Case No: K01CL400

Neutral Citation Number: [2025] EWCC 34

IN THE COUNTY COURT AT CENTRAL LONDON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2025

Before :

DISTRICT JUDGE FAGBORUN BENNETT

- -

Between :

SHAFQAT DAD	**Claimant**
- and -	
PAVILION HP13 LIMITED	**Defendant**

- -
- -

Quentin Tannock (instructed by **Russell-Cooke LLP**) for the **Claimant**
Christopher Snell (instructed by **Lexlaw Solicitors & Advocates**) for the **Defendant**

Hearing dates: 12th May 2025

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JUDGMENT

County Court approved Judgment:

DISTRICT JUDGE FAGBORUN BENNETT :

1. This is my judgment on the Defendant's application dated 31st January 2025, for an order pursuant to CPR 3.8(1) and 3.9(1) for relief from sanctions from paragraph 1 of the unless order made by District Judge Rippon on 20th August 2024 (drawn 12th September 2024) and of paragraph 1 of the order of Deputy District Judge Foote dated 7th January 2025 (drawn 15th January 2025). It is agreed between the parties that the judgment of DDJ Foote is a "judgment without trial after striking out" pursuant to CPR 3.5.

2. The matter was listed for 45 minutes on 12th May 2025. There was insufficient time to consider the oral and written submissions, the 1,247 page application bundle and to give an oral judgment on that day.

Procedural Background

3. The relevant procedural history is as follows. The proceedings concern a dispute between the Claimant, Mr Dad and the Defendant company Pavilion HP13 Limited regarding the terms of the profit-sharing agreement between the parties. The claim and particulars of claim are dated 12th April 2023 (issued on 14th April 2023). The defence is dated 6th July 2023. On 30 August 2023, the Claimant made a Part 18 Request for Further Information ("Part 18 Request") of the Defendant.

4. Around four and a half months later, on 15th January 2024 (drawn 13th February 2024), District Judge Le Bas made an order, by consent, which

included at paragraph 6 that "the Defendant shall provide a response to the Claimant's Part 18 Request by 4.00pm on 30th January 2024."

5. Seven months after DJ Le Bas's order, on 20th August 2024, DJ Rippon at paragraph 1 made an unless order, that the amended defence be struck out and judgment entered for the Claimant unless, the Defendant provided the further information sought in the Part 18 Request within 14 days of service of that order. The Defendant says that the order was made based on the parties' agreement, without DJ Rippon hearing arguments from them.

6. The Defendant's Part 18 Response is dated 4 September 2024. The Response is accepted by the Defendant as having been made around 2 hours late. That delay was not subsequently considered, by DDJ Foote on 7th January 2025 to be a material breach or one for which relief from sanctions would not be given.

7. On 20 October 2024, the Claimant made an application for the defence to be struck out on the basis that the Defendant had failed to comply with DJ Rippon's unless order.

8. On 7th January 2025, DDJ Foote determined that the Defendant had breached the unless order made by DJ Rippon. Judgment was entered for the Claimant, for an amount of money to be decided by the court at a disposal hearing using the calculations identified at paragraphs 8.3.1 and 8.3.2 of the Particulars of Claim. A transcript of the judge's judgment has been provided to this court. DDJ Foote's order was drawn and sealed by the court on 15th January 2025. The Defendant says that the Claimant resisted its attempts before DDJ Foote to be first given a period of time to make an application for relief from sanctions, before further determination of the unless order.

9. The relevant failures to comply with the Part 18 reply set out in the bundle at [**1195-1196**] as follows:

Failure 1
15. Part 18 Request (9) (d) was: "Please provide full details in relation to.....(d) The new tradesman allegedly hired".

16. The Defendant's response was "There were several tradesmen hired with the assistance of Mr Raj Popat and Mr Safdar Dad. The appropriate place to list the same is in evidence and no counterclaim has been pleaded to the Claimant does not need this information to understand the pleaded Defence or narrow the issues in dispute."

17. The Unless Order was clear and required the Defendant to serve "the further information sought". The Defendant has had numerous previous opportunities to object to the framing on the information sought but did not… It would have been reasonable and straightforward for the Defendant to provide the names, registered addresses and contact details (for example) of these trades people. The Defendant chose not to and instead provided a plainly incomplete and insufficient response, in the context of the requirements set out in the Unless Order.

"Failure 2"
18. Part 18 Request item (9) (e): "Please provide full details in relation to:....(e) The additional costs allegedly incurred, and how they were so incurred."
19. The Defendant's response was: "The additional costs of the snagging works will be provided in evidence. It is noted that no counterclaim has been made therefore the Claimant does not need this information to understand the pleaded Defence or narrow the issues in dispute."

20. Again, the Defendant could have, on a previous occasion, raised the "not entitled" type objections that it had to the scope and the phrasing of this RFI that it went on to say that it would respond to. It chose not to do so until now, after an Unless Order was put in place to require compliance. Therefore this response is incomplete and insufficient for the same
reasons as I have found in relation to Failure 1.

"Failure 3"
21. Part 18 Request item 12: "Please supply full details and documents in relation to the "financing costs" referred to, in particular (a) what financing was obtained from whom and on what basis and (b) the repayment plan (s)."

22. The Defendant's response was: "No documents are referred to in paragraph 16 of the Defence. a. Financing was obtained from Oaknorth Bank P/c at base plus 3.3%; and b. The repayment plan of the financing was structured as a 5-year loan."

23. The parties' disagreed about the scope of the request being made here and in the limited time available to consider the submissions at the hearing I had some sympathy that the "financing costs" could have been limited in scope to Oaknorth Bank rather than the wider scope argued for by the Claimant. But in any event, the request clearly refers to the provision of documents and no documents were provided. So, that request was not adhered to even applying a narrow scope. Subsequent to the hearing I have had opportunity to review the Yorkshire Building Society's charging documents over the relevant property [see JM2/pages 25-29] and the Defendant's email commenting on the same, I.e. "we have refinanced the loans as is obvious and we still own all of the flats" [JM2/page 33]. The Defendant's RFI
Response makes no reference to this refinancing, never mind its details or documents. This indicates a greater failure to engage with and respond to the request that the Unless Order required.

"Failure 5"
27. Part 18 Request item 18: "Please state the total rental income received from the Development since practical completion to date."

28. The Defendant's response was: "The response to [11] is reiterated in response to this question. Information beyond that is not necessary for the Claimant to understand the Defence nor to narrow the issues and this request is in direct contradiction and challenge to the meaning and content of 24 (iii)"

29. For context, The Defendant's response to item 11 states: "the monthly rental income received from the flats as at the date of the Defence was around £20,786.00".

30. If this response was the only alleged "failure", there is a possibility you could infer what was meant by the response and it could be elaborated on. However, it is not the only incomplete/unclear response and it adds to the larger failure to be particular in answering these requests. It also contains further "not entitled" wording. The request was for total income from the Development to completion and the answer gives an approximate ("at around") monthly value up to the Defence, which I understand from the Claimant's skeleton was almost 18 months earlier than the date requested. So the specific question is not properly addressed.

"Failure 6"
31. The Charge Requirement: As noted above, paragraph 2 (b) of the Unless Order obligated that:
"The Defendant's response to Part 18 Request is required to include:....b. In response to Item 12, full details in relation to any pending charge or charge over the property at 185-197 Gordon Road, High Wycombe, HP13 6AR."

32. The details of the Defendant's response to Item 12 is set out at paragraph 22 above. In circumstances where I have found that the Defendant has failed to adhere to item 12, I make the same finding here. This is of particular significance given the Unless Order's specific requirement that this information be provided.

10. The Defendant made an application dated 31st January 2025, for relief from sanctions. That application is supported by the second witness statement of Mohammed Ali Akram in the bundle at [**514 – 535**].

11. I am aware that on 19th February 2025, the Defendant made another application, but that application was not before the court on 12th May 2025.

12. By order dated 27th February 2025, HHJ Holmes considered the Defendant's applications and ordered that the Defendant's relief from sanctions application should be heard and the 11th March 2025 disposal hearing vacated and relisted following determination of the Defendant's relief from sanctions application.

13. The Defendant's application for relief from sanctions was heard by me on 12th May 2025. Judgment was reserved to be delivered ahead of the disposal hearing listed for 9th June 2025. In the end, the 9th June 2025 hearing was vacated, to enable this judgment to be handed down by email and the disposal hearing relisted for 25th June 2025.

14. On 16th June 2025, the Defendant informed the court that it was in administration and on 20th June 2025, the solicitors for the Joint Administrators for the Defendant requested a stay of proceedings. That issue will be dealt with separately by the court but is likely to result in the court vacating the 25th June 2025 disposal hearing.

Legal framework

15. CPR 3.5 provides as follows:

Judgment without trial after striking out
(1) This rule applies where –
(a) the court makes an order which includes a term that the statement of case of a party shall be struck out if the party does not comply with the order; and
(b) the party against whom the order was made does not comply with it.

(2) A party may obtain judgment with costs by filing a request for judgment if –
(a) the order referred to in paragraph (1)(a) relates to the whole of a statement of case; and
(b) where the party wishing to obtain judgment is the Claimant, the claim is for –
(i) a specified amount of money;
(ii) an amount of money to be decided by the court;
(iii) delivery of goods where the claim form gives the Defendant the alternative of paying their value; or
(iv) any combination of these remedies.
(3) Where judgment is obtained under this rule in a case to which paragraph (2)(b)(iii) applies, it will be judgment requiring the Defendant to deliver goods, or (if the Defendant does not do so) pay the value of the goods as decided by the court (less any payments made).
(4) The request must state that the right to enter judgment has arisen because the court's order has not been complied with.
(5) A party must make an application in accordance with Part 23 if they wish to obtain judgment under this rule in a case to which paragraph (2) does not apply.

16. The request under CPR 3.5 can be made without notice and by completing a prescribed form (Form PF84A) in cases falling under CPR 3.5(2), where the solicitor states that the right to enter judgment has arisen because a court order has not been complied with.

17. CPR 3.6 provides as follows:

Setting aside judgment entered after striking out
(1) A party against whom the court has entered judgment under rule 3.5 may apply to the court to set the judgment aside.
(2) An application under paragraph (1) must be made not more than 14 days after the judgment has been served on the party making the application.
(3) If the right to enter judgment had not arisen at the time when judgment was entered, the court must set aside(GL) the judgment.
(4) If the application to set aside(GL) is made for any other reason, rule 3.9 (relief from sanctions) shall apply.

18. The commentary in the White Book at 3.6.1 provides

> *This rule applies to a judgment entered under r.3.5, i.e. a judgment with costs entered where a statement of case has been struck out automatically as a consequence of non-compliance with the terms of a court order. It does not apply to orders directly striking out a statement of case (for example, a striking out under r.3.4).*
> *The party against whom the judgment under r.3.5 was entered may apply to the court to set the judgment aside (r.3.6(1)). The application must be made promptly, within 14 days of service of the judgment on the applicant (r.3.6(2); as to the calculation of time periods under these rules, see r.2.8 and the commentary thereto). If the judgment was entered prematurely, the court must set it aside. In other cases the court has a discretion, to be exercised after considering all the circumstances (r.3.6(4) which refers to r.3.9 (relief from sanctions)).*
> *Where the court has made an order directly striking out a statement of case (for example, an order under r.3.4(2)(c) the party against whom that order was made may apply under r.3.9 for relief from that order.*

19. Under CPR 3.6, the court therefore has a discretion to set aside a judgment, rightly entered, applying CPR 3.9.

20. CPR 3.9 provides as follows:

> *Relief from sanctions*
> *(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –*
> *(a) for litigation to be conducted efficiently and at proportionate cost; and*
> *(b) to enforce compliance with rules, practice directions and orders.*
> *(2) An application for relief must be supported by evidence.*

21. As is well known, in dealing with an application under CPR 3.9, the court must consider the principles established in Denton v TH White Ltd [2014] EWCA Civ 906, which set out a three-stage test for relief from sanctions.

22. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages r.3.9(1). If the breach is neither serious nor significant, the court is

unlikely to need to spend much time on the second and third stages. Determining whether the breach is serious or significant involves consideration of, for example, whether it imperils future hearing date, disrupts conduct of litigation. A failure can however be considered serious even though it does not affect the efficient progress of litigation, for example a failure to pay a court fee.

23. The second stage is to consider why the default occurred and whether the defaulting party has a good reason for the breach. Good reasons are likely to arise from circumstances outside the control of the defaulting party. For example, the fact that the defaulting party's solicitor suffered debilitating illness or was involved in an accident. A later development in the course of litigation which shows that the original time limit was unreasonable, although it seemed reasonable at the time, may also qualify as a good reason for the default.

24. The third stage is to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application including r.3.9(1)(a)(b). All of the circumstances, includes considering previous breaches by the applicant, the need for litigation to be conducted efficiently and at proportionate cost, the need to enforce compliance with rules, practice direction and court orders and the effect of the breach. If the breach prevented litigation being conducted efficiently then this factor weighs against the grant of relief. Other considerations include whether the sanction is proportionate to the breach, whether the application for relief from sanctions was made promptly (lack of promptness added to other factors can be enough to refuse to grant relief) and whether the defaulting party has a poor record of complying with court orders.

25. The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted.

26. The higher courts have also given guidance as to the importance of penalising parties who unreasonably oppose applications for relief from sanctions. ·CPR 1.3 provides that "*the parties are required to help the court to further the overriding objective".* Parties who opportunistically and unreasonably oppose applications for relief from sanctions take up court time and act in breach of this obligation. It has been said that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by CPR 3.8(4). The court, it has been said, should be more ready to penalise opportunism. Heavy costs sanctions should, therefore, be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions. e.g. costs being ordered on an indemnity basis.

27. CPR 3.10, which is also relevant, provides as follows:

General power of the court to rectify matters where there has been an error of procedure
3.10 Where there has been an error of procedure such as a failure to comply with a rule or practice direction –(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error.

28. CPR 3.1(7) provides as follows: *"(7) A power of the court under these Rules to make an order includes a power to vary or revoke the order."* The White Book commentary provides the following useful commentary on CPR 3.1(7):

Rule 3.1(7): Court's power to vary or revoke an order

3.1.17
Rule 3.1(7) states that "a power of the court under these Rules to make an order includes a power to vary or revoke the order". It should be noted that the rule refers to "order" and not to "judgment or order", which is the formulation used in other provisions permitting revocation and variation (see further below). In certain contexts, the distinction between "judgment" and "order" can be important (see para.40.1.1).

Final orders
3.1.17.1
The term "final order" is used in this paragraph to describe an order which determines between the parties the issues which are the subject matter of their litigation and which give rise to a cause of action estoppel between them. Whether an order is final or not depends upon the nature of the order itself, not upon the nature of the hearing (if any) at which it was made (Sangha v Amicus Finance Plc [2020] EWHC 1074 (Ch) at [26]).
The interests of justice, and of litigants generally, require that a final order remains final unless there are proper grounds for an appeal, or unless there are exceptional grounds for varying or revoking it without an appeal.
Rule 3.1(7) is not in terms restricted to procedural orders. However, in Vodafone Group Plc v IPcom GmbH and Co KG [2023] EWCA Civ 113 the Court of Appeal, reviewing the relevant authorities (including in particular Roult v North West SHA [2009] EWCA Civ 444; [2010] 1 W.L.R. 487), held that whilst there is no authority which absolutely precludes the invocation of CPR r.3.1(7) in relation to final orders the overwhelming thrust of them was that the court's power under CPR r.3.1(7) to vary or revoke orders either cannot or should not be used to discharge a sealed final order. Lewison LJ commented that the only limited exception thus far even contemplated in civil proceedings is the case of a continuing order (such as a final injunction) (see below). In Vodafone the Court refused to set aside a costs order which had been made following the declaration of infringement of a patent, even though the patent which had been fundamental basis for those orders (infringement of a valid patent) had been revoked by the European Patent Office; the Defendants' only

available route to challenging the order was through r.52.30 or by an appeal to the Supreme Court.
In Terry, cited above, Hamblen LJ indicated an example, drawn from family proceedings being the use of powers akin to r.3.1(7) to vary or revoke final orders concerning financial arrangements in relation to which there is a duty of full and frank disclosure in cases where the court retains jurisdiction (see [75] citing Sharland v Sharland [2015] UKSC 60; [2016] A.C. 871, and Gohil v Gohil (No.2) [2015] UKSC 61; [2016] A.C. 849).
The CPR expressly provides for the variation or revocation of some final orders, for example, Pt 13 ("Setting aside or varying default judgment") and r.39.3 ("Failure to attend the trial"); see further para.3.1.17.5. In Terry v BCS Corporate Acceptances Ltd [2018] EWCA Civ 2422, it was held that the proper procedure under the CPR for challenging a default judgment is the specific procedure set out in r.13.3, a rule which forms part of a separate self-contained regime to which a general power such as r.3.1(7) does not apply.
In respect of orders made in the absence of the party now seeking to set it aside, in non-trial cases r.39.3 (in respect of trials) applies by analogy under r.3.1(7) and the applicant is required to satisfy three requirements: prompt action, good reason for non-attendance and reasonable prospect of success at trial: see Forcelux Ltd v Binnie [2009] EWCA Civ 854; [2010] H.L.R. 20, Hackney LBC v Findlay [2011] EWCA Civ 8; [2011] H.L.R. 15, Salix Homes v Mantato [2019] EWCA Civ 445; [2019] 1 W.L.R. 3069; and Terry, cited above, at [75].
As to final orders on admissions obtained pursuant to Pt 14 on request, not on application (i.e. orders issued by an administrative act, without any hearing before a judge) and where the applicant seeking to set aside the orders is the party in whose favour the orders were made, see Madison CF UK (t/a 118118 Money) v Various [2018] EWHC 2786 (Ch) Hildyard J and Re Cabot Financial (UK) Ltd [2021] EWHC 789 (Ch), Mann J).
In Salekipour v Parmar [2017] EWCA Civ 2141; [2018] Q.B. 833; [2018] 2 W.L.R 1090, the Court of Appeal considered whether r.3.1(7) can be used in support of applications to set aside a judgment on grounds that had been obtained by fraud. Sir Terence Etherton MR holding that the precise scope of r.3.1(7) was unclear but, for the purposes of this case, it was neither necessary nor appropriate to provide further clarity: in High Court cases the court has an inherent jurisdiction to rescind a final order obtained by means of fraud; in County Court cases this jurisdiction is statutory (the County Courts Act 1984 s.23(g) and see para.3.1.17.6).

Interim orders
3.1.17.2
Interim orders do not finally decide anything as of right between the parties: they include case management decisions which govern the procedure by which those rights will be determined (Prestney v Colchester Corp (1883) 24 Ch. D. 376, CA at 384, per Cotton LJ) and also orders providing parties with some interim remedies or protections pending that determination such as orders granting interim injunctions, interim payments and security for costs (as to which, see generally Pt 25). Final orders determine between the parties the issues which are the subject matter of the litigation and which give rise to a cause of action estoppel between those parties.

Even in respect of matters not giving rise to an estoppel, a party cannot fight over again a battle which has already been fought unless there are good grounds; see Chanel Ltd v FW Woolworth & Co Ltd [1981] 1 W.L.R. 485; [1981] 1 All E.R. 745. In Woodhouse v Consignia Plc [2002] EWCA Civ 275; [2002] 1 W.L.R. 2558; [2002] 2 All E.R. 737, it was said that there is a public interest in discouraging a party who makes an unsuccessful interlocutory application from making a subsequent application for the same relief, based on material which was not, but could have been, deployed in support of the first application.

In Tibbles v SIG Plc [2012] EWCA Civ 518; [2012] 1 W.L.R. 2591, the Court of Appeal reviewed the authorities and stated that although the discretion under r.3.1(7) was apparently broad and unfettered, considerations of finality, and the need to avoid undermining the concept of appeal, pushed towards "a principled curtailment" of an otherwise apparently open discretion. Rix LJ, giving the leading judgment, said (at [39]) that 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, the jurisprudence had laid down firm 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. There was room for debate in any particular case as to whether and to what extent misstatement may include omission as well as positive misstatement, or concern argument as distinct from facts. This was said to be a matter of discretion for the judge in each case. Questions might arise as to whether the misstatement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or unknowable. These too were 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 them is conscious or deliberate. Rix LJ concluded 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.

Rix LJ also stated that there is room within CPR r.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 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 that 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. Rix LJ emphasised the word "prompt". 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.

In Thevarajah v Riordan [2015] UKSC 78; [2016] 1 W.L.R. 76, SC, the Defendant's first application for relief from sanctions had been refused. The Supreme Court held that r.3.1(7), and the Tibbles criteria, applied to a second application for relief from sanctions so that the Defendant had to show that there had been a material change in circumstances since the first application. The Defendant had failed to do so. A party's compliance with an unless order after a debarring order has been made cannot amount to a material change of circumstances unless accompanied by other facts.
The court may, in its discretion, refuse an application to vary an order on the basis of misstatement where the misstatement in question was made by the applicant itself and could not have been reasonably made. In Catalyst Management Services v Libya Africa Investment Portfolio [2018] EWCA Civ 1676; [2018] 4 Costs L.R. 807 Andrew Baker J refused an application for variation upon this (and other grounds) and his decision was upheld by the Court of Appeal.
As to what may amount to a material change of circumstance and its effect upon an application to vary an Unless order, see Athena Capital Fund SICAV-FIS v Crownmark Ltd [2020] EWHC 2945 (Comm) (Jacobs J) noted in para.3.1.14.
It may, in principle, be an abuse of process for a party to seek to reopen an interim order on the basis of a material change of circumstances relying upon a development that was wholly within that party's control. In deciding whether it is an abuse the court should take a broad, merits-based approach; it must take into account the public and private interests involved and 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 (JSC VTB Bank v Skurikhin [2020] EWCA Civ 1337; [2021] 1 W.L.R. 434 at [47]–[56]; Oyston v Rubin [2021] EWHC 448 (Ch), variation allowed; Walton Family Estates Ltd v GJD Services Ltd [2021] EWHC 464 (Comm), variation refused; and see further, para.3.4.17).
In Koza Ltd v Koza Altin Isletmeleri AS [2020] EWCA Civ 1018 the Court of Appeal (Moylan LJ dissenting) described the principles governing the varying of interim orders as aspects of the rule in Henderson (as to which see para.3.4.5) and the rule in Hunter (as to which see para.3.4.9).

Analysis and Conclusions

29. Turning then to this case, there are 4 issues which require determination:

i) Whether the Defendant has made the correct application?

ii) Whether the Defendant's application was within the time limit set by CPR 3.6?

iii) Whether the judgment of DDJ Foote should be set aside?

iv) Whether the order of DJ Rippon should be set aside?

Issue 1: Whether the Defendant has made the correct application?

30. The Claimant contends that the order made by DDJ Foote is a final order and that DDJ Foote's judgment is one that determines the case. He says that DDJ Foote's order does not require further compliance and/or there is no sanction that it imposes to be relieved in respect of it, so is not a CPR 3.9 application under CPR 3.6. The Claimant contends that the Defendant's application for relief from sanctions in respect of paragraph 1 of the order of DDJ Foote is therefore misconceived. The Claimant contends that the application for relief should have been made by way of an application to set aside under CPR 3.6(4) or an appeal, rather than under 3.9. Further, that the Defendant should have applied to amend the application that it made under CPR 3.9 into a 3.6(4) application. He submits that it is now too late for the Defendant to make an oral application to amend its application into one under CPR 3.6(4). The Defendant resists this and contends that given the test under CPR 3.9 is the applicable test in relation to the setting aside of the judgment in this case, following strike out, its application was well made.

31. On the face of it, the application made by the Defendant is one seeking the application of CPR 3.9, rather than one seeking the application of CPR 3.6. However, given that the court must address the factors under CPR 3.9 in determining the application to set aside a judgment entered after strike out and

the Defendant's application addresses these crucial factors, in my judgement, the error is of form rather than substance and the Defendant's application falls to be considered. Further or alternatively, in so far, as it is an error of procedure, then I make an order to remedy the procedural error under CPR 3.10 and/or grant relief from sanctions in relation to it, given it is neither serious nor significant.

Issue 2: whether the Defendant's application was made on time

32. The terms judgment and order are sometimes used interchangeably (see CPR 40) to mean the same thing, for example in section 18(2) of the Civil Jurisdiction and Judgments Act 1982 which says *"(2) In this section "judgment" means any of the following (references to the giving of a judgment being construed accordingly) (a)any judgment or order (by whatever name called) given or made by a court of law in the United Kingdom."* However, sometimes the difference between a judgment (the final court decision which disposes of a claim or part of a claim) and an order (an interim, directional or procedural court decision which is not dispositive of the proceedings) is significant. In my judgement, the meaning of "judgment" as used in CPR 3.5 is in its historical sense of meaning a final court decision that conclusively disposes of a claim or part of a claim. This is because a judgment without trial after striking out determines the issues between the parties which are the subject of the litigation. Absent an appeal, the power under CPR 3.6 or the limited power to vary or revoke orders under CPR 3.1(7), a judgment given provides finality.

33. The Claimant contends that the Defendant's application to set aside the judgment entered by DDJ Foote under CPR 3.6(1) was made outside the time limit set by CPR 3.6 because an application to set it aside must be made no more than 14 days after the judgment has been served on the party making the application. The Claimant contends that the judgment was given at the hearing attended by the parties, rather than on the papers or in a hearing without the losing party being present. Accordingly, the Claimant contends that judgment should be taken as having been served on the person making the application on the date it was given.

34. It appears to the court that most applications under CPR 3.5 and 3.6 will be determined without hearing the parties, rather than at a hearing in which the parties have had a chance to argue whether a final order striking out the case should be made. Based on that assumption, it makes sense, in my judgement, that the fourteen days under CPR 3.6(2) would be from the date that the sealed court order or court judgment disposing of the proceedings was served on the parties, rather than the date of the court's decision, which may not be known to the parties until receipt of the court order. Further, the use of "entered judgment" rather than "date of decision" is in my judgement significant. An appeal is against a court order rather than the judgment or reasoning given by the court for its decision on the issues. The usual 21 days to file an appeal runs from the "date of the decision of the lower court." In my judgement, it is therefore significant that CPR 3.6(2) requires the application to be made "not more than 14 days after the judgment has been served" rather than say 14 days after the date of the decision.

35. Further support for this, in my judgement, can be found when considering the difference between pronouncing judgment and entering judgment. The question which arises is whether "judgment has been served" should be given a different meaning to "judgment is entered"? The phrase "Judgment is entered" is used in CPR 12.3. In Galliani and another v Sartori and others [2023] EWHC 3306, it was held that the date that judgment is entered is the date that the judgment has been drawn up and sealed. Reference was made, in that case to Holt v Hodgson (1889) 24 QBD 103 where it was observed that "Pronouncing judgment is not entering judgment; something has to be done which will be a record, and so the judgment that the judge has pronounced is the judgment which is to be entered". Further, CPR 40.2(20(b) provides that "every judgment or order must be sealed by the court."

36. I consider that, "after the judgment has been served" in CPR 3.6(2) means after the date that the court order was sealed and sent by the court to the parties. Further, applying CPR 2.8, the application was required to be served within 14 clear days from service of the judgment of DDJ Foote. The application made on 31st January 2025, was therefore made in time, in relation to the application to set aside DDJ Foote's order.

Issue 3: should the judgment of DDJ Foote be set aside?

Point 1: analogous to setting aside default judgment

37. The Defendant contends that the CPR 3.6 application is analogous to setting aside a default judgment. The Claimant contends that it is not correct to apply

the rules applicable to setting aside a default judgment by analogy, because in this case, judgment was entered following a contested hearing after hearing submissions from counsel. This he contends is a different regime under the CPR. The Claimant contends that, as shown by the transcript, the sanction was properly imposed, following detailed submissions by counsel for both sides.

38. There are of course various ways in which judgment without trial can be obtained including default judgment, summary judgment, strike out for failure to comply with a rule or court order, under CPR 3.5 and by consent order. CPR 12.1 provides that "default judgment" means *"judgment without trial where a Defendant – has failed to file an acknowledgement of service; or has failed to file a defence or any document intended to be a defence."* It is an administrative act. The test for setting aside default judgment is given in CPR 13 and includes in addition, the consideration of the Denton factors. Judgment without trial after striking out is defined in CPR 3.5(1).

39. Whilst a case to set aside under CPR 3.6 also involves the consideration of the Denton factors, there is, in my judgement, no need to apply the requirement in CPR 13 to consider whether the Defendant has a real prospect of successfully defending the claim or there is some other good reason why judgment should be set aside or varied or the Defendant should be allowed to defend the claim, in considering an application under CPR 3.6. There is no cogent reason to apply the specific rule provision made for relief from the particular sanction of a default judgment under CPR 13, which applies in circumstances in which no acknowledgement of service or defence has been filed, to one in which regardless of the merit of the defence, the court has ordered that it is

proportionate and appropriate in all of the circumstances to impose the sanction of striking out a case, for further non-compliance. It would not further the overriding objective to grant relief simply on the basis of the submissions about the Defendant's prospects of success or some other compelling reasons. Parties are not in analogous situations and the test applicable to a CPR 3.6 case should not extend, in my judgement, beyond the Denton criteria into CPR 13.

CPR 3.6 applying 3.9

40. The Defendant contends that the breach is not serious or significant as it consists of not adequately responding to 3 out of 26 items and sub-items, which amounts to less than 9% of the Part 18 Request. The Defendant contends that it is relevant that the claim is heavily contested and that the defence is good and arguable. The Claimant contends that the breach was serious and significant.

41. The question at the first Denton stage is whether this was a serious or significant breach. I find that failure to file an adequate response to the Part 18 Request, following an unless order, is one that is serious and significant. It resulted in the entering of judgment for the Claimant.

42. The Defendant contends that the breach was a result of a genuine belief that the unless order had been complied with, given the wide scope of the Part 18 Request. The Claimant contends that there is no good reason for the breach and that the failures were the result of deliberate or conscious choices by the Defendant. The Claimant relies on the finding at paragraph 17 of DDJ Foote's

judgment, which was not appealed, about the deliberate nature of the Defendant's breaches.

43. The question at stage 2 of Denton is why the default occurred. I find that there is no good reason for the Defendant's failure to file an adequate response to the Part 18 Request. The Defendant took a risk in assuming that the Part 18 Response that it had provided was adequate. I note that DDJ Foote found that "*it could not be reasonably thought that the RFI Response as a whole was complete and sufficient"* [**1197**]. The Defendant having agreed to provide the information in the first place, cannot now rely on an argument, that the information not provided was not necessary, as a good reason for its non-compliance.

44. The Defendant sets out a number of factors that it contends mean that relief should be granted in all of the circumstances. These include that:

i) the breach has occurred in the early phase of proceedings, ahead of the listed case management conference.

ii) the breach was not deliberate but based on an honestly held belief that the unless order of DJ Rippon had been complied with.

iii) the default has been cured by the provision of the missing disclosure.

iv) the prejudice to the Claimant is limited.

v) the Claimant would obtain a windfall in the litigation as the Defendant would not be able to defend the case.

vi) the Defendant has already been sanctioned with £35,000 cost orders in relation to the Part 18 Request, that is a sufficient sanction.

vii) the Defendant says that it promptly complied with the matters found by DDJ Foote not to have been complied with in the Part 18 Request.

viii) the Claimant's strike out application took the time that had been set aside for the CCMC but that the litigation can be back on track by listing a new date for the CCMC.

ix) Whilst it was accepted that delay was caused to the litigation, it is now back on track.

x) strike out of the defence is a disproportionate response given the limited nature of the documents and information found by DDJ Foote not to have been disclosed.

45. The Claimant contends that the 3.9 factors – (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with the rules, practice directions - should be given special prominence at stage 3.

46. At stage 3 of Denton, the question is then whether relief should be granted in all of the circumstances of the case. At this stage, it is relevant that there were multiple breaches of court orders in relation to the requirement to comply with the Part 18 Request, that approximately four costs orders have already been made against the Defendant in these proceedings relating to the Part 18 Request, that significant delay has been caused to the progress of the litigation as a result of the Defendant's default. The Claimant calculates that there were 496 days between the Part 18 Request and DDJ Foote's order. The case has not proceeded

to close of pleadings and considering all of the circumstances, the overriding objective and the matters that I must consider in CPR 3.9 1(a) and 1(b) with regard to the efficient conduct at proportionate costs of litigation and the need to enforce compliance with rules, practice directions and orders, I find that the Defendant has not satisfied the test under CPR 3.9 as set out in Denton. I do not therefore grant the Defendant relief from sanctions.

3.1(7)

47. Further, and for completeness, considering CPR 3.1(7) – this does not, in my judgement, provide a basis for varying DDJ Foote's order because there are no exceptional circumstances which would warrant varying or revoking of DDJ Foote's order in this case. Although the court was addressed on this point, the Defendant does not itself point to any such circumstances.

Partial relief from sanctions

48. In the alternative, the Defendant seeks limited relief, so that only paragraph 15(ix) of the amended defence, which it says relate to the items which the Part 18 Request failed to address should be struck out. The Defendant contends that partial relief from sanctions should be given relating to the items DDJ Foote determined the failure to comply with the unless order related to. The Denton principles fall to be considered in relation to any application for partial relief, which are considered below.

49. The Denton factors at stage 1 and 2 would remain the same in relation to partial relief as they are for full relief of sanctions. When considering the third factor (a) the need for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with the rules, practice directions, these point strongly against the grant of relief.

50. In my judgement, taking the approach of granting partial relief based on the Defendant's contention of which aspects of the Claimant's claim, it is said that the missing information and disclosure relates to, would not fully mitigate the prejudice to the Claimant, who seeks these documents and information in order to resolve the substantive dispute between the parties.

51. The Defendant contends that costs are an appropriate and sufficient sanction for their default and that there are compelling reasons to allow the matter to proceed to CCMC and trial. The Claimant contends that it is not sufficient to penalise the Defendant in costs in relation to its failures, that the CPR has been brought in to ensure that cases are dealt with justly and at proportionate costs. A party cannot merely rely on having to pay the other side's costs in relation to repeated breaches. I accept the submissions made by the Claimant in this regard. In a situation in which multiple costs orders have been made against a Defendant in relation to breaches of court orders, this is a serious factor weighing against the grant of relief from sanctions.

Setting aside DDJ Foote's judgment is pointless if DJ Rippon's order remains

52. CPR 3.8(1) provides that "(1) Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction."

53. The Commentary in the White Book at paragraph 3.5.1 provides:

> *"[At a hearing under CPR 3.5(5) to obtain judgment without trial after striking out] … the court's function is limited to deciding what order should properly be made to reflect the striking out sanction which has already taken effect. The court rejected the submission that, at such a hearing, it was open to the defaulting party to contend that striking out could not be justified unless the breach of the order was so serious as to prevent there being a fair trial…. It is only if there is an application under r.3.8 by the defaulting party that the court is required to consider whether, in all the circumstances, it is just to make an order granting relief from the sanction automatically imposed." Marcan Shipping (London) Ltd v Kefalas [2007] EWCA Civ 643; [2007] 1 W.L.R. 1864; [2007] 3 All E.R. 365, CA).*

54. The order of DDJ Foote on 15th January 2025 made clear that the sanction embodied in the unless order of DJ Rippon took effect 14 days after service of that order (drawn on 12th September 2024) when the Defendant failed to comply with the unless order in material respects. The Defendant was therefore required from the point of default to make an application for relief from sanctions under CPR 3.8 if it wished to escape its consequences. The application for relief from sanctions in relation to the consequences of DJ Rippon's order was made on 31st January 2025.

55. In light of the unchallenged findings made by DDJ Foote, DDJ Foote's judgment simply gives effect to the consequences for which the order of DJ Rippon's unless order itself provided. The Claimant rightly relied on the fact that DDJ Foote's order was not appealed and that the Defendant made no

applications in respect of the substantive judgment. As the Claimant contends, the findings and conclusions in DDJ Foote's judgment remain undisturbed, including in relation to the failures to provide responses to the Part 18 Request (para 15 to 32 of the judgment) and the conclusion at paragraphs 34 to 35.

56. Further, setting aside the order of DDJ Foote would be pointless unless the sanction imposed by DJ Rippon was also removed. This is because CPR 3.8(1) would mean that the claim would still fall to be automatically struck out for non-compliance with the unless order. Once DDJ Foote found that there had been a breach of the unless order to provide answers to the Part 18 Request, then pursuant to DJ Rippon's order, and the sanction set out in that order, took effect.

Issue 4: should the order of DJ Rippon be set aside under 3.9?

57. DJ Rippon made an unless order. CPR 3.1(3) refers to a power to impose a condition on an order and/or to make an unless order. Useful commentary is provided in the White Book at 3.4.19 and 3.1.14.7 on unless orders.

CPR 3.9

58. As was held in Marcan Shipping (London) Ltd v Kefalas [2007] EWCA Civ 643, the sanction embodied in an unless order in traditional form took effect without the need for any further order if the party to whom it was addressed failed to comply with it in any material respect.

59. Since there was a dispute about whether the Defendant had failed to comply with DJ Rippon's order, it was necessary for DDJ Foote to decide whether the Claimant had established a breach of the unless order, and if so, whether the order being sought by the Claimant properly reflected the sanction that DJ Rippon's order contained. DDJ Foote found that there had been material breaches of the unless order, that finding has not been challenged, and it followed that the sanction for which DJ Rippon's order provided became effective.

60. The order of DDJ Foote on 15th January 2025 gives effect to the sanction embodied in the unless order of DJ Rippon, which took effect 14 days after service of that order (drawn on 12th September 2024), when the Defendant failed to comply with the unless order in material respects. The Defendant was therefore required from the point of default to make an application for relief from sanctions under CPR 3.8 if it wished to escape its consequences. The application for relief from sanctions in relation to the consequences of DJ Rippon's order was made on 31st January 2025.

61. The Claimant contends that the time for making an application (either for an extension of time to comply with the unless order and/or for relief from sanctions) has now passed. At the latest, it is said that the Defendant could have made an application for relief from sanctions in respect of the unless order ahead of or at the hearing before DDJ Foote. The Claimant contends that it is too late now to make such an application as judgment has been entered for the Claimant by the final order of DDJ Foote.

Serious/ significant

62. The Defendant does not make any separate points in its application or in the supporting witness statement of Mr Akram, as to why the order of DJ Rippon should be set aside. The points made by the Defendant are therefore in summary, the same as in relation to the application to set aside the order of DDJ Foote. The Defendant contends that the breach of the unless order was not serious or significant because only 3 out of 26 items and sub-items were not provided in the Part 18 Response. The Claimant disagrees with this and relies on paragraphs 31 to 49 of the witness statement of Mr Mitchell [**1115-1119**] in support of a contention that the Defendant had a prior opportunity to object to the provision of any information but chose to agree the term of the original consent order regarding the Part 18 Request. The Claimant contends that the information requested in the Part 18 Request was crucial to the Claimant, for example the total rental income received from the development since practical completion and the full details in relation to any pending charge or charge over the property. Further, that the failure to provide these details in breach of multiple court orders and in breach of the provisions of the CPR, were both serious and significant.

63. The first Denton stage is, was this a serious and significant breach? The Defendant's breach was in failing to comply with an unless order, which was itself made as a result of a failure to comply with a consent order. The rationale for an unless order is clear, it is to give a party one final chance to comply with some obligation previously imposed upon them before imposing an automatic sanction in default of compliance. I consider the failure to comply with DJ

Rippon's unless order to be both serious and significant taking into account both the failure to comply with the order of DJ Le Bas and the unless order itself. This is highlighted by the fact that the Defendant was warned on the face of the order that judgment would be entered for the Claimant and its defence struck out, if it failed to comply. The Defendant chose to withhold the provision of certain documents and information from the Claimant, despite that order.

Good reason

64. The Defendant contends that the breach resulted from an honestly held belief that the unless order had been complied with. The Claimant says the breaches are deliberate, with answers provided including that the Claimant does not need this information or that the information requested goes beyond what is necessary. At paragraphs 48 to 51 [**1119-1120]** of the witness statement of Joshua Mitchell the Claimant contends that the Defendant has no good reason for its non-compliance and cannot rely on its contention that the information is not necessary as a good reason. The second Denton stage is why did the default occur? The Defendant states that it considered that the disclosure provided was sufficient and suggests that it had the option not to provide disclosure of documents that it considered were not necessary or relevant. I find that there is no good reason offered by the Defendant for the failure to comply with the response to the Part 18 Request within the time limit.

All of the circumstances

65. The Defendant contends that it has now cured the relevant default and the Claimant has suffered limited prejudice as a result of the Defendant's default. The Defendant also makes submissions about the merits of the underlying case. The Claimant at para 55 to 61 of the witness statement of Joshua Mitchell [**1121 to 1122**] states that the Defendant's disregard of court orders, failure to apply for relief from sanctions prior to January 2025 or promptly in any event, should be considered as part of the circumstances making it inappropriate to grant relief to the Defendant.

66. The Denton third stage is whether relief be granted in all of the circumstances of the case. I have accepted that the breach is serious and significant and that there is no good excuse for the delay. I also consider all of the circumstances of the case, including that the claim form was filed on 12th April 2023. Judgment was entered on 15th January 2025. Even before that stage the case had not proceeded to close of pleadings as the Defendant was required to pay for the Claimant's amended Reply necessitated by the response to the Part 18 Request.

67. I am specifically tasked in CPR 3.9.1(a) and (b) with having regard to litigation being conducted efficiently and at proportionate cost and to enforce compliance with Rules, Practice Directions and orders. It does seem to me that there has been inexcusable and substantial delay in this litigation and there has been a failure to comply with Rules, Practice Directions and orders by the Defendant.

68. This is a case in which it is the Defendant's own failures to comply with the Rules and orders that has led it to this position. The overriding objective has not been furthered and there has been serious delay caused in this case. The Defendant failed to comply with the consent order made by DJ Le Bas. The

application for relief from sanctions cannot be said to have been made promptly. In my judgment, lack of promptness added to other factors is sufficient in this case to refuse to grant relief. The Defendant has not satisfied the test under CPR 3.9 as set out in Denton and I do not grant the Defendant relief from sanctions. The application to set aside the order of 20th August 2024 is dismissed.

69. For the sake of completeness and because I heard submissions on alternative applications, I deal with CPR 3.1(2) and 3.1(7) and 3(6) below.

CPR 3.1(2)

70. It was noted during the hearing, that the Defendant could have made an application for an extension of time to comply with the unless order of DJ Rippon, extending the time when the unless order took effect – it did not. I have considered, for completeness, given it was not pursued by the Defendant at the hearing, whether time could be extended under CPR 3.1(2) for retrospective permission for an extension of time to make an application under CPR 3.9. The court has a general power to extend time for compliance with rules and orders, even when that time has expired.

71. The commentary in the White Book at 3.1.2 provides

> *"The court's power under r.3.1(2)(a) to extend time does not come to an end with the drawing and entry of an order, even a final order such as an order made at trial (Omega Engineering Inc v Omega SA [2003] EWHC 1482 (Ch); The Times, 29 September 2003 (Pumfrey J). The court's power under r.3.1(2)(a) is separate and distinct from its power under r.3.1(7) to vary or revoke an order, and the authorities relevant to r.3.1(7) cannot be applied directly, although the same factors might be relevant (Re Kingsley [2020] EWHC 2017 (Ch))."*

72. On an application under CPR 3.1(2)(a) for a retrospective extension of time, the court decides what, if any, extension of time to allow in accordance with the Denton principles: White Book commentary at 3.1.2.2 and (R. (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633; [2015] 1 W.L.R. 2472; [2015] 2 Costs L.R. 19.

73. As is noted in the commentary in the White Book at 3.1.2.9

> *"It is generally more difficult to get relief from sanctions in respect of a breach of an unless order than it is from the breach of a simple conditional order (see Khandanpour v Chambers [2019] EWCA Civ 570.… In British Gas Trading Ltd v Oak Cash & Carry Ltd [2016] EWCA Civ 153; [2016] 1 W.L.R. 4530, CA, an application was made to extend a deadline imposed by an unless order shortly after that deadline had passed; the Court of Appeal applied the principles in Denton v TH White (see above) and, in doing so, took into account, not just the breach of the order itself, but also the underlying breach which had led to the making of the order; this turned the breach into a major breach and relief from sanctions was withheld."*

74. CPR 1.1 provides that "*These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost."* Sub-paragraph (2) provides that *"Dealing with a case justly and at proportionate cost includes, so far as is practicable –(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence; (b) saving expense; (c) dealing with the case in ways which are proportionate –(i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; f) promoting or using alternative dispute resolution; and (g) enforcing compliance with rules, practice directions and orders."*

75. I have set out earlier, the procedural background to this case. What is clear from that is that this case has already taken up a disproportionate amount of the court's resources. It would not further the overriding objective to allow this application to proceed by granting an extension of time to comply with the unless order. If the Defendant was seeking an application to extend the time limit for complying with DJ Rippon's order in the alternative, then I would refuse the application considering the Denton factors. There has to be finality to litigation.

3.1(7)

76. The court was addressed by the Claimant on the court's powers under CPR 3.1(7). The Claimant contends that DJ Rippon's order of 20th August 2024, which was made at a hearing attended by both parties, could conceivably have been subject to an application to vary or revoke it, perhaps seeking an extension of time for compliance. This was not done. The Claimant contends that the proper provision in respect of varying or revoking orders is under CPR 3.1(7). Mr Tannock, in his skeleton argument makes reference to Vodafone Group Plc v IP com GmbH and Co KG [2023] EWCA Civ 113, in which LJ Lewison at paragraph 54 and LJ Arnold at 67 stated that the court does not under CPR 3.1(7) have power to open its sealed final order.

77. In so far, as the Defendant is seeking to vary the order of DJ Rippon, the Claimant notes that the lower court has a very limited discretion to set aside its own final order pursuant to CPR 3.1(7), there have to be exceptional grounds to justify the court in varying or revoking a final order without an appeal. Hughes

LJ in the Court of Appeal case of Roult v. North West Strategic Health Authority [2009] EWCA Civ 444, addresses this at paragraph 15.

78. An application under CPR 3.1(7) was not however an application that was pursued by the Defendant either in its written application or in oral submissions. It was not said that the original order made on the basis of erroneous information (whether accidentally or deliberately given), that subsequent events, unforeseen at the time the order was made, have destroyed the basis on which it was made or that there exist any issues of fraud, that would justify setting aside of DJ Rippon's order. I have therefore not considered that alternative case any further.

CPR 3.6

79. CPR 3.6 does not apply to the judgment of DJ Rippon as it was not one entered under CPR 3.5. Rather, it was itself an *"order which includes a term that the statement of case of a party shall be struck out if the party does not comply with the order."* In any event, if there is an application by the Defendant in relation to setting aside the judgment of DJ Rippon, given it was made more than 14 days after service of the judgment, it would be out of time and the power under 3.6 would not fall to be exercised.

80. There is no basis to now set aside the unless order of DJ Rippon in whole or in part. There is no dispute that the parties agreed that responses to the Part 18 Request would be made, which was reduced to a consent order approved by the court, or that at the time that DJ Rippon made the unless order, the Defendant

had not complied with the consent order, despite the time for compliance having long passed. The Defendant cannot determine which disclosure it will provide or seek to circumvent the failure to carry out their duty to help the court to further the overriding objective, by seeking partial relief. Application to set aside the unless order made by DJ Rippon is dismissed.

Conclusions

81. The application to set aside DDJ Foote's order, I have found was made in time however, setting aside DDJ Foote's order achieves nothing, if DJ Rippon's order remains in place, as there would still be an unless order which on the findings made by DDJ Foote had been breached. For the reasons given above, neither DJ Rippon, nor DDJ Foote's orders will be set aside.

Totally without merit

82. In R (Grace) v Secretary of State for the Home Department [2014] EWCA Civ 1091, the Court of Appeal ruled that "totally without merit" means simply "bound to fail" (at paragraph 13). This was confirmed in Sartipy v Tigris Industries Inc [2019] EWCA Civ 225, in which the Court of Appeal held that a claim or application is "totally without merit" if it is bound to fail in the sense that there is no rational basis on which it could succeed (at paragraph 27).

83. In Hayden v Family Education Trust [2023] EWHC 950 (KB), in refusing to make a declaration that the claim had been totally without merit, the judge stated

that there is "a distinction to be drawn by a litigant pursuing litigation which is ultimately unsuccessful and instances where it crosses the line into the territory of being wholly without merit" (paragraph 51, judgment).

84. In my judgement, this application for relief was bound to fail, and is one that is totally without merit. This is because I am satisfied that:

i) As was found by DDJ Foote setting out clear examples of the nature of the responses to the Part 18 Request, the responses provided by the Defendant on 4th September 2024, were clearly not adequate responses to the Part 18 Request.

ii) The application for relief and the witness statement in support failed to consider or appreciate the different considerations that would apply to the setting aside the order of DDJ Foote which fell to be dealt with under CPR 3.5 and 3.6 and the earlier order of DJ Rippon, which would fall to be dealt with under CPR 3.9. The Denton stages are dealt with as if the application to the two orders would be the same.

iii) There is no adequate explanation for the failure to comply with the unless order and the reason provided for the breach was unconvincing and had previously been found as such by DDJ Foote. However, the Defendant did not give this any further consideration and simply repeated the same excuse within this application.

iv) Despite being aware that there was a real risk, given the nature of the Part 18 Response given, that the defence had been struck out, the

Defendant did not seek to make an application for relief until after DDJ Foote made a determination of breach.

v) There was considerable delay in making the application for relief, despite the Defendant's awareness of the Claimant's contention that there had been a breach of the unless order since at least October 2024, when the Claimant made its application to strike out the defence for failure to comply with the unless order.

vi) It is clear that the breach of the unless order was a deliberate breach of an order made in January 2024 and August 2024.

vii) The failure to combine the application for relief with the application heard by the court in January 2025 has led to further delay in the efficient conduct of the proceedings.

viii) The Defendant's conduct has resulted in several costs orders being made against it.

ix) The Defendant has sought to re-litigate that there was a material breach of the unless order within this application despite the fact that detailed findings had been made in relation to this by DDJ Foote.

85. The court order will record the fact that the application made by the Defendant was totally without merit.

86. The matter will continue to be listed for a disposal hearing in due course before me, if available.

Costs

87. I will hear any application for costs after dealing with the disposal hearing in this matter. This will include consideration of whether costs should be on an indemnity or standard basis.

Other matters

88. By virtue of the appointment of the Administrators, there is a stay over the proceedings and the claim shall be listed for a disposal hearing (with a time estimate of two hours, before me if available) once the stay is lifted, however that shall occur.

89. This judgment was circulated in draft on 24th June 2025 and formally handed down on 26th June 2025 without the need for the parties to attend court. I hope to shortly amend and approve the parties' Minute of Order dealing with the outstanding issues.

90. A party may appeal if a decision is wrong in law. Any appeal will need to be lodged within 21 days of the date of the disposal hearing (once listed) rather than of the final judgment being handed down.

91. That concludes my judgment.