCA Civ 434*, the Court of Appeal summarised the position as follows:

"*It is convenient at this point to refer briefly to Article 6 of the Convention, on which the claimant placed some emphasis in his grounds of appeal and to which reference was made in the order granting permission to appeal. Although article 6.1 provides that "In the determination of his civil rights and obligations … everyone is entitled to a fair … hearing", it is well established that courts are entitled to give directions for the proper and efficient conduct of proceedings before them and to impose sanctions on parties who fail to comply with their*

orders. Such sanctions may, in an appropriate case, include striking out proceedings. Provided such powers are exercised fairly, they do not constitute a breach of Article 6 . The question in the present case, therefore, is simply whether, in dismissing the claimant's application for permission to appeal as a sanction for failing to comply with his earlier directions, the judge exercised his discretion improperly."; and

(c) the same questions apply here: did I exercise my discretion improperly in imposing and then applying the Unless Order? Mr Lewis submits that I did not but that, even if I did, that is a question for an appeal and does not justify another application to vary the Unless/Debarring Order or for relief from the Sanction.

70. In *Active Media*, the context for the comments of Calver J in paragraphs 307 and 309 of his judgment was that Calver J had found that the claimant failed to call relevant witnesses and more importantly that their sole witness had deliberately deleted an unknown number of relevant documents, which was only revealed towards the end of the trial when, in the view of Calver J, he had no other choice other than to confess to what he had done. Calver J (in that context) had to decide what to do about those issues which came down to a choice, either to strike out the claim or to make strong adverse inferences. Ultimately he decided to make strong adverse inferences and in doing so made his comments at paragraph 307 and 309.

71. The position in this case is very different from that in *Active Media.* In this case the Defendants are making a second (or third) application for relief from the Sanction and an application under CPR 3.1(7) and both the Court of Appeal (in *Tibbles*) and the Supreme Court (in *Theravarajah*) have set out, in those contexts, what principles I should apply in deciding whether or not to grant the Application. The Court of Appeal and Supreme Court have therefore determined how CPR 3.1(7) and CPR 3.9 are to be interpreted consistently

with Article 6 of the ECHR. If I apply those principles wrongly, or unfairly then, on appeal, my decision may be overturned, but I do not, as Mr Atkins appears to suggest, need to consider whether the fair application of those principles would be incompatible with the Defendants' Article 6 rights.

THE FOUR ROUTES SAID TO BE AVAILABLE UNDER TIBBLES

72. If it is established that one or more of the four routes or gateways suggested by Mr Atkins are a means by which my jurisdiction to vary the Unless Order/Debarring Order, under CPR 3.1(7) arises, then the question is whether I should exercise that discretion in all the circumstances (although the factors to be taken into account in the exercise of the discretion and how difficult it may be for the Defendants to persuade me to exercise the discretion may vary according to which "gateway" engages my discretion). What I propose to do therefore is first to decide if any or all of the four gateways that Mr Atkins suggests allow me to exercise the CPR 3.1(7) discretion apply here and if any of them do, whether it is appropriate to exercise that discretion on the facts of this case.

ISSUE OVERLOOKED BY GENUINE ERROR

73. Mr Atkins says that the parties and the Court overlooked the issue of whether the Defendants ought to be debarred from defending the Quantum Issue, in genuine error at the time of both the Unless Order and the Debarring Order:
    (a) the issue was not raised by the Defendants and would have been, had it occurred to them to do so. I confirmed (in refusing the Defendants' permission to appeal against the refusal of their first application for relief from the Sanction on the ground that the court ought to have considered granting partial relief, so that they were not debarred from

defending the Quantum Issue) that this point was not raised in argument, on hearing of the application for relief from the Sanction;

(b) in the March Judgment I concluded that the Unless Order and Debarring Order are unfair to the Defendants in that they prevent the Defendants from taking part in the Quantum Issue. The Orders thus breach the overriding objective and Article 6 of the ECHR. The Court would not have made orders which had these consequences, unless it had overlooked them; and

(c) Mr Woolstenhulme has as good as confirmed that the Claimant also overlooked the issue of whether the Defendants ought to be debarred from defending the claim after the Liability Trial. Mr Woolstenhulme says:

"*What the Claimants were considering at the time, and whether or not they overlooked the issue, is outside the knowledge of the Defendants and as such, it is inappropriate for them to submit [that the Claimant overlooked it]*";

(d) this is not, therefore, Mr Atkins says, the Defendants having a second consideration of something which has already been considered once, but a consideration for the first time of this issue and it is obvious, on the materials already before the Court, that the Defendants ought not to be debarred from participating in the Quantum Trial; and

(e) the issue is being raised promptly before directions are ordered for the Quantum Issue.

74. Mr Lewis, in his skeleton argument, deployed the same arguments in relation to all four routes which Mr Atkins says are available to me to grant the Defendants' relief, in accordance with *Tibbles.* Mr Lewis said, in oral argument that *Tibbles* requires that there is either a material change of circumstances or that the facts were misstated to the judge when the original order was made. The Defendants accept that they cannot go behind my finding (in the March Judgment) that there has been no material change of circumstances since the Unless Order/Debarring Order were made and Mr Lewis says, there is no

question of the facts having been misstated to me when the Unless Order or Debarring Order were made, in those circumstances, I should not vary those orders so as to allow the Defendants to defend the Quantum Issue.

75. I am satisfied that:

    (a) at the hearings of the applications for the Unless Order and the Debarring Order I was not addressed on the question of whether the Unless Order or the Debarring Order should be limited to the Liability Issue (the Liability Trial being due to commence in October 2024) or extend to the Quantum Issue as well, for which no directions had yet been given. Mr Atkins says I was not addressed on the issue, the March Judgment makes it clear that I was not and Mr Lewis does not say otherwise;

    (b) the point was overlooked inadvertently by the Defendants at both hearings and would have been raised by them had it occurred to them to do so (because, as Mr Atkins says, it was to the Defendants' advantage to raise the point and it would not have deliberately failed to do so); and

    (c) I cannot say whether the Claimant was aware that I could have been asked to limit the effect of the Unless Order and the Debarring Order to the Liability Issue, and not the Quantum Issue as well. It was the Claimant that sought the Unless Order and Debarring Order in unlimited terms and it would perhaps have been strange if they had brought to my attention that I could make the Unless Order/Debarring Order in more limited terms than they were asking me to make it.

76. I am satisfied that, at least in principle, the overlooking of such an important issue by the Defendants (and consequent failure on my part to consider the point) does engage my discretion under CPR 3.1(7) to vary both the Unless Order and the Debarring Order because:

(a) it seems to me that the failure of the Defendants to argue, at the hearing of the Unless Order application or the Debarring Order application that, if the Defendants were to be debarred from defending at all, then such debarral should be limited to the Liability Issue and not extend to the Quantum Issue, falls within the conclusion of Rix LJ, that it was open to debate whether an omission to run an argument at the hearing at which the order (which it was sought to vary) was made was a basis on which the CPR 3.1(7) discretion may be exercised and fell to be considered as factors relevant to the exercise of that discretion (see paragraph **61 (iv)** above); and

(b) there are similarities between the relevant circumstances in this case and those in *Tibbles*. In both cases, in support of an application under CPR 3.1(7), it is said that an issue was overlooked when the original order was made: (i) in *Tibbles* it was the existence and effect of CPR 44.11; and (ii) here it is the overlooking of an argument that the Unless Order and the Debarring Order could have been limited to the Liability Issue, rather than extending to the Quantum Issue as well. In Tibbles, Rix LJ said (see paragraph 62 (a) above) that, if an application in that case had been made the day after the District Judge made his order, then it may well have been granted but various factors and in particular delay militated against exercise of the discretion in favour of varying the order in that case.

MANIFEST MISTAKE

77. Mr Atkins says that there was a manifest mistake by me, in the Unless Order and the Debarring Order in that, on the Court's construction of them, they debar the Defendants from defending the Quantum Issue, when no thought was given to the justice or proportionality of the Sanction extending to the Quantum Issue or the impact of this on the Defendants' rights of access to the court under Article 6 of the ECHR. Mr Atkins suggests

that: (a) it was an unintended consequence that the orders were unlawful under Article 6 of the EHCR (I having found they unfairly deprive the Defendants of access to the court when the Quantum Issue is determined); and (b) there is manifest error, because the Unless Order and Debarring Order had a consequence that was neither intended nor appreciated, namely that the Defendants were debarred from defending the claims, not just as to the Liability Issue, but as to the Quantum Issue as well.

78. Mr Lewis says that the failures of the Defendants to provide disclosure extended to the Quantum Issue, as well as the Liability Issue and so it was not disproportionate for the Unless Order and the Debarring Order to extend to both issues.

79. I accept that if I made what Mr Atkins refers to as a "manifest mistake" then such mistake would engage my discretion under CPR 3.1(7). Manifest mistake was identified by Rix LJ in *Tibbles* as an example of the operation of CPR 3.1(7) in a different context to that in which it ordinarily operates (see paragraph **61 (vi)** above). Rix J identified *Edwards v Goulding* as an example of the operation of CPR 3.1(7) in that context.

80. I do not consider that either the Unless Order or the Debarring Order could be properly regarded as subject to a manifest error. In *Edwards v Goulding* it was accepted that the Master's judgment made clear that he had intended to make an order which left open the question of limitation, but his order in fact did not do so. There was a manifest error therefore in giving effect to the Master's intention in the order. That is very different from the situation here, which is that it was never suggested to me that the Sanction contained in the Unless Order and given effect to in the Debarring Order should be limited to the Liability Issue and therefore not affect the Defendants' ability to defend the Quantum Issue (if I was not prepared to grant relief in respect of the whole of the Sanction). In my judgment, handed down on 11 March 2025, I made it clear that, had it been put to me, at the hearing of the Claimant's application for the Debarring Order/Defendants' application

for relief from the Sanction, that, in the alternative to granting relief from the whole of the Sanction, I ought to grant partial relief from the Sanction to the Defendants, so that they were not debarred from defending the Quantum Issue, then I may well have granted partial relief to the Defendants in that form. That was not however put to me at the hearing on 31 July 2024 when I made the Unless Order or at the hearing on 2 September 2024, when the Claimant applied for the Debarring Order and the Defendants for relief from the Sanction. I did not intend to limit the Sanction in the Unless Order so that it only applied to the Liability Issue and not the Quantum Issue. I cannot see therefore how it can be said that there was a manifest mistake by me in the wording of the Unless Order or the Debarring Order. They both accurately reflected my intentions in accordance with my judgment on each occasion, unlike the court order of the Master in *Edwards v Goulding.*

INNOCENT MISSTATEMENT

81. Mr Atkins says that the facts and/or arguments on which the original decisions were made were innocently misstated in that neither party put before the Court that the effect of the Unless Order and/or the Debarring Order would be to debar the Defendants from defending the Quantum Issue, in circumstances where the relevant breach had no impact on the fairness of the proceedings after the Liability Trial. All of the Claimant's evidence and submissions were addressed, Mr Atkins says, exclusively at the effect on the Liability Trial of the Defendants' failures to comply with the order for disclosure of 3 July 2024 and there was, says Mr Atkins, an onus on the Claimant to make clear to me what the effect of the Debarring Order, which I ultimately made was.

82. Mr Atkins says that it is sufficient that I was misled, even though unintentionally, into believing that I was imposing a proportionate sanction, when I was not, to engage my

discretion under CPR 3.1(7) to vary the Unless Order and/or the Debarring Order. Mr Atkins says that paragraphs 19, 21 and 70 of the March Judgment confirm that I was misled.

83. Mr Lewis says that the allegation that there was an innocent misstatement could have been taken in the January Application but it was not and he refuted the suggestion that the Claimant had any responsibility to draw the court's attention to the fact that the Unless Order and the Debarring Order would extend to debarring the Defendants from defending the Liability Issue and the Quantum Issue, that much, Mr Lewis said, was clear on the face of both orders.

84. I accept that, if relevant facts and arguments were misstated to me at the hearing on 31 July 2024, which resulted in the Unless Order being made, or the hearing on 2 September 2024 which resulted in my making the Debarring Order and refusing the Defendants' application for relief from the Sanction, then my discretion to vary those orders, pursuant to CPR 3.1(7), would be engaged. Misstatement of the facts resulting in the original decision which it is sought to vary under CPR 3.1(7) was identified by Rix LJ in *Tibbles* as one of the two primary basis upon which CPR 3.1(7) the CPR3.1(7) discretion would be engaged (see paragraph **61 (ii)** above) and misstatement of arguments was identified by Rix LJ as a basis upon which the discretion might be engaged (see paragraph **61 (iv)** above).

85. I do not however consider that the facts or arguments can be said to have been misstated to me at either the hearing on 31 July 2024 or the hearing on 2 September 2024. Mr Atkins has pointed to no fact and no argument that was misstated, his case is that it was not put to me, at the hearing on 31 July 2024, that I could or should restrict the Unless Order so that the Sanction did not debar the Defendants from defending the Liability Issue only and it was not put to me, at the hearing on 2 September 2024 that I could or should grant the Defendants partial relief from the Sanction, so that they were not debarred from defending the Quantum Issue (and no arguments were advanced as to why I should in either case make

an order in that form). That is in the nature of an omission to seek, in the alternative to full relief from the Sanction, partial relief from the Sanction (so that the Defendants were only debarred form defending the Liability Issue) not a misstatement of the facts or arguments.

OTHER MISSTATEMENT BY THE CLAIMANT

86. Mr Atkins says that the Claimant ought to have disclosed at the pre-trial review ("PTR") on 2 September 2024 that the Claimant was not ready for the Liability Trial, because it could not prove, without expert evidence (for which permission had not been given), which counterfactual scenario should be used to determine the Claimant's losses in respect of the Hotel Site, which DJ Phillips by her directions order of 22 February 2023 directed to be determined at the Liability Trial.

87. Mr Atkins says that:

    (a) this serious allegation of wrong doing is not addressed in Mr Woolstenhulme's witness statement of 8 April 2025 at all. The strong inference is that Mr Woolstenhulme is silent because the Claimant knew, at the PTR, that it was not ready for the Liability Trial, but told the court that it was ready;

    (b) the Claimant did not correct this position, until the end of the Liability Trial, six weeks later, when the Claimant requested an adjournment on the basis that the Counterfactual Issue could not be resolved without the benefit of expert evidence, which the Claimant had never sought permission to obtain;

    (c) the misstatement is likely to have been material to the Court's decision to refuse the Defendants' application for relief from the Sanction (which was made at the PTR on 2 September 2024). If neither party was ready for the Liability Trial, the fair course would have been either to adjourn the Liability Trial so that the Defendants could complete their disclosure exercise and the Claimant could obtain expert evidence on the

Counterfactual Issue, or to require both parties to continue to the Liability Trial but determine the Counterfactual Issue against the Claimant, rather than adjourning the issue to the Quantum Trial; and

(d) it is open to me to re-open the Debarring Order and order a retrial of the Liability Trial, but even if I do not do that, I should grant partial relief from the Sanction so that the Defendants are allowed to participate fully, from now on.

88. Mr Lewis denies that I was misled in any way at the PTR on 2 September 2024.

89. It is clear from the judgment of Rix LJ in *Tibbles* that misstatement of a material fact or facts at the hearing at which a previous order was made is one of the primary grounds on which that previous order may be varied pursuant to CPR 3.1(7) (see paragraph **61 (ii)** above.

90. Mr Atkins says that the misstatement, made at the PTR on 2 September 2024, was that the Claimant was ready for the Liability Trial, whereas, in fact the Claimant knew that it was not ready to deal with the Counterfactual Issue which District Judge Phillips had directed should be determined at the Liability Trial. It was at the hearing on 2 September 2024 that the Defendants made their application for relief from the Sanction and had I known that the Claimant was not ready for the Liability Trial, I should either have adjourned it, or refused the subsequent application of the Claimant, at the end of the Liability Trial, to adjourn determination of the Counterfactual Issue to the Quantum Trial.

91. I am not satisfied that the Claimant misrepresented at the PTR on 2 September 2024, that they were ready for the Liability Trial:

(a) Mr Woolstenhulme's witness statement of 8 April 2025 replied to Mr Little's witness statement of 25 March 2025 served in support of the Application. Mr Little does not deal, in his witness statement, with the assertion that the Claimant misrepresented on 2 September 2024 that the Claimant was ready for the Liability Trial. I do not

consider therefore that it is appropriate to infer that the Claimant accepts that it misrepresented, at the PTR that it was ready to proceed to the Liability because Mr Woolstenhulme did not deal with the point in his witness statement; and

(b) even if, as Mr Atkins contends, the Claimant knew that it would have difficulties in proving, at the Liability Trial, which counterfactual scenario should be used to value its loss for the Hotel Site, the Claimant is entitled to proceed to trial with the case it had and take its chances, rather than seek an adjournment of the Liability Trial, in an attempt to improve its case on this issue.

92. In any event, even if the Claimant had asked that the Liability Trial be adjourned and sought permission to rely on expert evidence to assist it to prove its case on the Counterfactual Issue, I do not consider that that would have had a material effect on my determination of the Defendants' application for relief from the Sanction for three reasons:

(a) the Defendants did not ask me, on 2 September 2024 to adjourn the Liability Trial, they argued that they would be able to complete all of the outstanding disclosure which they were required to provide, in time for the Liability Trial;

(b) I accept that, if I had adjourned the Liability Trial, because the Claimant said that it wanted to produce expert evidence on the Counterfactual Issue, then this may well have affected the outcome of the Defendants' application for relief from the Sanction, however I think it highly unlikely that I would have granted such an adjournment, even if the Claimant had asked for it. The Claimant would have had no excuse for not raising the issue long before the PTR, if they wanted, contrary to the directions order of DJ Phillips, to rely on expert evidence on the Counterfactual Issue, at the Liability Trial; and

(c) I decided, in the Liability Judgment that I handed down on 24 December 2024, that consideration of the Counterfactual Issue should be dealt with at the Quantum Trial, for the reasons set out in that judgment. I gave the Defendants permission to appeal that decision. If the appeal fails then my order, that the Counterfactual Issue should be dealt with at the Quantum Trial will stand, if it succeeds, then the Claimant may be denied the opportunity to recover damages in relation to the Hotel Site, notwithstanding that I determined at the Liability Trial that the Claimant was entitled to recover half of any profit for the Hotel Site. Either way I do not consider there is any link between my decision, at the end of the Liability Trial, to adjourn the determination of the correct counterfactual scenario for the Hotel Site and my refusal of the Defendants' application for relief from the Sanction, decided before the Liability Trial.

SHOULD I EXERCISE MY DISCRETION UNDER CPR 3.1(7) IN THIS CASE?

93. The only one of the four routes or gateways suggested by Mr Atkins, which I have found engages my discretion under CPR 3.1(7), is that the question of whether I should consider granting partial relief to the Defendants so that they would not be debarred from defending the Quantum Issue, was overlooked at least by the Defendants' counsel at the hearing of the Claimant's application for the Unless Order on 31 July 2024 and the Defendants' application for relief from the Sanction heard on 2 September 2024, and therefore by me on those dates (see paragraphs 75 and 76 above).
94. I now need to consider, having regard to the guidance given by Rix LJ in *Tibbles,* whether I should vary the Unless Order/Debarring Order so that the Defendants are not debarred

from defending the Quantum Issue. Mr Atkins says that I should exercise my discretion in that way because:

(a) in the March Judgment, I held that:

(i) as matters stand the Quantum Trial will be unfair to the Defendants because they are debarred from defending the Quantum Issue, as well as Liability Issue;

(ii) the Quantum Trial would be unsatisfactory to the court without the participation of the Defendants;

(iii) the failure of the Defendants to provide the disclosure that the Unless Order required the Defendants to provide, which resulted in the Debarring Order, would not prevent the Claimant from obtaining disclosure relevant to the Quantum Issue or disrupt their preparations for the Quantum Trial;

(iv) it was disproportionate or at least less appropriate for the Defendants to be debarred from defending the Quantum Issue as well as the Liability Trial; and

(v) I would have granted partial relief from the Sanction, to enable the Defendants to defend the Quantum Issue, had I been asked to do so, on 2 September 2024; and

(b) it follows that, if I have a discretion under CPR 3.1(7) to vary the Unless Order/Debarring Order, I should do so to grant the Defendants at least partial relief so that they can defend the Quantum Issue.

95. Mr Lewis says that the Defendants do not meet the *Tibbles* criteria for varying the Unless Order/Debarring Order.

96. The first point I will make is that in *Tibbles,* Rix LJ said that the District Judge, in that case had used the wrong test, in deciding whether to exercise the CPR 3.1(7) jurisdiction, namely “should the order have been made in the first place, knowing what I know now”

(paragraph 23 of the *Tibbles* judgment). After a comprehensive review of the authorities, Rix LJ set out the principles to be applied in deciding whether the discretion under CPR 3.1(7) arises and guidance on the use of that discretion (see paragraph 61 above) and then went on in paragraphs 41 and 42 of his judgment (see paragraphs 62 above) to comment specifically on what had been overlooked by the parties and the District Judge in the *Tibbles* case.

97. I consider that the following principles set out by Rix LJ in *Tibbles* are relevant to my decision as to whether or not I should exercise the discretion, that I have found under CPR 3.1(7), to vary the Unless Order/Debarring Order:

(a) *"considerations of finality, the undesirability of allowing litigants to have two bites of the cherry and the need to avoid undermining the concept of appeal, push towards a principled curtailment of an otherwise apparently open discretion…."*

(b) *there is room for debate as to whether the discretion extends to omissions in the arguments that could have been put before the court on the first occasion, but were not;*

(c) *questions may arise as to whether the omission is conscious or unconscious; and whether the argument was known or unknown, knowable or unknowable. These are factors going to discretion: but where the facts or arguments are known or ought to have been known, at the time of the original order it is unlikely that the order can be revisited and that must be still more strongly the case where the decision not to mention them is conscious and deliberate;*

(d) *the successful invocation of the rule is rare, such is the interests of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances, in an interlocutory situation;*

(e) it may well be that there is room within CPR 3.1(7) for a prompt recourse back to the court to deal with a matter which ought to have been dealt with in an order, but which in genuine error was overlooked (by the parties and the court) and which the purposes behind the overriding objective, above all the interests of justice and the efficient management of litigation, would favour giving proper consideration to on the materials already before the court. This would not be a second consideration of something which had already been considered once (as would typically arise in a change of circumstances situation) but would be giving consideration to something for the first time; and

(f) the court would be unlikely to be prepared to assist an applicant once much time had gone by. With the passing of time is likely to come prejudice for a respondent who is entitled to go forward in reliance on the order that the court has made…..".

98. It is also, in my judgment useful to look at why, applying the principles that he had just set out in his judgment, Rix LJ decided that the appeal should be dismissed in *Tibbles* (so that the District Judge's variation of his original order was set aside). The reasons are set out in paragraphs 46 – 52 of Rix LJ's judgment and in summary they were that, if an application had been made the day after the District Judge's order, then granting that application could not be said to be an impermissible use of CPR 3.1(7), but nearly all the other circumstances of the case militated against varying the order:

(a) there was a delay of over 10 months in making the application which included determination of the claim, at trial, in the claimant's favour;

(b) there was inevitable prejudice to the defendant caused by the claimant's failure to apply for a variation earlier, the Claimant was entitled to proceed on the basis of the original order;

(c) the case fell outside of Patten J's two principal categories (change of circumstances and misstatement of the facts). At highest, the case was that the parties and the judge acted in ignorance of the relevant rule, but each party is responsible for looking after its own interests;

(d) the question was not what the right order would have been, if the relevant rule had been brought to the District Judge's attention, but what should be done at the time the application to vary was heard, bearing in mind any change of circumstances, new evidence, any delay, any explanation offered and especially any prejudice; and

(e) the application did not fall in the spirit of the primary circumstances in which CPR 3.1(7) can be invoked and even if it was a proper case, those circumstances did not support granting an application where there had been such a delay in making it.

99. Having set out counsels' arguments and the parts of the judgment of Rix LJ in *Tibbles* which I consider are relevant to the exercise of my discretion, I will now: (a) summarise those circumstances in this case which I consider favour my exercising my discretion; (b) summarise those circumstances in this case which I consider militate against me exercising my discretion; (c) analyse each of the circumstances for and against my exercising my discretion; and (d) balance the factors for and against and come to a conclusion about whether I should exercise my discretion or not.

Summary of Circumstances in Favour of Granting Relief

100. I consider that the following circumstances favour my exercising my discretion:

(a) had I been asked on 13 September 2024 (in the alternative to granting the Defendants full relief from the Sanction) to grant the Defendants partial relief from the Sanction, so that they were not debarred from defending the Quantum Issue, I would have granted them that partial relief, for the reasons set out in the March Judgment; and

(b) those reasons include that granting such partial relief would:

(i) ensure that the Sanction was more proportionate to the breaches of the Unless Order which triggered the Sanction;

(ii) have been a more appropriate sanction, given my finding that the breaches by the Defendants of the Unless Order, by failing to provide the disclosure that it required them to provide, whilst potentially impacting the Liability Trial, would not impact the Quantum Trial, or disrupt the Claimant's preparations for that trial;

(iii) avoid an unsatisfactory trial of the Quantum Issue, which would result from the Defendants being excluded from defending the Quantum Issue; and

(iv) be consistent with the overriding objective of dealing with the case justly, for the Defendants not to be debarred from defending the Quantum Issue.

Summary of Circumstances Against Granting Relief

101. Against my exercising my discretion in favour of varying the Unless Order/Debarring Order, so that the Defendants are not debarred from defending the Quantum Issue, are the following matters:

(a) successful invocation of CPR 3.1(7) is rare and normally requires something out of the ordinary to justify the court using that discretion to vary an order (absent a material change of circumstances/a misstatement and that does not apply here);

(b) the Defendants have appealed my order of 13 September 2024, refusing them relief from the Sanction, they have been given permission to proceed with that appeal. It is arguable that using the jurisdiction under CPR 3.1(7) in those circumstances, in particular, undermines the concept of appeal, because the Defendants are pursuing an

appeal against the Unless Order/Debarring Order whilst at the same time seeking an order varying those same orders under CPR 3.1(7);

(c) the onus was, in my judgment, on the Defendants' counsel, at the hearing on 2 September 2024, to make submissions as to what alternative relief the Defendants sought, if I did not grant relief from the Sanction in its entirety. Whilst Mr Atkins says that he did not realise, until 11 September 2024, that the Sanction arguably barred the Defendants from defending the Quantum Issue, in my judgment, he ought to have realised that when the Unless Order was made on 31 July 2024;

(d) the Defendants delayed in making the Application for well over 6 months between 11 September 2024, when Mr Atkins accepts that he became aware that the Sanction in the Unless Order might extend to Quantum Issue, and the Application being made on 25 March 2025. During the period of that delay:

(i) the Defendants applied to me for permission to appeal my order of 13 September 2024 on the same day, one of the grounds being that I ought to have considered granting partial relief from the Sanction, so that the Defendants were not debarred from defending the Quantum Issue;

(ii) the Liability Trial took place between 15 and 16 October 2024;

(iii) I handed down the Liability Judgment in respect of the Liability Trial on 24 December 2024 (having circulated the draft judgment on 29 November 2024) granting judgment on the Liability Issue to the Claimant against the Defendants;

(iv) the Defendants issued the January Applications, the aim of which was to obtain an order which enabled the Defendants to defend the Quantum Issue, but they elected not to seek a variation of the Unless Order/Debarring Order under CPR 3.1(7) in that application; and

(v) the Claimant has suffered prejudice as a result of the delay.

Detailed Analysis of Points in Favour of Granting Relief

102. In the March Judgment I did indicate that, had I been asked, on 2 September 2024, to grant the Defendants partial relief from the Sanction, in the form in which the Defendants now seek it, I would have granted partial relief, in that form. However, as Rix LJ made clear in *Tibbles*, the correct question, in deciding whether or not to exercise the discretion under CPR 3.1(7) is not, whether knowing what I know now, I would have made the 13 September Order, but what should be done now, bearing in mind any change of circumstances, new evidence, any explanation offered and especially any prejudice. It is however appropriate to summarise why I said, in the March Judgment, that I would have granted partial relief so that the Defendants could defend the Quantum Issue, if I had been asked to do so on 2 September, as those reasons may be relevant to the exercise of my discretion.

103. I accepted, in the March Judgment, that granting partial relief from the Sanction, so that the Defendants can defend the Quantum Issue, would have been an appropriate order to make on 13 September, 2024 had I been asked to make such an order, in the alternative to full relief. In summary, my reasons for coming to that conclusion were and remain that:

(a) such a sanction would be a more appropriate sanction for the Defendants' breaches of the Unless Order, because: (i) I refused the Defendants' relief from the Sanction, at least in part on the basis that I was not satisfied, due to the imminence of the Liability Trial, that the Defendants defaults; in providing the disclosure to which the Unless Order applied could be made good in time for the Liability Trial; (ii) the disclosure orders to which the Sanction applied did not, at least substantially, relate to the Quantum Issue, but rather the Liability Issue; and (iii) insofar as the failures to

provide disclosure may have related to the Quantum Issue, there would be ample time to ensure that such disclosure was provided, before the Quantum Trial;

(b) for the reasons set out by me at (a) above, granting partial relief from the Sanction, which enabled the Defendants to defend the Quantum Issue would be more proportionate to the breaches of the Unless Order which triggered the Sanction, than debarring the Defendants from defending the Liability Issue and the Quantum Issue;

(c) it was unsatisfactory for the court to have to decide the Quantum Issue without the Defendants being allowed to participate in the determination of that issue and in particular the Defendants being prevented from: (i) providing evidence to explain why documents which had been disclosed supported the Defendants' case as to quantum; (ii) relying on expert evidence to support their case on quantum; (iii) asking questions of the Claimant's expert; (iv) cross examining the Claimant's factual and expert witnesses at the Quantum Trial; and (iv) making submissions on the Quantum Issue, at the Quantum Trial.

104. Finally, I accept that granting the Defendants partial relief from the Sanction, so they can do all of the things that I summarise in paragraph 103 (c) above, would meet the objective of "*ensuring that the parties are on an equal footing and can participate fully in the proceedings",* which is the first factor which CPR 1.2 says is included in the overriding objective of dealing with cases justly and at proportionate cost. This is because, if I do not grant to the Defendants, the partial relief that they seek, they will not be able to participate in the determination of the Quantum Issue at all. On the other hand, granting such partial relief may not be consistent with the other factors which CPR 1.2 says are included in the overriding objective of dealing with cases justly and at proportionate cost, namely: saving expense; ensuring the case is dealt with expeditiously; allotting the case an appropriate share of the court's resources and particularly the need to

ensure compliance with court orders. This is because use of the discretion under the CPR 3.1(7) too readily, in the context of an unless order/debarring order tends to undermine the effectiveness of sanctions which are aimed at ensuring compliance with court orders and may increase the number of inappropriate challenges of court orders, which undermines the objectives of dealing with cases expeditiously, saving expense and allotting an appropriate share of the court's resources to the case in question.

Detailed Analysis of Points Against Granting Relief

105. As an overarching point, Rix LJ in *Tibbles* made it clear that, whilst the word "exceptional", should not be used to describe the circumstances in which it was appropriate to use CPR 3.1(7), the successful invocation of CPR 3.1(7) is rare and normally something out of the ordinary is necessary to justify varying a previous order, especially in the absence of a change of circumstances/misstatement of facts. In this case the discretion arises in circumstances of: (a) omission rather than misstatement; and (b) omission to advance an argument, rather than omission to state a fact. It follows that this is a case falling into a category in which it would be rare to grant an order under CPR 3.1(7).

106. Hughes LJ said in *Roult* (see paragraph **59 (d)** above) that CPR 3.1(7) cannot be used by a judge to, in effect, hear an appeal from himself. The Defendants have sought and been granted permission to appeal against my decision of 13 September 2024 (to make the Debarring Order and refuse the Defendants' application for relief from the Sanction). The fact that the Defendants are seeking to appeal the Unless Order/Debarring Order at the same time as they are seeking to vary those same orders under CPR 3.1(7), may be seen as undermining the concept of appeal, which Rix LJ highlighted in *Tibbles* as a

reason why there should be a principled curtailment of the apparently otherwise broad discretion under CPR 3.1(7).

107. In *Tibbles* Rix LJ said that one of the factors that militated against using CPR 3.1(7), in that case, was that it was the responsibility of each party to look after their own interests (see paragraph 63 above). In *Tibbles* that meant that the claimant, in that case, was responsible for bringing to the District Judge's attention, at the first hearing, the provisions of CPR 44.11 and its effect and for asking the District Judge to make the order concerning costs that they wanted. In this case, what the Defendants' counsel omitted to ask for, at the hearing on 2 September 2024, in the alternative to full relief from the sanction, was partial relief, on the basis that the Defendants would not be debarred from defending the Quantum Issue. The Defendants' counsel did point out, at that hearing that, in the alternative to full relief from the Sanction, I could grant partial relief but he asked me to do so (in the alternative to full relief) on the basis that the Defendants were debarred from defending on certain issues but not others.

108. In my judgment, it was the responsibility of the Defendants' counsel, Mr Atkins, to put to me, on 2 September 2024, what alternative relief the Defendants sought, if I was not prepared to grant the Defendants full relief from the Sanction. Although Mr Atkins says that he did not realise until 11 September 2024 that the Sanction may debar the Defendants from defending the Quantum Issue, he ought to have realised this when the Unless Order was made on 31 July 2024. I do not consider that any responsibility could be said to have fallen on the Claimant to suggest what partial relief I might grant to the Defendants, in the alternative to full relief, when they were opposed to any relief being granted. Equally I do not consider that any onus fell on me to consider ways in which I might grant the Defendants partial relief from the Sanction, other than those suggested to

me by the Defendants' counsel. These points militate against me exercising the discretion under CPR 3.1(7) in their favour.

109. In *Tibbles* Rix LJ said, at paragraph 41 of his judgment (see paragraph **62** above) that there was room for prompt recourse back to the court to deal with a matter that was, in genuine error, overlooked in making the original order, to "deal with something which, once the question is raised, is more or less obvious, on the materials already before the court". At paragraph 42 Rix LJ said that he wanted to emphasise the word "prompt" and that it was unlikely that the court would assist an applicant once much time had gone by because "with the passing of time is likely to come prejudice for a respondent who is entitled to go forward in reliance on the order that the court has made." It is clear that the delay of the claimant, in *Tibbles,* in making the application was a factor that Rix LJ considered militated strongly against making an order under CPR 3.1(7). In that case, the delay was over 10 months in making the application and a further 4 months before judgment on the application under CPR 3.1(7) was handed down. In this case, the delay between 11 September 2024 (when Mr Atkins accepts that he realised that the Sanction in the Unless Order may extend to the Quantum Issue) and the Application being made (25 March 2025) was well over 6 months. Arguably, as the order which imposed the Sanction was the Unless Order which was made on 31 July 2024 (and I have found that Mr Atkins ought to have realised that the Sanction extended to the Quantum Issue as well as the Liability Issue, when the Unless Order was made) the delay was nearly 8 months, but I will proceed on the basis that the delay was something over 6 months. Looked at in isolation, a delay of over 6 months, in making the Application hardly answers Rix LJ's emphasis that an application must be made "promptly" and this is a factor against exercising the discretion under CPR 3.1(7), how material that factor is depends, at least in

part upon whether there is a good excuse for the delay, what happened during that delay and "especially" prejudice to the Claimant, which I will consider next.

110. I am satisfied that the Defendants' counsel genuinely overlooked, at the hearings on 31 July 2024 (when the Unless Order was made) and 2 September 2024 (when the Debarring Order was made/relief from the Sanction was refused) that the Sanction, on its face, debarred the Defendants from defending the Liability Issue and the Quantum Issue. Mr Atkins accepts however that he realised on 11 September 2024 that the Sanction contained in the Unless Order may extend to debarring the Defendants from defending the Quantum Issue. At the hearing on 13 September 2024, Mr Atkins applied for permission to appeal on the ground that partial relief should have been granted so that the Defendants could defend the Quantum Issue. Notwithstanding that realisation, the Defendants delayed for well over 6 months in making an application under CPR 3.1(7).

111. On 17 January 2024 the Defendants issued the January Application. The January Application did not seek a variation of the 13 September 2024 order pursuant to CPR 3.1(7), instead it sought orders that would result in the Defendants being able to defend the Quantum Issue on the following alternative bases:

(a) a declaration that paragraph 16 of the Debarring Order applied only to the Liability Issue;

(b) an order varying the Unless order and the Debarring Order pursuant to CPR 40.12 to make it clear that the Defendants were not debarred from defending the Quantum Issue; and

(c) relief from the Sanction, based on a change in circumstances since the previous application for relief from the Sanction was made on 2 September 2024.

112. Mr Little, in his witness statement of 25 March 2025, says that it would not have been sensible for the Defendants to change solicitors prior to January 2025, because an appeal was being prepared against the Debarring Order, prior to that date. He goes on to say that,

at the time that his firm, Hill Dickinson, came onto the record as acting for the Defendants on 8 January 2025 the CMC had not yet been listed, that the Claimant pressed for the CMC to be listed on 23 January 2025 and then, when it was listed on 23 January refused to agree to adjourn the CMC to give the Defendants more time to properly prepare the Application to be heard at the CMC. Finally he says that there was insufficient time available on 23 January to deal with all of the applications listed to be heard on that date and so the Defendants' counsel decided not to include in the January Application, an application to vary the Unless Order/Debarring Order pursuant to CPR 3.1(7).

113. Mr Woolstenhulme says the Liability Trial took place on 15 and 16 October 2024 and therefore there was a 3 month gap between the end of the Liability Trial and the date fixed for the CMC, allowing the Defendants ample time to change legal advisers. Whilst Mr Little refers to work done in connection with appeals against the orders of 13 and 23 September 2024, that work was completed by 30 October 2024. In those circumstances, 8 January 2025 was not the soonest that the Defendants could have sensibly changed legal representatives, says Mr Woolstenhulme. As to Mr Little's complaints about the CMC being listed on 23 January, Mr Woolstenhulme says that dates of availability for the CMC that both parties gave to the court, included dates in January 2025, so Hill Dickinson knew that the CMC could be listed at any point after 13 January 2025 and it was clear on the face of the Unless Order and the Debarring Order that they extended to both Liability and Quantum.

114. I am not satisfied that what Mr Little puts forward as the reasons why the Defendants decided not to include an application under CPR 3.1(7) in the January Application are good excuses for them not doing so. It was open to the Defendants, having listed the January Application for hearing on 23 January 2025 to apply, on that date, to adjourn it to a later date, on the basis that there was insufficient time to deal with it, rather than

choosing not to advance the CPR 3.1(7) ground at all. This choice led to yet another application being made on 25 March 2025 (this time under CPR 3.1(7) and a third application for relief from the Sanction under CPR 3.9).

115. More importantly, whilst Mr Little provides explanations for the Defendants' delay in changing solicitors until January 2025 and as to why a CPR 3.1(7) application was not pursued in the January Application, he does not explain why an application under CPR 3.1(7) was not pursued promptly after 13 September 2024 when I handed down my judgment refusing the Defendants' application for relief from the Sanction and made the Debarring Order. Mr Atkins accepts that he realised on 11 September 2024, that the Debarring Order, on its face extended to the Quantum Issue. The Defendants then, acting by their former solicitors, pursued an application for permission to appeal against my 13 September order (including on the basis that I should have granted partial relief from the Sanction). They could have issued an application for a variation of the Debarring Order under CPR 3.1(7) straight away, after 13 September 2024, given the very limited amount of evidence required to support it (which, as Rix LJ said in *Tibbles,* would be an application in reality "on materials already before the court") plus the additional argument that partial relief from the Sanction should be granted so that the Defendants were not debarred from defending the Quantum Issue.

116. Rix LJ identified prejudice to the other party caused by delay in seeking an order under CPR 3.1(7) as a significant factor to be taken into account in deciding whether or not to exercise the discretion under that rule. Mr Atkins points out that no directions have been issued in relation to the Quantum Issue (because both parties agreed that such directions should not be issued pending the outcome of the appeal in relation to my 13 September order). The Claimant has not therefore, Mr Atkins says, been prejudiced by complying with directions on the footing that the Defendant is debarred from defending

the Quantum Issue. Nonetheless, the Claimant has been proceeding, since 13 September 2024, on the basis that the Defendants are debarred from defending the Quantum Issue and have had to respond to the January Application and the Application. The Defendants' delay in applying to vary the Unless Order/Debarring Order under CPR 3.1(7) is, due to the length of the delay and prejudice to the claimant, a strong factor against granting such an order.

Balancing the Factors For and Against Granting Relief

117. The question is not, what order would I have made on 13 September 2024, if I had been asked by the Defendants' counsel, on 2 September, in the alternative to full relief from the Sanction, for partial relief, so that Defendants were not debarred from defending the Quantum Issue. The question, as a Rix LJ makes clear, is what should be done, when the application under the CPR 3.1(7) is heard, bearing in mind any change in circumstances, new evidence, the delay, the explanation for the delay and especially any prejudice.

118. Mr Atkins relies heavily on Article 6 of the ECHR and on the overriding objective (particularly ensuring that the Defendants can participate in the Quantum Issue) in support of the Defendants' application, however, I have already concluded that, provided that I apply the principles that Rix LJ sets out in *Tibbles* fairly, my decision will comply with Section 3 of the HRA and Article 6 of the EHCR. As for the overriding objective, there are, as I have already observed, factors identified in CPR 1.2, to be taken into account in promoting the overriding objective, that point towards and away from exercising the discretion under CPR 3.1(7) in this case and I do not consider that the overriding objective points strongly either towards or away from exercising the CPR 3.1(7) discretion.

119. Rix LJ said that it will be rare to use the discretion under CPR 3.1(7) where, as here, neither of the two primary circumstances apply (material change of circumstances or misstated facts) and

it normally requires something out of the ordinary to justify the use of the CPR 3.1(7) discretion, in those circumstances.

120. In the March Judgment I said that, had the Defendants counsel applied to me, on 2 September 2024, for partial relief from the Sanction, so that the Defendants were not debarred from defending the Quantum Issue, I would have granted that partial relief. I gave what I consider to be powerful reasons as to why I would have done so, however, as I have just said, the question is not, what order would I have made at the hearing of the original application, on 2 September, knowing what I know now, but what order should I make now. In my judgment and bearing in mind that the successful use of the CPR 3.1(7) discretion is rare in these circumstances and that something out of the ordinary is required to justify its use, the following factors weigh sufficiently against the exercise of the CPR 3.1(7) discretion to mean that I should not exercise it notwithstanding: the serious consequences for the Defendants of their being debarred from defending the Quantum Issue; my conclusion that I would have granted partial relief, if asked to on 2 September; and the reasons why I would have done so (set out in the March Judgment):

(a) the Defendants seek to vary the Unless Order/Debarring Order under CPR 3.1(7) at the same time as pursuing an appeal against the Debarring Order. This brings into sharper focus the need to avoid CPR 3.1(7) being used in a manner that undermines the concept of appeal. I should make it clear however that, even if I attributed no weight to this point, I would have still refused to exercise my discretion under CPR 3.1(7), for the other reasons set out in this paragraph;

(b) I have found that it was the responsibility of the Defendants' counsel to apply, on 2 September 2024, in the alternative to full relief from the Sanction, for partial relief, in the form in which it is now sought and that he ought to have realised at that point (not 9 days later) that the Sanction had the effect of debarring the Defendants from defending the Quantum Issue;

(c) I have found that the Defendants did not apply "promptly" (as Rix LJ made clear in *Tibbles* a party would need to if a party wants to rely on an omission by genuine error to put forward an argument at the original hearing). The delay was over 6 months since the Defendants knew, on 11 September 2024 that the Sanction had, or at least arguably had, the effect of debarring them from defending the Quantum Issue. I have also found that there was no good reason for that delay, in spite of what is said in Mr Little's witness statement. These are powerful reasons against exercising my discretion under CPR 3.1(7); and

(d) Mr Atkins says that no directions have been issued to determine the Quantum Issue and the Claimant has not therefore been prejudiced by having to comply with directions (or preparing to do so) which would need substantially to be complied with by the Claimant again (if I were to exercise my discretion under CPR 3.1(7)). Nonetheless, the Claimant has been proceeding, since 13 September 2024, on the basis that the Defendants are debarred from defending the Quantum Issue and have had to respond to the January Application and the Application and I consider that it has suffered a material amount of prejudice as a result of those matters, given the Defendants' delay.