

JERSEY / JUDGMENT

Powell v Chambers [2018]

JRC 169 (11 September 2018)

[2018] JRC 169

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judgment

the MASTER:

Introduction

1. This judgment represents my reasons for partially allowing the First Plaintiff relief from her breach of an unless order striking out the entirety of the claim including my reasons for imposing certain conditions in granting relief.

Background

2. The general background to this dispute was set out in a judgment of the Royal Court dated 7th February, 2018 In the matter of II

[2018] JRC 031 at paragraphs 3 to 11 which I adopt for ease of reference. 3. The proceedings were commenced by way of an order of justice dated 29th March, 2012. 4. The procedural history of this dispute has been summarised in a number of judgments. I firstly refer to paragraph 13 to 27 of an earlier judgment in this matter reported at In the matter of II

[2015] JRC 194 . I refer in particular to paragraphs 15 to 17 as follows:- "15. In respect of the second application, the Royal Court gave directions and expressed its concern that the matter was making no progress towards a hearing. Directions were therefore given for discovery. 16. Regrettably the order for discovery was not adhered to by the plaintiffs and further orders were made on 20th February, 14th May, 6th August and 16th September, 2013. Ultimately this resulted in me making an Unless Order on 18th December, 2013, which led to some discovery being provided by the plaintiffs; however discovery is still not complete. Directions were also given for affidavits of witness of fact to be produced on 20th February, 14th May, 6th August and 16th September, 2013, and 11th June, 2014. Such evidence has still not been produced. 17. It is however right to observe that in relation to the directions given, some of these dates have been varied or set aside because of serious health issues which it is not necessary to specify but which clearly have affected A by reference to independent medical evidence provided through A. In particular, on 16th

September, 2013, A raised an issue that the proceedings should be adjourned by reference to a letter from her consultant for six months. However, she only wanted to delay matters for a shorter period because of the risk of losing the property in which she resided in Jersey and because she was facing other financial difficulties. Accordingly I extended the obligation to provision of discovery until the end of December 2013." 5. The history of the litigation is then recorded in my judgment reported at In the matter of II

- [2016] JRC 106 striking out the claims of the second and third plaintiffs. The procedural steps recorded in this judgment are at paragraphs 6 to 21. I emphasise paragraph 18 as follows:- "18. I also made it clear that enough delay had occurred. I explained that the court had bent over backwards to try to help the plaintiffs by appointing an Amicus, which assistance had not been accepted for the reasons set out in the Amicus judgment. The court had further adjourned matters in October 2015 to enable legal aid to be sought and legal advice obtained, had adjourned matters in December 2015 to enable an opinion to be obtained from an expert psychiatrist and had further adjourned matters in March 2016 to enable further legal advice to be obtained. I therefore made it clear that the summonses absent extraordinary circumstances had to proceed." 6. On 7 th July, 2016, by a judgment reported at In the matter of II
- [2016] JRC 116 , I struck out the first plaintiff's claims of fraud against the defendants. 7. It is these judgments that were the subject of an appeal to the Royal Court by all the plaintiffs which led to the Royal Court's judgment dated 7 th February, 2018 In the matter of II
- [2018] JRC 031 referred to in paragraph 2 above which dismissed the appeals. 8. While the above appeals were pending, I refused to order a split trial or a preliminary issue by a judgment dated 4 th January, 2017 reported at In the matter of II
- [2017] JRC 001 . This judgment followed a stay granted by me pursuant to Rule 6/28 of the Royal Court Rules 2004 , as amended ("the Rules"), following my decision to strike out the first plaintiff's claims in fraud. 9. In refusing a split trial I issued various directions by an Act of Court dated 7 th December, 2016 including the following orders at paragraphs 2 to 5:- "2. the First Plaintiff shall provide discovery in accordance with paragraph 5 of the Schedule to the Act of Court dated 11th June, 2014 by 5.00 p.m. Friday, 27th January, 2017; 3. the First Plaintiff shall file a schedule of loss in accordance with paragraph 22 of the schedule to the Act of Court dated 11th June, 2014 by 5.00 p.m. Friday, 24th February, 2017; 4. the first Plaintiff and the First and Second Defendants shall exchange witness statements by 5.00 p.m. Friday, 28th April, 2017; 5. the orders in paragraph 2, 3 and 4 of this Act of Court are final orders." 10. The first plaintiff filed a supplemental affidavit of discovery on 27 th January, 2017 and provided a schedule of loss on 24 th February, 2017. 11. The schedule of loss at paragraphs 5 and 6 stated as follows:- "5. The following are the First Plaintiff's Losses in respect of General Damages: a) Exemplary or Aggravated Damages b) Damages for Personal Injury due to acute stress, depression, nervous hysteria and/or post-traumatic stress disorder caused or aggravated by the Defendants' conduct. c) Damages for Personal Injury for the late diagnosis of the First Plaintiff's [medical condition] with the attendant

foreseeable worsening of her condition, something which would have been considerably mitigated had the First Plaintiff been able to maintain her private health cover and scheduled checks ... under a private health scheme. There has been considerable suffering through several years of treatment including disfiguring surgery and there is a reduced life expectancy. d) Damages for pain and suffering, injury to feeling, humiliation due to the widespread publication of the debt proceedings involving the First Plaintiff and/or loss of amenity due to greatly reduced circumstances and loss of my previously high credit rating.

6. The following are the First Plaintiff's Claims for Special Damages; a) Loss of a half share in Mrs Mary Sarah Chamber's, 'the Deceased's' estate with further disclosure and/or expert's reports to quantify this but this is expected to be in the region of £500,000 in respect of the Deceased's immovable estate and a minimum amount, subject to full disclosure, of approximately £50,000 at the time of the Deceased's death on 1st April 2011. b) Restitution of the jewellery and other items which the Deceased specifically mentioned in a Letter of Wishes for the benefit of the First Plaintiff and the personal items which the First Plaintiff left for safety at the Deceased's house before and after the Deceased' death c) Loss of the use of the funds which the First Plaintiff should have had paid to her from the Deceased's estate which the First Plaintiff was known to the Defendants to have wished to have under her own control as soon as possible following the sale of the Deceased's property and proper administration of her estate allowing for insurance cover to be taken to cover any distributions from the estate prior to a year and a day elapsing after the Grant of Probate. But for the wrongful retention by the Second Defendant of the First Plaintiff's share of the Deceased's estate the Plaintiff would have applied from the funds available to her from the estate as follows, i) immediately paid off any sum owing by her to Acorn Finance such amount being approximately £190,000 at the date of death of the Deceased. ii) allocated £30,000 for a new kitchen and essential repairs to [the Jersey property] in order to rent out the property for a sum approximating to £50,000 per annum with Cost of Living increases annually iii) allocated £ 25,000 for improvements to [a property in Winchester] prior to moving back there to live with the Second and Third Plaintiffs iv) put £100,000 down as a deposit on each of two buy to let properties in Winchester costing around £500,000 each and rented each property out for a sum in the region of £27,000 per annum initially v) over time used any capital gain and rental income on any of the properties in my name to borrow additional low interest funding secured on the properties to buy as many buy to let properties as I could over the period since the approximately 4 months after the date of death of the Deceased at around the £500,000 purchase price level, as increasing for similar properties according to market forces since 2011 and going on to rent out such properties at a yield of around 6% vi) maintained my mortgage payments on [the Jersey property] and [Winchester property] and not had to borrow additional funds from Acorn Finance, a non-status lender, at a high rate of interest and also thereby avoiding the degreivement and remise proceedings which have cost me dear in terms which have yet to be finalised but include the potential sale in early course at below market value of [the Jersey property] as a known forced sale and the sale of [Winchester property] in or around October this year when the mortgages are unable to

extend my mortgage facilities as my term matures due to changes in their own lending policies and I will be unable to re-mortgage elsewhere vii) maintained my insurance premiums in a Scottish Widows policy up to and beyond 2013 such policy having a critical illness clause which would have paid me £20,000 on the diagnosis of a [medical condition] in 2013, such policy I was known by the Second Defendant to be anxious to retain due to a previous diagnosis viii) maintained my private health cover which would have allowed me to have private treatment which would certainly have detected the [condition] detected in 2013 at the 6 monthly checks the insurer was paying for under the aegis of one of the world's leading ... experts and leading me potentially to incur significant charges in the future for equivalent treatment and medication and accordingly the First Plaintiff would like to claim for the losses incurred due to the losses of opportunity and other losses set out in this paragraph and future losses, costs, interest including compound interest where applicable whether incurred on debts or unobtainable due to withholding of funds including compound interest. The First Plaintiff will also have potential future tax losses which she would like to recover from the Defendants depending on whether she has to incur UK capital gains tax on the enforced sale of [the Winchester property] later this year or on any damages in this case and/ or the balance due to the First Plaintiff following the finalisation of her demise. The First Plaintiff would also like to apply for Costs including disbursements and loss of earnings and future earnings." 12. The eight sub-paragraphs in the schedule of loss cited in the preceding paragraph set out in some detail the loss of use of the funds the first plaintiff claims she had suffered. 13. The plaintiffs' appeals against the decisions I reached in 11 th June 2016 striking out the whole of the second and third plaintiffs' claims and the first plaintiff's claim in fraud were adjourned in 2017. Although the effect of this adjournment meant that directions could not be given to proceed the claim to trial until the appeals had been resolved, I considered that certain directions could be issued to progress the case as far as was possible until the outcome of the appeals was known. 14. On 7 th September, 2017, I therefore gave directions requiring the first plaintiff to provide her discovery to the defendants for the defendants to copy the documents to enable inspection to take place. I also permitted the defendants to apply to strike out the first plaintiff's claim if documents were not provided for copying. The first plaintiff was also required to identify which losses were claimed against which defendants and if she did not do so then the claim against that defendant would be struck out. 15. At paragraph 12 to 14 of the Act of Court of 7 th September, 2017 I ordered as follows:- "12. by 5.00 p.m. Friday, 10th November, 2017 the First Plaintiff shall provide a further list of documents to the Defendants setting out all documents in her possession, custody or power relevant to the losses claimed by the Plaintiff based on how she would have applied monies from her mother's estate set out at paragraphs (i)

- (viii) of the First Plaintiff's Schedule of Loss dated 24th February, 2017; 13. the First Defendant shall also by 5.00 p.m. Friday, 10th November, 2017 provide discovery of any documents relevant to the provision or statements of the movable and immoveable estate of the deceased, including payments made to the First Plaintiff set out in the Schedule to the

First Defendant's Supplemental Answer dated 21st July, 2016; 14. within 14 days of determination of the First Plaintiffs' appeals against the decisions in this matter dated 15th June, 2016 reported at

[2016] JRC 106 and 7th July, 2016 reported at

[2016] JRC 116 the Plaintiff shall set out all facts and matters relied upon, why she is claiming exemplary and aggravated damages." 16. No sanctions were attached to these orders because they were orders made for the first time. 17. The first plaintiff did not provide documents for copying which resulted in the matter returning to court on 9 th January, 2018. The first plaintiff was ordered to provide the discovery she had listed by 16 th February, 2018 failing which her entire claim would be struck out without further order. Copies were provided to the defendants in compliance with this order. 18. The first plaintiff, if her claim was not struck out due to a failure to provide documents she had then disclosed, was ordered to identify which losses were claimed against which of the defendants. Again the order carried a sanction that if there was a failure to identify which losses were claimed against which defendant the claim would be struck out against any defendant where non-compliance had occurred. 19. The first plaintiff, if any claims were not otherwise struck out, was also required to provide discovery of the matters set out at paragraphs (i)-(viii) of her schedule of loss dated 24 th February, 2017. If she did not do so then paragraph 8 of the Act of Court dated 9 th January, 2018 provided that the first plaintiff's claim for consequential loss dated 24 th February, 2017 would be struck out automatically without further order. 20. The first plaintiff provided a schedule of loss split between the first defendant and the second defendant by a document dated nd May, 2018 and an updated list of documents dated 16 th March, 2018. However, no copies of the documents in the updated list of documents were provided for inspection. 21. This led to the following orders at paragraphs 1 to 4 of the Act of Court of 25 th April, 2018. by 5.00 p.m. Tuesday, 5th June, 2018 the First Plaintiff shall provide copies to each of the First and Second Defendants of all documents listed at paragraphs i) to viii) inclusive of her further list of documents dated 16th March, 2018; if the First Plaintiff fails to provide copies of the said documents in compliance with paragraph 1 of this order to the First Defendant, then the First Plaintiff's entire claim against the First Defendant shall be struck out automatically without further order; if the First Plaintiff fails to provide copies of the said documents in compliance with paragraph 1 of this order to the Second Defendant, the First Plaintiff's entire claim against the Second Defendant shall be struck out automatically without further order; the First and Second Defendants shall meet the reasonable copying costs of the First Plaintiff to comply with paragraph 1 of this order; 22. Paragraphs 5 and 6 of the same order also stated as follows:- "5. the First Defendant shall comply with paragraph 13 of the Act of Court of 7th September, 2017 also by 5.00 p.m. Tuesday, 5th June, 2018, such order to be a final order; 6. the list of documents dated 16th March, 2018 provided by the First Plaintiff pursuant to paragraph 7 of the Act of Court dated 9th January, 2018 shall be verified by an affidavit to be sworn by the First Plaintiff also by 5.00 p.m. Tuesday, 5th June, 2018." 23. Directions were then given for witness statements of fact

and expert evidence at paragraphs 7 to 12 as follows:- "7. the parties shall simultaneously exchange witness statements of fact verified by affidavit from all those witnesses including the parties themselves upon which they intend to rely on at trial on or before 5.00 p.m. Wednesday, 5th September, 2018, such witness statements to stand as evidence in chief; 8. there shall be simultaneous exchange of expert medical reports on the mental capacity of Mrs Mary Sarah Dilworth Chambers, née Geddis ("the Deceased") to make wills of movable and immovable property in April 2008, such exchange to take place by 5.00 p.m. Friday, 30th November, 2018; 9. the First Plaintiff shall further by 5.00 p.m. Friday, 30th November, 2018 provide to the First and Second Defendants an expert medical report on her severe emotional distress; 10. the Plaintiff shall further by 5.00 p.m. Friday, 30th November, 2018 provide an expert report from an accountant relating to the consequential losses claimed by the First Plaintiff at paragraphs i) to viii) of her schedule of loss dated 24th February, 2017; 11. the First Defendant shall provide by 5.00 p.m. Friday, 30th November, 2018 either a report from an accountant acting as an expert or a schedule setting out his dealings with the Deceased's estate both as executor and in his personal capacity and setting out all monies provided to the Plaintiff by way of *légitime*; 12. Paragraphs 7 to 11 are all final orders." 24. The first plaintiff failed to provide copies of all documents referred to in her further list of documents dated 16 th March, 2018 as required by paragraph 1 by 5.00 p.m. Tuesday, 5 th June, 2018 and accordingly her claims against both defendants were struck out automatically without further order by virtue of paragraphs 2 and 3 of the Act of Court of 25 th April, 2018. 25. It is these orders that the first plaintiff effectively seeks to set aside by her application seeking an extension of time. *Dégrèvement* proceedings 26. I next deal with the *dégrèvement/remise* proceedings because the history of these proceedings is relevant to the present applications. 27. In a judgment of the Royal Court dated 20 th April, 2018 reported at Representation of Powell

[2018] JRC 073 paragraphs 2 to 10 of the judgment described in summary that a *remise* was granted on 31 st January, 2017 which *remise*, following an extension, expired on 31 st January, 2018. This led to the Royal Court to rule as set out in paragraphs 26 and 27 of its judgment as follows:- "26. Applying these well established and settled principles of law to the facts of this case:- (i) The *remise* ended on 31st January, 2018, a year after it had first been imposed. It was unsuccessful. (ii) Immediately thereafter Mrs Powell is deemed as a matter of law to have made *cession générale* of all of her property, both movable and immovable for the benefit of her creditors. (iii) The stay of the *dégrèvement* proceedings imposed by the granting of the *remise* was automatically lifted. 27. The temporary respite, therefore, given by way of indulgence on the granting of the *remise* is now over, and the process of execution against Mrs Powell's property continues." 28. It is also appropriate to refer to paragraph 31 as follows:- "31. We accept that Mrs Powell has suffered health issues for many years, that she is under considerable stress, and facing the loss of her home, but she is able to communicate well in writing, as evidenced by her many e-mails, and orally as she did when making her application for an adjournment before the Court. Whilst accepting that we are not experts in the field of capacity, she did seem perfectly able to

participate in the hearing, but the simple fact is that the law had taken its course and there can be no further interruption in the process of execution against her. As a necessary consequence of the remise which she sought and which has been unsuccessful, she has already made cession générale in favour of her creditors." 29. The Royal Court refused leave to appeal its decision on 21 st May, 2018. 30. On 1 st June, 2018 McNeill J. A., sitting as single judge of the Court of Appeal reported at Representation of Powell

- [2018] JCA 099 , ruled that leave to appeal was required and ordered the first plaintiff to make written submissions to be lodged by 12 th June, 2018, with the creditors being given time to reply by 15 th June, 2018 and the first plaintiff time to respond by 21 st June, 2018. 31. Leave to appeal was refused by McNeill J. A. by a further judgment title Representation of Powell dated 29 th June, 2018 reported at
- [2018] JCA 113 . 32. The dégrèvement hearing was initially due to take place on 1 st June, 2018 but was then adjourned to 26 th June, 2018. 33. The dégrèvement hearing proceeded with the property being taken by an unsecured creditor. The first plaintiff continues to make challenges to set aside the dégrèvement hearing which are matters still before the Royal Court. 34. The history of the dégrèvement proceedings is relevant in two respects. Firstly, it is relevant to other steps the first plaintiff was having to deal with before the Royal Court when the first plaintiff was also required to make copy documents available for inspection. 35. Secondly, at the hearing on 25 th April, 2018, I raised with the parties the effect of the cession generale on the claim brought by the first plaintiff and whether this was a cause of action that now vested in her creditors generally. This led me to produce a second Act of Court also dated 25 th April, 2018 as follows:- "1. Pursuant to Rule 6/24 of the Royal Court Rules 2004, as amended, the following questions are referred to the Royal Court for determination:- a. in light of the ruling of the Royal Court dated 20th April, 2018 that the First Plaintiff is deemed as a matter of law to have made cession générale of all her property both moveable and immoveable for the benefit of her creditors, what is the effect on the present proceedings of the First Plaintiff having made cession générale and do the present proceedings vest in the creditors of the First Plaintiff; b. if the benefit of the present proceedings does vest in the Plaintiff's creditors, who on behalf of the creditors should control the present proceedings and by what mechanism; c. if the benefit of the present proceedings does vest in the Plaintiff's creditors, but the creditors do not wish to take control of the present proceedings, whether the First Plaintiff may continue to pursue the Defendants; 2. the Viscount, Acorn Finance Limited and Jersey Home Loans Limited are convened to the referral to the Royal Court ordered by paragraph 1 of this Act of Court in the case of Acorn Finance Limited and Jersey Home Loans Limited by the delivery of this Act of Court to the advocates acting for them in relation to the Remise proceedings; 3. the parties to the present proceedings, the Viscount, Acorn Finance Limited and Jersey Home Loans Limited shall within 14 days attend a date fix hearing to fix a date for directions before the Master of the Royal Court in respect of the referral ordered by paragraph 1 above; 4. liberty to apply; and 5. costs in the cause." 36. Subsequent to that Act of Court the Viscount was directed to advertise for creditors of the first plaintiff in order to

review whether any creditor was interested in the question referred to the Royal Court. Procedural steps subsequent to the default 37. It is also right to refer to events from 14 th June, 2018 onwards as a result of emails from the advocates for the first and second defendants stating that the first plaintiff's claim had been struck out as the first plaintiff had not provided copies of the documents as required. In response to these emails I wrote to all parties confirming, unless I extended time for compliance, that I agreed that the case had been struck out. I also considered it was arguable that I had the power to extend time but I required an application to be made. 38. This email led the first plaintiff to respond indicating that she was going to make an application as soon as possible but she was suffering serious mental health problems. 39. I then directed that any application to extend time by the first plaintiff had to be issued by Friday, 6 th July, 2018. This was because by this date both any time limit for final submissions to the Court of Appeal for leave to appeal the Royal Court judgment of 20 th April, 2018 and the rescheduled dégrèvement hearing would have passed. I also directed that any application had to be accompanied by an affidavit setting out all matters relied upon. A summons and an affidavit were sent by the first plaintiff by email just before expiry of the deadline on Friday, 6 th July, 2018 with a date fix appointment taking place on 11 th July, 2018. The first plaintiff's summons was then listed to be heard for 25 th July, 2018.

Submissions

40. While the first plaintiff's submissions ranged widely, the following represents my understanding of the salient points either made orally, in the first plaintiff's affidavit or skeleton argument. 41. The failure to provide documents was not deliberate. There was no guile on the first plaintiff's part in delaying the provision of copies. 42. The reason for the non-compliance was all the other steps the first plaintiff had to take in relation to seeking to appeal the judgment of the Royal Court in relation to the remise coming to an end and the subsequent dégrèvement. She had to seek leave to appeal from the Royal Court and then the Court of Appeal, had to respond to the Court of Appeal's further timetable and then had to take steps to challenge the dégrèvement proceedings. 43. The first plaintiff said there was also clear evidence of the severe emotional distress she had suffered. 44. She was critical of the conduct of the defendants and their advocates in relation to the present litigation. She submitted this was a general tactic on their part to try to wear down the first plaintiff. 45. The first plaintiff said the effect of the decision of the Royal Court in relation to the remise proceedings was extremely stressful which at times meant that she was struggling to cope. The first plaintiff relied on previous medical evidence produced to the Court on the effect of Court proceedings upon her. 46. The case had also been delayed due to the late strike out applications by the defendants and the refusal to order a split trial. 47. The Court had a discretion to extend time even where an unless order had been made. The approach to be taken was analogous to the case of *Denton v T. H. Wight*

- [2014] EWCA Civ 906 where a three stage test had been applied. 48. She also emphasised it was more difficult for a litigant in person. 49. The breach was not serious because the documents could be provided within a couple of weeks due to the assistance of the former second plaintiff. 50. She emphasised the following extract found in paragraph 3/5/10 of the 1999 White Book where the Court set out a series of factors. Factor 6 stated as follows:- "The judge would exercise his judicial discretion whether to excuse the failure in the circumstances of each case on its own merits at the core of which was service to justice." 51. This led the first plaintiff to emphasise the strength of her claim. 52. Advocate Blakeley for the first defendant generally adopted the position set out in the skeleton argument filed by the second defendant but also made the following observations. 53. Firstly, there was a continuing pattern of default. 54. Secondly, cost orders were of no benefit because they could not be enforced due to the first plaintiff not having any money. 55. The first plaintiff only complied with orders carrying a sanction. Otherwise the first plaintiff ignored Court orders. 56. The first plaintiff failed to apply for any extension before the time limit to provide the documents expired. 57. The position of the other parties having to deal with extensive defaults had to be taken into account. 58. Advocate Wilson for the second defendant emphasised the following:- (i) The action started against the defendants over six years ago and yet there was no desire on the part of the first plaintiff to prosecute the case to trial. This was in respect of a dispute where the events took place over ten years ago. (ii) There were still no witness statements of fact and the current timetable, if any if granted would not be complied with. (iii) The general approach of the first plaintiff was to ignore orders and to seek to delay proceedings. (iv) An inference could also be drawn, given the legal advice previously made available to the first plaintiff, that the first plaintiff was refusing to accept the legal advice on the merits of her claim. (v) She had also rejected the assistance of an Amicus . (vi) The Court had determined in previous hearings that the first plaintiff was capable of representing herself. (vii) There was severe prejudice to the second defendant if the first plaintiff was not sanctioned. Ultimately a failure to sanction the first plaintiff brought the Court into disrepute. (viii) The application itself was made out of time because the date fix hearing only took place after the dates were set by me for an application to be issued. (ix) Litigants in person should not be awarded a special status - see *Barton v Wright-Hassall* LR
- [2018] UKSC 12 . (x) The breach was clearly a serious one because an unless order was made. This was right given all that gone before. (xi) Seeing copies of the documents was important because the affidavit of discovery was not in the correct form and therefore it was not clear what was being disclosed. (xii) The defendants needed to see these documents in order to decide how to respond to them. (xiii) The delay in filing documents would lead to a delay in filing witness statements. (xiv) There was no medical evidence relating to the first plaintiff's health during the period the first plaintiff was required to provide copies of documents. (xv) The first plaintiff still had not provided a sworn affidavit of discovery and was therefore also in breach of paragraph 6 of the Act of Court of 25 th April, 2018. This was indicative of the first plaintiff's approach to orders which were constantly breached

unless they carried sanctions. (xvi) There was no application for specific discovery against any of the defendants. The defendants were not therefore in breach of any Court order. (xvii) He criticised strongly the repeated serious allegations made by the first plaintiff against the defendants. It was not fair on the defendants for the proceedings to continue as they had because this did not allow the defendants to respond or address the serious allegations being made. (xviii) The difficulties the first plaintiff found herself in in terms of other issues were of her own making. 59. He also drew my attention to specific paragraphs of the overriding objective found in Royal Court Rule 1/6(2) in particular the obligations of saving expense, ensuring that cases were dealt with expeditiously, fairly and enforcing compliance with Rules/Practice Directions and orders (see paragraphs (b), (d) and (f) of Rule 1/6(2). Decision 60. The starting point for my decision is whether I have jurisdiction at all to grant relief from sanction from an order which has not been complied with and which has a consequence the proceedings have automatically been struck out. 61. Paragraph 3/5/9 of the 1999 White Book Edition states as follows:- "Where the court makes an "unless" or conditional order that a party is required to do an act within a specified time but the order to do that act is not complied with within the time specified the court nevertheless retains the power to extend the time within which such act should be complied with." 62. The note expressly rejected the argument that where an unless order had been made but not complied with, the Court was then deprived of a jurisdictional power to extend the time for doing the act. No party challenged that I did not have such a power. It is also implicit in Rule 3.9(1) of the Civil Procedural Rules that there is such a power because that rule allows the Court to grant relief from any sanction used for the failure to comply with "any order or common practice direction or court order" . 63. In respect of unless orders the 1999 White Book Edition also states as follows:- "The court, when considering an application to strike out proceedings following a party's failure to comply with an unless order should look at the overall justice of the matter. The Court of Appeal consider what the proper test ought to be for a striking-out where a party was in breach of an unless order and consider the cases of *Allen v. McAlpine & Son Ltd*; *Birkett v. James*; *Tolley v. Morris*; the *Jokeri* case; *Caribbean General Insurance v. Frizzell Brokers*; *Costellow v. Somerset County Council*. The court observed that each case had to be considered on its own facts but that the underlying approach might be encapsulated by the following:- An unless order was an order of last resort, not made unless there was a history of failure to comply with other orders. It was the party's last chance to put its case in order. Because it was the last chance, a failure to comply would ordinarily result in the sanction being imposed. The sanction was a necessary forensic weapon which the broader interests of the advanced to exonerate the failure. It seemed axiomatic that if a party intentionally flouted the order he could expect no mercy. A sufficient exoneration would almost invariably require that he satisfied the court that something beyond his control had caused the failure. The judge would exercise his judicial discretion whether to excuse the failure in the procedural inefficiencies causing the twin scourges of delay and wasted costs. The public administration of justice to contain those blights also weighted heavily. Any injustice to the defaulting party, though never to be ignored came a long way behind

the other two. (*Hyler Information Systems Ltd v. County City Council*,

[1997] 1 WLR 1666 , CA)." 64. While I regard the above as helpful guidance, for unless orders, these factors need to be placed in the context of what approach the Court should take generally where orders have not been complied with. This has been the subject of some controversy in England as I observed in *Cummins v Howland*

[2014] JRC 165 at paragraphs 15 to 17. In particular I noted at paragraph 17:- "...it is not appropriate without submissions on *Denton* to consider how far the approach of the English courts in the *Mitchell* and *Denton* should be followed by the courts in Jersey." 65. Since *Cummins* two further developments have occurred. Firstly the Royal Court has introduced an overriding objective in Rule 1/6 which applies to the exercise of any power given to the Court by the Rules or the interpretation of any rules. Royal Court (Amendment No.20) Rules 2017 also modified Rule 6/26 which is the power to give directions which now permits the Court of its own motion to make any order it sees fit including dismissing a case where there has been non-compliance with any order made under the provisions of Rule 6/26 (see 6/26(12)). 66. The second development is that in the very recent decision of *Newman v De Lima*

[2018] JRC 155 (which was not published at the time of the hearing) I considered the question raised in *Cummins* , that is how far the approach in *Denton* should be followed by the courts in Jersey. In summary my conclusion in *Newman* was that the first two questions posed by *Denton* should be followed, namely:- (i) Was the breach serious or significant; and (ii) Was there good reason for the breach? 67. However, in respect of the third limb, I concluded that the Court possessed a more general discretion than existed in England and applied by the majority of the Court of Appeal in *Denton* . This was because the exercise of a discretion in England is governed by Civil Procedure Rules (the "CPR") 3.9(1) which provides as follows:- "On an application for relief from any sanction imposed for 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 costs; and (b) To enforce compliance with rules, practice directions and order." 68. The majority of the Court of Appeal in *Denton* reached the view that the factors expressly listed at paragraphs (a) and (b) of Rule 3.9 were of particular importance and had to be given particular weight. The view I reached in *Newman v De Lima* was that it was not appropriate to give the factors in Rule 3.1 the same weight in Jersey because there was no equivalent expressly given to Rule 3.9 of the CPR in this jurisdiction. Rather the discretion is one that is more general and is found in Rule 6/26(12) of the Rules. In exercising the power under Rule 6/26(12) however regard does have to be had to the overriding objective, set out in Rule 1/6. 69. Applying this test to the present case, I have no doubt that the breach of paragraph 1 of the order of 25 th April, 2018 was serious and significant. Firstly, discovery is a serious obligation. Documentation in most cases forms a key part of the evidence before a trial Court. It is often the material by which the Court tests oral evidence or assertions or

submissions be made by one party or the other. 70. Secondly, documentation is necessary because it allows parties to prepare their witness statements and their evidence to address any evidence raised in documentary form. Without documents any party is not in a position to address any evidence arising from the documents or appropriate obtain expert evidence on the issue raised by the relevant document or documents. 71. Thirdly, the discovery in this case to be provided was not insignificant. It was the discovery relied upon in support of the first plaintiff's claim for economic loss and in particular in respect of the first plaintiff's schedule of loss dated 24 th February, 2017. 72. Fourthly, in the context of how long the case had been running and that the first discovery order was made on 18 th December, 2013, the non-compliance with the obligation to provide copies of documents was not trivial or minor. The first plaintiff pleaded economic loss from the outset. It is trite law that discovery is also an ongoing obligation. The first plaintiff is also well aware, having already provided copies of documents, of the obligation to provide documents to another party. By reference to the description contained in the list of documents, these were also not new documents. They could have been both listed and copies provided at a much earlier point in time. The fact that the first plaintiff suggested that copies could be provided in a couple of weeks does not make the breach insignificant or not serious. The ability to remedy the breach is a separate question from whether the breach of serious in the first place. 73. Provision of the documents was also important because the list of documents was not in the correct form required by Practice Direction RC 17/07 in particular paragraphs 14 and 15 which provides as follows:- "1. The list must identify the documents in a convenient order. Normally documents should be a. listed individually, b. in date order, c. numbered consecutively and d. described concisely. 2. Documents may be disclosed in bundles in a list provided the following practice is adhered to:- a. the bundles must be documents of the same nature (e.g. invoices, bank statements); b. the documents within a bundle must be numbered; c. the nature of the documents within a bundle must be concisely defined; d. the date range of the documents within each bundle must be stated." 74. It was therefore only on receipt of copies of documents could the defendants evaluate what had been disclosed and the case they had to meet in respect of claims for economic loss. 75. Finally, to provide documents also meant that the ability to provide witness statements was in jeopardy. If the documents were provided now or within the next two weeks there was then only three further weeks to complete witness statements which further illustrates why the breach was serious and significant. 76. The fact that there was no guile on the part of the first plaintiff in not providing documents does not mean that the breaches were neither serious nor significant for the reasons I have set out. An entirely innocent breach can still be serious or significant. All depends on the order being breached. Whether or not a breach is deliberate or innocent is also a question that is more relevant to the question of whether or not any breach should be excused as distinct from the nature of the breach itself. 77. In respect of whether there is any good reason for the breach, I am not satisfied that there was a good reason. I accept that the first plaintiff was involved in other proceedings, in particular, her applications for leave to appeal. However, what was required was the provision of copies of documents. I also ordered

expressly that the defendants were to meet the reasonable copying costs of the first plaintiff. The first plaintiff could therefore have engaged a professional copier to copy the relevant documents. This would have been at the expense of the defendants. All the first plaintiff had to do was to make arrangements for the delivery of the relevant documents to an organisation to arrange for them to be copied. Including the date of the order, the first plaintiff had 7 weeks to make arrangements for copies to be made. I accept that some time would have been taken to gather the relevant material and provide it to the organisation for copying, but I still consider there was sufficient time for this to occur. In addition, in making the order I made allowance for the fact that leave to appeal was being sought from the Royal Court and if refused would be sought from the Court of Appeal. 78. I also accept that I raised an issue as to the effect of the cession generale on the litigation. However, the referral of this issue to the Royal Court did not require the first plaintiff to take immediate steps beyond fixing the date for directions before me in respect of the referral and to attend a directions hearing, which took place on 4 th June, 2018. 79. In contrast to the above, there was no evidence before me that the first plaintiff made any attempt to copy any of the documents during the period allowed. 80. Secondly, the first plaintiff did not indicate that she could not comply nor did she issue any application for an extension of time before the time limit expired, which she could have done. Having made previous unless orders, the first plaintiff clearly understood the effect of such an order. There was no misunderstanding on the first plaintiff's part about the consequence of non-compliance. 81. Thirdly, while the first plaintiff referred to previous evidence filed with the Court about her mental health, there was no evidence filed in respect of her health during the period that she had to provide copies of those documents or that her mental health prevented from her making arrangements for copies to be provided in the manner I have described. I was aware of the previous medical evidence when making the order of 25 th April, 2018 and accordingly took this into account in setting the time frame I did to allow the first plaintiff to provide copies of documents. 82. In relation to the first plaintiff's submission that there was no guile on her part in not providing documents, to the extent that she means by this that the breach was not deliberate, I am unable to reach any conclusion on whether or not the breach was intended. What I am able to conclude is that the breach was neither minor nor insignificant. It was not a breach of a few hours; nor was there any evidence of a clear mistake or oversight. I refer to this because the first plaintiff's submission there was no guile on her part is not a justification to excuse the serious and significant breach. 83. Having found that the breach was serious and significant and there was no good reason for the breach, the question I then had to consider is what approach I should take in relation to whether or not to grant relief from sanction. To exercise this discretion is a separate question from the first two questions. It does not follow automatically that an extension of time should be refused or there should be no relief from sanction simply because the Court is satisfied that a breach is serious or significant and there is no good reason for the breach. I still consider I have to ask myself separately what order should be made in the exercise of the discretion vested in me. 84. This in part requires me to look at the overriding objective and to manage cases justly and

at proportionate cost, which includes enforcing compliance with rules, practice directions and orders. As Sir Michael Birt noted in his judgment issued earlier this year referred to above, the progress in this case has been lamentable. In deciding whether there has been a serious or significant breach, my focus was on the specific order breached and any earlier related orders; by contrast when it comes to exercising a more general discretion as to whether or not to grant relief of a sanction, the overall approach of a party to litigation can be taken into account. The history I have set out above is relevant to the question where orders have not been complied with on a number of occasions. In this case some of the earlier breaches were down to the first plaintiff's health as I noted in my judgment issued in 2015 at paragraph 17 set out at paragraph 4 above. However, in other cases, the first plaintiff has sought adjournments time and again and has only complied with directions when sanctions were imposed. The directions issued by the Act of Court of 7 th January, 2018 are illustrative of this. Each direction that carried a sanction was complied with. 85. It is also not a relevant factor that the first plaintiff is a litigant in person. The position was summarised by Sumption JSC in *Barton v Wright-Hassall* at paragraph 18 where he stated as follows:- "18 Turning to the reasons for Mr Barton's failure to serve in accordance with the rules, I start with Mr Barton's status as a litigant in person. In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f) . The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him." 86. Lord Briggs made a similar observation where he stated as follows:- "...there cannot fairly be one attitude to compliance with rules for represented parties and another for litigants in person, still less a general dispensation for the latter from the need to observe them." 87. It is also relevant to have regard to the effect of the litigation on the defendants. They are facing allegations made some six years ago concerning events 10 years ago which have not progressed to trial and where the lack of progress is due to matters outside their control. While some of the delay is due to matters outside the control of the first plaintiff, in particular adjournments due to her health, adjournments due to seeking legal advice or because of appeals are not matters that the defendants can control. Yet they have to bear the consequences. 88. It is also relevant that the first plaintiff neither applied for an extension of time before the time limit to provide copies had expired and only applied for an extension of time when I indicated this was a possibility. Even then the first plaintiff left her application to the last possible moment by providing a summons and affidavit and only asking for a date fix. She did the bare minimum to issue her application

but did not arrange a date fix hearing to take place until after the time limit I had set had passed. Arguably this places the first plaintiff in breach of Rule 6/29(4), albeit my email did not expressly direct that a date fix hearing should take place before the 6 th July, 2018. Nevertheless it is clear that the first plaintiff left matters to the last possible moment in seeking relief from sanction. 89. The first plaintiff also did not either in her summons, affidavit or skeleton argument state by when she would provide the documents if I was minded to permit her to do so. She only indicated at the hearing that provision would take a couple of weeks because of the assistance the second plaintiff could now provide. 90. All the above factors point strongly towards refusing relief from sanction. I should add that if this case were in England, in light of the approach taken by the English Courts I consider it highly likely that the Courts of England, faced with the history I have described, would have refused relief from sanction. 91. The only reason I did not refuse relief from sanction in this case was because in reviewing the history of the orders made I was concerned that the sanction of a total strike out of the first plaintiff's claim for not providing discovery relating to economic loss was not a proportionate sanction to have imposed in the first place. 92. This was firstly because previous sanctions I had imposed, in particular by the Act of Court of 9 th January, 2018, in respect of the schedule of loss led to the claim for consequential loss being struck out, not the entirety of the claim. Yet paragraphs 2 and 3 of the Act of Court of 25 th April, 2018 imposed the wider sanction of striking out the entirety of the claim. Paragraph 3.9.22 of the CPR permits the Court to grant partial relief rather than total relief. I consider this is also consistent with Rule 6/26(12) where a general discretion is granted and I have power to make any order that I consider just. The fact that the order of 25 th April, 2018 was not appealed by any party does not affect my considering at the time of an application for relief from sanction whether or not that order was appropriate in the first place. 93. The view I reached was that the sanction of a total strike out for not providing discovery relevant to one issue was a step too far on my part. The right sanction was to strike out claims for economic and consequential loss for the non-compliance. As the first plaintiff's breach is significant and serious as I have found, and as there is no good reason for the non-compliance for provision of the documents as I have also found, the first plaintiff's claim for economic and consequential losses set out at paragraph (c) of the order of justice and in the schedule of loss as set out above remain struck out. 94. However it was a step too far to have struck out the entirety of the first plaintiff's claim at the heart of which is a claim for a breach of promise by the first defendant. I therefore echo the observations of Sir Michael Birt at paragraph 34 of his 2018 judgment at In the matter of II

[2018] JRC 031 as follows:- "34. We would however emphasise that, as the Master also made clear, this should not ultimately affect her claim. As well as the allegation that the 2008 wills should be declared invalid on the grounds of lack of testamentary capacity or otherwise, the nub of the first plaintiff's claim appears to be that, as set out at paras 15 and 20 of the Order of Justice, the first defendant assured the deceased before she made the 2008 wills leaving everything to him that he would nevertheless share the estate equally with the first

plaintiff and he repeated these assurances to the first plaintiff and others after the death of the deceased. If the first plaintiff is successful in proving that the first defendant made promises in these terms, it seems likely that she will succeed under one or other of the headings of unjust enrichment, breach of contract or estoppel. In that event, the measure of damages will be the same as it would be if the promise had been made fraudulently." 95. There are also breaches by the first plaintiff of other directions which are relevant to how far the first plaintiff should be allowed relief from sanction. Firstly, the affidavit of discovery has still not been verified on oath as required by paragraph 6 of the Act of Court of 25 th April, 2018. 96. Secondly, the first plaintiff failed to provide any statement of the reasons why she is claiming exemplary and aggravated damages as required by paragraph 14 of the Act of Court of 7 th September, 2017. Therefore I refused to allow the claim for exemplary and aggravated damages to continue because the first plaintiff has not provided the necessary statement. Rather the first plaintiff's claim is now limited to the primary claim against her brother for damages for breach of promise and the severe emotional distress suffered as a result and the consequential claim against the second defendant. 97. The effect of non-compliance with paragraph 1 of the Act of Court of 25 th April, 2018 also had knock-on consequences for the other directions I gave on that date relating to the filing of witness statements and expert evidence. Clearly these time limits could no longer be met. 98. In relation to witness statements I therefore extended the time limit to Friday, 28 th September, 2018 for the provision of witness statements. However, in relation to the first plaintiff I made it clear that if she does not file her own witness statement by that date then the remaining entire claim will be struck out automatically without further order. I also made it clear that she could only adduce evidence at trial from anyone who had filed a witness statement by Friday, 28 th September, 2018. 99. I also ordered in respect of expert evidence concerning the capacity of the first plaintiff's late mother that if the first plaintiff did not produce her expert evidence by 30 th November, 2018 then she could not at any trial challenge that her mother did not have mental capacity to make her wills. 100. I also ordered that if she did not produce expert evidence on her severe emotional distress pursuant to paragraph 9 of the Act of Court dated 25 th April, 2018 then she could not make any claim for severe emotional distress and any such claim would also automatically be struck out. 101. The reason for making these orders was to ensure compliance because, without sanction, the first plaintiff in my view will not comply otherwise with orders made to progress her case to trial. The defendants are entitled to have the remainder of the case progressed to a conclusion. 102. Advocate Wilson asked me to further vary the order for medical reports in relation to the capacity of the first plaintiff's mother to order sequential exchange. This was because his client did not know the case they had to meet. In my judgment, disclosure of the relevant medical records has taken place. Advocate Wilson's expert will therefore have to draw what conclusions he or she can from the records provided. If there is material referred to in the first plaintiff's expert report which the first defendant's expert has not been able to consider that can be addressed at subsequent meetings of experts or by discovery. The possible difficulties that the defendants' expert might face were outweighed by the importance of simultaneous exchange for a critical

issue which the lack of capacity issue clearly is. I was not therefore persuaded it was appropriate to depart from the general principle of simultaneous exchange for contested issues that were central to a case. 103. The other order I set aside was the obligation to provide expert evidence in relation to consequential loss at paragraph 10 of the Act of Court of 25 th April, 2018. This evidence was not needed as a result of the claim for consequential loss remaining struck out. 104. Finally, while the first plaintiff is not in a position to pay any costs, I ordered the first plaintiff to the defendants' costs on an indemnity basis as the sanction for her serious breach of an order without justification. Authorities In the matter of II

[2018] JRC 031 . In the matter of II

[2015] JRC 194 . In the matter of II

[2016] JRC 106 . In the matter of II

[2016] JRC 116 . In the matter of II

[2017] JRC 001 . Royal Court Rules 2004. Representation of Powell

[2018] JRC 073 . Representation of Powell

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[2018] JCA 113 . Denton v T. H. Wight

[2014] EWCA Civ 906 . 1999 White Book Edition. Barton v Wright-Hassall LR

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[2018] JRC 155 . Practice Direction RC 17/07. Page Last Updated: 09 Oct 2018 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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