

ENGLAND AND WALES / JUDGMENT

Clearway Drainage Systems Ltd v Miles Smith Ltd

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Neutral Citation Number: [2016] EWCA Civ 1258 IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE MANCHESTER DISTRICT REGISTRY (HER HONOUR JUDGE MOULDER)
Case No. A3/2016/2778 Royal Courts of Justice Strand London, WC2A 2LL Date: Tuesday, 8
November 2016 B e f o r e: SIR TERENCE ETHERTON, MR LADY JUSTICE KING

- ----- Between: CLEARWAY DRAINAGE SYSTEMS LIMITED v MILES SMITH LIMITED
- ----- DAR Transcript of the Stenograph Notes of WordWave International Limited A DTI Company 165 Fleet Street London EC4A 2DY Tel No: 020 7404 1400 Fax No: 020 7404 1424 (Official Shorthand Writers to the Court)
- ----- Applicant Respondent Mr M Budworth (instructed by Butcher and Barlow LLP) appeared on behalf of the Applicant Mr A Schaff QC and Mr T Bell (instructed by CMS Cameron McKenna LLP) appeared on behalf of the Respondent
- ----- J U D G M E N T (Approved) Sir Terence Etherton, MR: This is an appeal from the order dated 21 June 2016 of Her Honour Judge Moulder, sitting as a judge of the Queen's Bench Division in the Manchester District Registry, by which she dismissed the application for the claimant, Clearway Drainage Systems Limited ("Clearway"), for relief from sanctions in respect of its failure to serve witness statements on 8 April 2016 and its failure to serve a witness summary. The basis of the appeal is that the judge failed properly to apply the principles in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926. The background The claim is by Clearway against its former insurance broker for breach of contract or breach of duty of care. The basic ingredients of the claim, as stated in the amended particulars of claim, are as follows. Clearway is in the business of drainage and sewer clearance and related services. The defendant, the respondent on this appeal, is Miles Smith Limited ("Miles Smith"), which acted as Clearway's insurance broker between around February 2010 and May 2012. Mr Graham Smerdon was the account executive responsible for Clearway's account. Clearway instructed Miles Smith to arrange insurance of various risks, including cover for Clearway's fleet of commercial vehicles for the policy period 6 May 2011 to 5 May 2012 ("the policy period"). It was the practice of Mr Smerdon to meet regularly with Scott Briggs and/or Suzanne Briggs of Clearway at Clearway's offices (1) to discuss their requirements before arranging or renewing cover, (2) to explain the cover that was

arranged, including in particular any significant, important or onerous terms, and (3) to conduct quarterly reviews. The amended particulars of claim allege that Mr Smerdon always explained any exclusions to Scott Briggs and/or Suzanne Briggs orally and was aware that they relied upon him to do so and to explain to them how to operate within cover generally. It is alleged that in breach of contract and/or its duties under the Insurance Conduct of Business Sourcebook and/or negligently Miles Smith failed in the policy period to draw Clearway's attention orally or at all to an endorsement to the commercial motor fleet policy arranged for Clearway, which required all drivers of vehicles exceeding 7.5 tonnes to have "at least 2 years recent, regular and relevant driving experience in the UK under a full driving licence authorising him to drive a vehicle". 6. 7. It is alleged that Miles Smith provided a summary of the commercial motor fleet policy cover that materially misstated the terms of the policy arranged for Clearway. On 13 July 2011 one of Clearway's fleet of vehicles, namely a 32 tonne rigid tanker, was involved in a road traffic accident whilst being driven by an employee of Clearway. As a result of the accident, the vehicle was seriously damaged and an insurance write-off. Clearway, via Miles Smith, notified a claim for indemnity of the loss to Amlin UK Limited ("Amlin"), which was Clearway's commercial fleet insurer under the policy arranged by Miles Smith in the policy period. Amlin declined indemnity to Clearway on the basis that the driver in question did not have two years' recent, regular and relevant driving experience in the UK at the time of the accident. Amlin also cancelled the policy. 8. In its skeleton argument for this appeal Clearway says that the value of the claim is in the region of £350,000. Clearway says that it has a strong case.

Procedural history

9. The claim form was served in June 2015. 10. In September 2015 Miles Smith's solicitors, CMS Cameron McKenna LLP ("CMS"), filed its directions questionnaire indicating that it would be calling two witnesses of fact. They were not identified.
11. On 13 November 2015 CMS filed the case management information sheet stating that Miles Smith would be relying on one witness of fact.
12. On 20 November 2015 District Judge Stephens ordered that: "By 4.00 pm on 8 April 2016 all parties must serve on each other copies of the signed statements of themselves and of all witnesses on whom they intend to rely and all notices relating to evidence." 13. From January 2016 until well after 8 April 2016, the date specified by DJ Stephens for service of witness statements, each side was contending that the other's disclosure of documents was deficient.
14. On 19 February 2016 CMS wrote to Clearway's solicitors, Greenhalgh Kerr, inviting Clearway to deposit £100,000 in court, failing which they indicated that they might make an application for an order for security for costs.

15. On 4 March 2016 Miles Smith wrote to Mr Smerdon reminding him of the terms of his employment contract in respect of the protection of confidential information. The letter said, among other things: "Should it come to light that the Claimant is in possession of any confidential information revealed by you, we are fully prepared to take action against you for damages resulting from a breach of your contractual terms of employment."
16. On 8 March 2016 Dr John Enoch of CMS emailed Mr Warren Usden of Greenhalgh Kerr stating that he was content that sufficient comfort had been provided on the issue of costs. He also stated: "We are not aware of anything that requires a change to the timetable... Should matters arise as a result of the exchange of witness evidence, the timetable for resolution of these will be a matter for the judge." SMITH BERNAL WORDWAVE
17. On 8 April 2016, which was the latest date for service of witness statements and notices relating to evidence, Mr Usden wrote to CMS making a complaint, among other things, about the letter written directly to Mr Smerdon. He also asserted that Miles Smith had failed in its duty of disclosure and then stated: "Although the original timetable provided for exchange of witness statements as to fact by today, 8 April, it is quite clear that witness statements cannot and should not be exchanged until disclosure has been fully complied with and the question of intimidation and interference with any witnesses has been resolved and removed."
18. On 18 April 2016 CMS responded to that letter of 8 April. They said, among other things, as follows: "Your assertion that exchange of witness statements was impacted by the letter sent to Mr Smerdon is totally without merit. That letter was sent over one month prior to the date for exchange of witness evidence (being 8th April 2016)... You and your client, therefore, had plenty of time to consider the issue, yet chose only to write to us on the actual date of exchange. Nor could the issue have impacted upon any other witness statements that your client was intending to exchange. Those excuses for failing to comply with a court order are totally untenable... Your assertion that your client was unable to exchange witness evidence due to the absence of specific documents is unfounded. The first (and only) time you made the assertion came on the date of exchange itself. If it really was an issue that affected the parties' ability to exchange witness statements (which we deny), you should properly have raised it well before 8th April 2016. It is particularly weak given your client's pleaded case is that it relied solely on an oral presentation by Mr Smerdon rather than any written documentation."
19. The pre-trial review ("PTR") was originally listed for 17 May 2016, but on 29 April Greenhalgh Kerr were asked if they would postpone the PTR due to the unavailability of Miles Smith's counsel. On 4 May 2016 Greenhalgh Kerr emailed the court requesting the re-listing of the PTR for the benefit of Miles Smith. On 5 May CMS were notified that the PTR had been listed for 26 May.

20. On 26 May the PTR took place by telephone. Issues of disclosure were raised. An oral application to strike out the claim for a failure by Clearway to serve its witness statements was adjourned to 14 June as no prior notice of the application had been given to Clearway, other than in Miles Smith's skeleton argument served the day before. Following the issue of the failure to serve witness statements being raised, Clearway's counsel told the court that an application for relief from sanctions would be made.
21. On 3 June Mr Smerdon, having taken legal advice, told Mr Usden that he was unwilling to give evidence. SMITH BERNAL WORDWAVE
22. On 9 June 2016 Miles Smith issued an application for summary judgment/strike out of the claim. On the same day Clearway issued an application for relief from sanctions for failing to serve the witness statements as well as seeking an order for specific disclosure of certain documents.
23. Witness statements for Clearway were filed with the court on 13 June, but those served on Miles Smith had been password protected. At the adjourned PTR hearing on 14 June counsel for both parties made submissions on the application for relief from sanctions. As a result of Clearway's witness statements being password protected, Miles Smith's counsel was unable to address the court on any consequences which might flow from their late service. In addition, it became clear that Clearway was seeking to rely on a witness summary of Mr Smerdon, but no application for relief from sanctions had been sought in relation to that witness summary. The PTR was, therefore, adjourned to 21 June to allow a further application to be made by Clearway and for the witness statements to be served on Miles Smith in a non-password protected form.
24. On 16 June 2016 Clearway made an application for relief from sanctions in relation to the witness summary relating to Mr Smerdon's evidence. On 21 June, as I have said, the judge dismissed the applications for relief from sanctions.
25. On 22 September 2016 the parties consented to an order vacating the trial. The judge's decision 26. In a detailed analysis, the judge began by referring to CPR 32.9 and 32.10. 27. She observed that the witness statements of Suzanne Briggs, Scott Briggs and a Mr Buckley were only produced on 13 June, over two months late and less than one month before the trial was due to start on 11 July, and in non-password protected form were only served after the hearing on 14 June. 28. She said that, in accordance with the approach laid down in Denton, she addressed the application for relief from sanctions in three stages.
29. Addressing the first stage, the judge said that the failure for over two months to serve witness statements and to serve them less than a month before the trial did affect the efficient progress of the litigation even if no particular prejudice was identified, and such a prolonged failure over a period of months had to be viewed by the court as serious or significant.

30. Turning to the second stage identified in Denton, the judge said that it seemed to her that there had been no good reason for the failure to serve witness statements. She said that issues of disclosure were often the source of dispute and ongoing in the lead up to a trial but, if that was a reason why Clearway felt unable to exchange its witness statements, it was open to it to make an application to extend time before the deadline of 8 April, and it could have made an application for specific disclosure to deal with the outstanding issues as it saw them. She said that it was not, however, open to Mr Usden merely to disregard the court order. SMITH BERNAL WORDWAVE
31. The judge further said that, since the primary case of Clearway was based on oral representations made at a meeting between Mr Smerdon and representatives of Clearway, namely Suzanne Briggs and Scott Briggs, it was difficult to see why the witness statements of those two people could not have been served and, if necessary, supplemental witness statements produced to take account of any late disclosure.
32. The judge said that it was difficult to understand why Clearway's solicitors made no application for relief from sanctions even after CMS made it clear in their letter of 18 April that they saw no reason why Clearway would be justified in not serving its witness statements. The judge said that it should have been clear at the latest by the PTR on 26 May that Miles Smith was not intending to rely on its own witness statements, but even then Clearway failed to serve its witness statements. She noted that when they were finally served on Miles Smith on 13 June, the day before the adjourned PTR, the witness statements were served in a form which was password protected so the witness statements could not be read by Miles Smith.
33. As to the position of Mr Smerdon, the judge said that the obvious course was to apply for an extension while his position was being investigated further. She said that whilst he had indicated on 3 June, having sought legal advice, that he was unwilling to give evidence, that was the point at the latest at which an application should have been made to provide a witness summary. She said that it was again difficult to understand why no steps were taken at all until the matter was raised at the PTR on 14 June, finally leading to an application on 16 June. 34. She said that, for all those reasons, there was no good reason for the failure to serve the witness statements on 8 April.
35. The judge then turned to the third stage of Denton, which, she said, requires that in every case the court will consider all the circumstances so as to enable it to deal justly with the application. She noted that the Court of Appeal in Denton had said that the factors in CPR 3.9(1) (a) and (b), namely that litigation has to be conducted efficiently and at a proportionate cost and that there should be compliance with rules, practice directions and orders, are to be given particular weight. She said that the Court of Appeal in Denton stressed that it is always necessary to have regard to all the circumstances of the case, and the promptness of the application will be a relevant matter among the circumstances to be weighed in the balance.

36. The judge acknowledged that the nature and scope of the claim in these proceedings was such that the matter could be dealt with within the then current trial window in just under three weeks time. She said, however, that the actions of Clearway had had an effect on the conduct of the litigation because the PTR on 26 May had had to be adjourned to allow Clearway to make an application for relief from sanctions, and the adjourned PTR on 14 June also had to be adjourned both because there had still been no application to deal with relief from sanctions in respect of Mr Smerdon's witness summary and because the witness statements in respect of Suzanne Briggs, Scott Briggs and Mr Buckley, as served on Miles Smith, could not in fact be read. SMITH BERNAL WORDWAVE 37. She said that the breaches had prevented the court and the other party from conducting the litigation efficiently and at a proportionate cost: not only were the witness statements served two months late and so close to trial, but the PTR had been adjourned twice as a result of failings with regard to the witness statements.
38. The judge then turned to questions of principle and said that she had been referred to *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795 and *Oak Cash & Carry v British Gas Trading Ltd* [2016] EWCA Civ 153, [2016] 4 All ER 129. 39. She said that the application for relief from sanctions was made on 9 June, two months after the date specified in the order. She said that it was not made promptly after the initial PTR hearing on 26 May, at which hearing Clearway was aware it was facing an application for summary judgment/strike out for failing to serve the witness statements and being disbarred from relying on any oral evidence at trial. She also noted that, when the application was made on 9 June 2016, Clearway was separately in breach of the deadline under CPR 23.7(1)(b) in that the application should have been served not less than three clear days before the adjourned hearing on 14 June.
40. The judge referred to the explanation by Mr Usden in his witness statement of his other commitments at the time which, he said, precluded him from dealing with the necessary application in the present case promptly.
41. The judge said that, while the other matters with which Mr Usden was engaged did require his urgent attention, they did not suggest to her that he should have been unable to lodge an application for relief from sanctions, particularly in light of the proposed application for summary judgment/strike out canvassed at the PTR on 26 May. She said that the possibility that the claim could be struck out should have ensured that he dealt with this matter as a priority notwithstanding his other commitments.
42. The judge said that, in any event, there was no explanation provided for the fact the witness statements, which were served on 13 June, were password protected and only served in a form which Miles Smith could access after the matter had been raised at the hearing on 14 June.

43. The judge said that she had to weigh, and did weigh very carefully, the fact that if relief from sanctions was refused Clearway's case would be effectively at an end. 44. 45. She concluded that, in all the circumstances, the application for relief from sanctions in respect of the witness statements of Suzanne and Scott Briggs and Mr Buckley must be refused. So far as concerned the witness summary, the judge noted that the application for relief was made on 16 June whereas the deadline was 8 April. She said that it was clear by the beginning of June what was the position in relation to Mr Smerdon, and the fact that no application for relief from sanctions with regard to the witness summary was made until 16 June was a serious failure. SMITH BERNAL WORDWAVE
46. The judge said that, having regard to the three stages in Denton, in all the circumstances the application for relief in relation to the witness summary must also fail. The appeal
47. Mr Martin Budworth, counsel for Clearway, placed at the forefront of his submissions the fact that Miles Smith had decided some two months before the 8 April deadline not to adduce witness evidence at trial but did not inform Greenhalgh Kerr of that decision until the PTR on 26 May or shortly before. Clearway's case is that the inescapable inference from that and the other evidence is that CMS, on behalf of Miles Smith, deliberately set a tactical trap, lulling Mr Usden into the belief that both sides were concerned to deal with outstanding issues of disclosure and preparation of witness statements before exchanging witness statements when the real intention of CMS was to try to knock out the claim on the basis of Clearway's failure to comply with the procedural timetable laid down by DJ Stephens and failure to make an application for relief from sanctions promptly.
48. Mr Budworth laid considerable weight on the provisions in the Mercantile Court Guide and especially the following provisions: "1.9. The Court's ability to meet the changing needs of the commercial community depends in part upon a steady flow of information and constructive suggestions between the Court, litigants and professional advisers..." "1.11. The Mercantile Courts seek to operate in a way which gives effect to the overriding objective of dealing with cases justly and proportionately, is streamlined, accessible to non-lawyers and cost effective, promotes the early resolution of disputes where possible and actively manages through to trial the cases which do not settle." "1.12. It is incumbent upon the parties to help the Court to achieve the overriding objective. They should co-operate courteously to achieve resolution at the lowest feasible cost and in the shortest practicable time. They should put their cards on the table from the outset. The Court expects a high level of co-operation and realism from their legal representatives... Parties who fail to observe these and other requirements of the overriding objective can expect to be ordered to pay the unnecessary costs incurred..." "6.15. [Concerning the case management information sheet]. This is an essential aid to the understanding by the Court (and the other side) as to one party's assessment of how the case is expected to progress to trial, and its cost, along with the evidence to be called. Parties who fail to lodge it can expected to be penalised in costs in an appropriate case."

49. Mr Budworth drew particular attention to the fact that pursuant to paragraph 8.2 of Practice Direction 59, Miles Smith's checklist should have been served not less than SMITH BERNAL WORDWAVE seven days before the PTR fixed for 26 May 2016, but CMS did not in fact serve Miles Smith's pre-trial checklist until 24 May. It was only at that stage that Miles Smith's intention to obtain summary judgment/strike out for failure to serve witness statements became apparent.
50. Mr Budworth submitted that this type of conduct, which was the very opposite of "putting the cards on the table" as required by the Mercantile Court Guide, was the subject of criticism by the Court of Appeal in Denton at paragraphs [40] – [43] where the court criticised parties who "opportunistically and unreasonably opposed applications from sanction" and 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" and that "the court will be more ready in the future to penalise opportunism".
51. Turning in more detail to the judge's three stage analysis, Mr Budworth said that the judge made three errors of principle, namely (1) in a reversion to what he characterised as the discredited approach in Mitchell, the judge gave overwhelming priority to the matters in CPR 3.9(1)(a) and (b) rather than, as she should have done, given them due weight together with other factors; (2) she failed to give due weight to the opportunistic litigation tactics of Miles Smith and CMS, which were contrary to the word and spirit of the Mercantile Court Guide and paragraphs [40] – [43] of Mitchell and which was the source of Mr Usden's misunderstanding of the intentions of Miles Smith to serve witness statements; and (3) she could not properly have concluded that there had been a serious and significant breach when it was still possible for the trial to go ahead on the trial date which had been fixed. 52. In addition to those failures of principle, Mr Budworth said that the judge in any event exercised her discretion in a way that was plainly wrong, that is to say in a way that no court properly addressing itself to the relevant considerations could have decided, because she laid far too much weight on lack of promptness in making the applications for relief from sanctions and had failed to give any or any significant weight to the following nine factors:
- (1) the general desirability of having disclosure resolved on both sides before evidence in chief is filed and served; (2) Miles Smith's conscious failure to let Clearway consider in good time or at all the implications of its private decision; (3) Miles Smith's consequent breach of the governing Court Guide; (4) the unresolved Smerdon issue at the time the breach took place; (5) the fact that the trial could plainly still take place satisfactorily without disrupting the allocation of the court's resources; (6) the fact that as late as 9 June 2016 Miles Smith itself (in revisiting its disclosure concerns) was demonstrably anxious not to jeopardise the trial date; (7) proportionality of the effect of the sanction to the breach; (8) overall justice; (9) the need to discourage unnecessary satellite litigation. Discussion SMITH BERNAL WORDWAVE

53. Despite all that Mr Budworth has so ably submitted, I consider that the judge's judgment in this case was a conscientious and, indeed, an impeccable application of the principles in Denton. 54. It is important in this area that there is consistency in the application of the legal principles which have been clearly laid down. It was made plain in Mitchell (at [1]) that the traditional approach of our civil courts used to be on the whole to excuse non-compliance if any prejudice caused to the other party could be remedied (usually by an appropriate order for costs) but that is no longer the correct approach. The new approach was stated in paragraph [37] of Mitchell as follows: "We recognise that CPR 3.9 requires the court to consider "all the circumstances of the case, so as to enable it to deal justly with the application". The reference to dealing with the application "justly" is a reference back to the definition of the "overriding objective". This definition includes ensuring that the parties are on an equal footing and that a case is dealt with expeditiously and fairly as well as enforcing compliance with rules, practice directions and orders. The reference to "all the circumstances of the case" in CPR 3.9 might suggest that a broad approach should be adopted. We accept that regard should be had to all the circumstances of the case. That is what the rule says. But (subject to the guidance that we give below) the other circumstances should be given less weight than the two considerations which are specifically mentioned."
55. That remains good law, as is shown in paragraph [32] of Denton as follows: "We can see that the use of the phrase "paramount importance" in para 36 of Mitchell has encouraged the idea that the factors other than factors (a) and (b) [in CPR 3.9(1)] are of little weight. On the other hand, at para 37 the court merely said that the other circumstances should be given "less weight" than the two considerations specifically mentioned. This may have given rise to some confusion which we now seek to remove. Although the two factors may not be of paramount importance, we reassert that they are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. That is why they were singled out for mention in the rule."
56. Denton laid down a three stage approach which the judge faithfully applied in the present case. The three stage approach is described in the following way in paragraph [24] in Denton: "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the SMITH BERNAL WORDWAVE second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]"."
57. Denton made clear that the focus of the enquiry at the first stage should be on whether the breach was serious or significant. The court (at [26]) expressly rejected the notion that the sole test was whether a future hearing date was imperilled. It emphasised that, although there are many circumstances in which materiality in that sense would be the most useful measure of whether a breach has been serious or significant, it is deficient in leaving out of

account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious.

58. As to the second stage, the Court of Appeal in *Denton* (at [29]) referred to the examples of failure or default given in paragraph [41] of *Mitchell*. One of the situations considered there was where solicitors may be under pressure and have too much work. The court said that this will rarely be a good reason. It said that solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. In paragraph [43] of *Mitchell* the court said that good reasons are likely to arise from circumstances outside the control of the party in default.
59. As to the third stage, the court in *Denton* emphasised (at [32]) that, as I have said, although the factors (a) and (b) in CPR 3.9(1) may not be of paramount importance, they are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. That is why they were singled out for mention in the rule.
60. The Court of Appeal in *Denton* said (at [34]) that factor (b), namely the importance of complying with rules, practice directions and orders, had received insufficient attention in the past but the “old lax culture of non-compliance is no longer tolerated”.
61. The Court of Appeal in *Denton* said (at [38]) that a more nuanced approach is now required, and that the two factors stated in CPR 3.9(1) must always be given particular weight since anything less will inevitably lead to the courts “slipping back to the old culture of non-compliance which the Jackson reforms were designed to eliminate”. 62. Finally, in *Mitchell* (at [52]) it was emphasised that the Court of Appeal will not likely interfere with case management decisions and, quoting Lewison LJ in *Mannion v Ginty*
- [2012] EWCA Civ 1667 at paragraph [18], it is vital that the Court of Appeal upholds robust fair case management decisions made by first instance judges. 63. I now turn to the specific criticisms made of the judge's decision by Clearway (summarised at paragraphs 51 and 52 above).
64. On the first point of principle relied upon by Mr Budworth, namely that the judge gave paramount importance to the matters in CPR 3.9(1)(a) and (b), on the contrary the SMITH BERNAL WORDWAVE judge did weigh a whole series of factors in her three stage analysis. This is apparent from her conclusions in paragraphs [59]-[61] as follows: “60. In conclusion, I accept that the trial date can be maintained and the defendant’s solicitors are in my view adequately resourced to deal with a truncated timetable. However, as I have indicated the test is broader than whether the trial date can be kept. I have referred above to the impact on the conduct of the litigation and it seems to me that time and money has been wasted by the claimant's continuing and repeated failures in this regard.

60. As to promptness, the claimant was aware from 18 April that the defendant objected to the failure to exchange witness statements, but Mr Usden decided that he would take his own approach and pursue the issues of disclosure with Mr Smerdon. Not only did he not make a protective application, as his counsel termed it, but even when he was facing a possible summary judgment application, following the PTR on 26 May he did not take action promptly. The delay and failure has nothing to do with the PTR being put off from 17 May to 26 May, as Mr Usden has suggested. Even after 26 May, Mr Usden did not see the need to prioritise his claim over his other work. He took his own view of what would be acceptable in terms of filing an application for relief. He ignored the rules about filing three clear days before a hearing application. He served the witness statements but decided to prevent the defendant from accessing them. He took no action in respect of the witness summary until prompted to do so by the Court at the second PTR hearing. Repeatedly, despite two adjournments of the PTR, it seems he has taken his own view of what is acceptable.
61. I accept and I have considered carefully the fact that the claimant in this matter has itself done nothing wrong, that his representative, it seems, has chosen to ignore the rules and caused disruption and expense to the defendant and the court. The fact that Mr Usden genuinely appears to have been of the view that he was entitled to take the approach that he did in the face of the stance taken by the defendant on disclosure, witness statements and Mr Smerdon does not in my view support a conclusion that relief should be granted."
65. On the second point of principle, namely that the judge did not take into account the cynical litigation tactics of Miles Smith and CMS, the judge did not ignore this altogether. In paragraph [29] of her judgment, she said: "Counsel for the Claimant submitted that the claimant was, therefore, placed under a misapprehension and the defendant did nothing to disabuse the claimant of that misapprehension, having taken the decision some time earlier that the defendant would not after all call any witnesses." SMITH BERNAL WORDWAVE
66. More to the point, the inescapable fact remains that it was perfectly clear from CMS' letter of 18 April 2016 that they were saying that, notwithstanding any outstanding issue as to disclosure, there had been a failure by Clearway to comply with the direction of DJ Stephens to serve witness statements by 4pm on 8 April. Nothing could have been simpler than Mr Usden asking then whether Miles Smith would agree to an extension of time. If Miles Smith refused unreasonably, and it was necessary for an application to the court to be made for an extension of time, no doubt Miles Smith would have been ordered to bear the costs unnecessarily incurred. Such a request would no doubt also have elicited whether Miles Smith was itself intending to serve witness statements. If an application had to be made at that stage for an extension, bearing in mind Mr Usden's reasonable misunderstanding about Miles Smith's intention to serve witness statements, I have no doubt that, with the trial some months away, such an extension or relief from sanctions would have been granted, bearing in mind the criticism in Denton (at paragraphs [40] – [43]) about opportunistic and unreasonable opposition to applications for relief from sanctions.

67. As to the third point of principle, as I have said, it is perfectly clear that Mitchell and Denton marked a departure from the old approach that, provided the trial date could be kept and any default in compliance with the CPR could be compensated by an award of costs, relief from sanctions or an extension of time would normally be granted. Both Mitchell and Denton made clear that, even where a trial date can be kept, factors (a) and (b) of CPR 3.9(1) will still be of particular importance even if not conclusive in cases where serious breaches affect the efficient progress of the litigation. That was precisely the approach taken by the judge in the present case. Paragraphs [28], [54] and
- [61] of the judge's judgment are relevant to this point. I have already quoted paragraph [61]. Paragraphs [28] and [54] were as follows: "28. Although it could be argued that the late service of the witness statements in this particular case has not imperilled the trial date, it seems to me that the failure for over two months to serve witness statements and to serve them less than a month before trial does affect the efficient progress of the litigation and even if no particular prejudice is identified. Such a prolonged failure over a period of months must be viewed by the court as serious or significant." "54. I do have to weigh and I have weighed very carefully the fact that if relief from sanctions is refused, the Claimant's case would effectively be at an end. This clearly weighs in favour of granting relief."
68. Turning to Clearway's submission that the overall decision of the judge was plainly wrong and outside the scope of any proper exercise of judicial discretion because it gave too much weight to one matter and no or insufficient weight to others, it must be remembered that this is a case management decision with which the court should not lightly interfere. The fact that different judges might give different weight to the various factors does not make the decision one which can be overturned. There must be something in the nature of an error of principle or something wholly omitted or wrongly taken into account or a balancing of factors which is obviously untenable. It is SMITH BERNAL WORDWAVE simply impossible to say that of the judge's decision in the present case, which was so carefully and conscientiously reached.
69. As to promptness, the judge was right to say this was relevant. She was fully entitled to take into account the delay of some two months following CMS' letter of 18 April before the applications for relief were made. 70. I respond as follows to the matters of which it is said the judge failed to give any or gave insufficient weight (set out in paragraph 52 above). As to (1), this did not excuse delay after the letter of 18 April from CMS for the reasons I have given. As to (2), I have dealt with this already. As to (3), I have also dealt with this already. As to (4), the judge cannot be criticised for the way she addressed this in paragraph [36] of her judgment as follows: "As to the witness statements from Mr Smerdon, even if the position of Mr Smerdon as a witness was unclear at 8 April, the obvious course was to apply for an extension while the matter was investigated further. Once Mr Smerdon indicated on 3 June his position, that was the point at which at the latest an application should have been made to provide a witness summary. Again, it is difficult to understand why no steps were taken at all until the matter was raised on the PTR on 14 June, finally leading to an application on 16

June."

71. As to (5), I have already dealt with this. As to (6), I do not see that this takes the matter any further. As to (7) and (8), it is apparent from the judge's three stage analysis, particularly at the third stage, including the effect of the breach, promptness and the justice of excluding Clearway from giving evidence, and her conclusions at paragraphs
- [59] – [61], that the judge did take into account proportionality and overall justice within the framework of Mitchell and Denton. As to (9), Mr Budworth drew attention to the observation of Mance LJ in *Hansom v Wright* [2003] EWCA Civ 1801 at paragraph [35] as the significance of a party refused relief from sanctions having to pursue its solicitors for negligence. *Hansom* itself is, of course, a pre-Mitchell and Denton case but, in any event, it seems to me implicit in the judge's judgment that she recognised that the consequence of refusal of relief from sanctions would put an end to Clearway's case, among the inevitable consequences of which would be a question as to the liability of its solicitors.

Conclusion

72. For all those reasons, I would dismiss this appeal.
73. LADY JUSTICE KING: I agree. SMITH BERNAL WORDWAVE

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