



Neutral Citation Number: [2020] EWCA Civ 1400

Case No: B2/2019/2836

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Central London County Court
(HHJ Lethem)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2020

Before

LORD JUSTICE COULSON
LADY JUSTICE NICOLA DAVIES
and
LADY JUSTICE ROSE

Between:

MR ABDIRAHIM ALI DIRIYE
- and -
(1) MS KALTRINA BOJAJ
(2) QUICK-SURE INSURANCE LIMITED

Appellant

Respondents

Mr David Peter (instructed by **Lincoln Harford Solicitors LLP**) for the **Appellant**
Mr David Fardy (instructed by **DWF Law LLP**) for the **Respondents**

Hearing Date: 15th October 2020

Approved Judgment

LORD JUSTICE COULSON:

INTRODUCTION

1. It is common ground that the appellant failed to comply with an Unless Order relating to the service of his Reply. On 21 August 2018, Deputy District Judge Goodman (“the DJ”), sitting at Willesden County Court, refused the appellant relief from sanctions, which meant that he was debarred from relying on an assertion of impecuniosity to support a claim for credit hire charges. At the Central London County Court, on 2 October 2019, His Honour Judge Lethem (“the judge”) upheld the DJ’s conclusions. This is therefore a second appeal.
2. The narrow point of principle on appeal is whether the Royal Mail service known as “Signed For 1st Class”, which requires a signature before the item is delivered, is covered by the description “First class post (or other service which provides for delivery on the next business day)” which forms part of the deemed service provisions of CPR 6.26. However, that question only goes to the extent of the non-compliance: whatever the answer, the Reply was still late and the appellant still requires relief from sanctions. So this court must decide whether the DJ was entitled to exercise her discretion against granting relief from sanctions under CPR 3.9, in accordance with the three stage test set out in *Denton and Others v T H White Limited* [2014] EWCA Civ 906, [2014] 1 WLR 3926.

THE FACTUAL BACKGROUND

3. The appellant is, and has been for some years, a minicab driver. On 30 May 2014 he was involved in a road traffic accident. The first respondent is the other driver; the second respondent is her insurer. The claim form was issued right at the end of the limitation period in 2017. The Particulars of Claim were served on 20 October 2017. The claim for damages included a relatively modest amount for whiplash injury, together with a claim for special damages in the sum of £15,728.28, of which the largest single item was a claim for the credit hire costs of a replacement vehicle in the sum of £12,048.29.
4. It is well-established that a claimant in an RTA claim is entitled to recover the reasonable cost of hiring a replacement vehicle: see *Lagden v O’Connor* [2014] 1 AC 1067. Reasonableness will be assessed by reference to need, rate and duration: see *Zurich Insurance PLC v Umerji* [2014] EWCA Civ 357. A claim to recover the significantly higher credit hire rates (as opposed to basic hire rates) will usually depend on the claimant demonstrating that he or she was not in a position to pay the ordinary rates upfront; that the claimant was, in the jargon used in the cases, “impecunious” (see *Lagden*, and *Zurich* at paragraph 9(3)). Although there had been some debate as to the whereabouts of the burden of proof in such a situation, Underhill LJ was clear at paragraph 37 of *Zurich* that “in this kind of case it is clearly right that a claimant who needs to rely on his impecuniousness in order to justify the amount of his claim should plead and prove it”. If a claim for credit hire charges fails, a claimant can still recover basic hire rates (what are sometimes referred to in the authorities as ‘spot rates’).
5. The Particulars of Claim expressly asserted that the claimant was impecunious. The problem was that no further information or elaboration of that assertion was provided.

That was so, even though the claim for credit hire was known to be contentious. Subsequently, in the Defence, the respondents averred (amongst other things) that the claim was excessive and that the appellant's decision "to choose an expensive credit hire option over the other available options represents a failure to mitigate loss." In terms of value, therefore, the impecuniosity of the appellant was the most important issue between the parties from the outset of these proceedings.

6. By early March 2018, the appellant had still not produced any proper pleading or other information in support of his assertion of impecuniosity. On 7 March 2018, Deputy District Judge Walder allocated the claim to the fast track and fixed a trial date for 1 November 2018. In respect of impecuniosity, he made an Unless Order in the following terms:

"The claimant shall be debarred from relying upon the facts of impecuniosity for the purposes of determining the appropriate rate of hire unless

(i) By 4:00pm on the 4th April 2018, the claimant files and serves a reply to the defence setting out all facts in support of any assertion that the claimant was impecunious at the commencement of and during the hire of the vehicle in question, and

(ii) By 4:00pm on the 18th April 2018, the claimant serves copies of the following documents which are in his control:

1) Copies of the claimant's wage slips or equivalent documentation evidencing the approximate level of available income to the claimant for a period of three months pre-accident and covering the period of hire, and

2) Copy bank and credit card statements for a period of three months pre-accident and covering the period of hire."

7. Mr Peter submitted on the one hand that orders of this kind were not uncommon in RTA/Whiplash claims, but subsequently argued – for the first time – that an Unless Order in these terms should not have been made at all, because there had been no prior breach of an 'ordinary' order. In my view, the appellant ought to have provided the necessary pleading in respect of impecuniosity at the outset of the proceedings so that, in the absence of that information, the Unless Order was entirely proper. If, as Mr Peter indicated, such orders are not uncommon, then that can only be because claimants in these sorts of cases are taking too lax an approach to the obligation to plead and prove impecuniosity so clearly spelt out in *Zurich*. That is a point to which I return below.

8. The Certificate of Posting recorded that the Reply had been posted at 17:36 on 4 April 2018, using the Royal Mail's "Signed For 1st Class" service, and stated: "Delivery aim: next working day". The Royal Mail United Kingdom Post Scheme ("the Scheme") explains this particular service at paragraphs 20.1 and 20.2:

"Royal Mail Signed For 1st Class ... items will only be delivered to an addressee or their representative once a signature or similar proof of delivery has been gained. Please note that Royal Mail Signed For 1st

Class... [is] not a tracked service; it simply provides a way of gaining the service called Proof of Delivery...”

9. As to delivery of First Class Post, paragraph 9.3 of the Scheme states:

“We aim to deliver ... a First Class item the next working day after it has been posted.”

As to delivery of “Signed For 1st Class” post, paragraph 9.4 of the Scheme states:

“We aim to deliver ... a Royal Mail Signed For 1st Class item the next working day after it has been posted.”

In other words, the intended delivery date is the next working day for both types of service. That is confirmed by Table 5 in Section 17 of the Scheme, which defines “the due date” as the “next working day after posting.”

10. The Reply was not signed for (and therefore not received by) the respondents’ solicitors until 9 April 2018. In a letter dated 17 April 2018 the appellant’s solicitors appeared to accept that they were in breach of the Unless Order and that an application for relief from sanctions would be required. However, an application for relief from sanctions was not filed until 31 May 2018 and issued on 5 June 2018.
11. By the time the application for relief from sanctions was heard by the DJ on 21 August 2018, it was conceded on behalf of the appellant that, pursuant to CPR 6.26, even if it was found that service had been by First class post “or other service which provides for delivery on the next business day”, the deemed date for service in accordance with that rule would be the second day after it was posted, namely 6 April 2018. Accordingly, on any view of r.6.26, there had been a failure to comply with the Unless Order.
12. There were a number of substantive issues between the parties, one being the appellant’s failure to make the application for relief from sanctions for a period of two months after the need for it was or should have been known, and another being the respondents’ underlying submission that, even in August 2018, the claim remained unsatisfactory because there was nothing to support the appellant’s assertion that he was impecunious.
13. The DJ held that service effected by “Signed For 1st Class” post was not the equivalent of First class post, because the mechanism required that the document be signed for before it was delivered, and was therefore outwith the deemed service regime. She therefore found that service did not occur until 9th April.
14. The DJ then turned to the three-stage test in *Denton*. She found that the breach of the Unless Order was serious. She noted that there was no explanation for the breach. Then, when considering all the circumstances of the case, she referred to the delay in the making of the application for relief from sanctions and found that it could not be said that the application had been made promptly. Importantly she then went on:

“13. The third stage is to evaluate all the circumstances. Here, not only do I take into account all the matters that were dealt with before but I am also asked to take into account by the defendants the fact that there are no details

of income. Mr Peter says that that is because there is none, that he has no evidence of his income, but this man is a minicab driver. He does not exist in a vacuum. He must be given work by somebody. He must be employed, even if it was as a self-employed contractor, by a firm of minicab drivers. There must be a licence, there must be some record of when he worked. He must be paid on some basis and there must be a record because there must be transactions between him and his cab company.

14 I disagree that there are no records, and if there are no records, there should be and this is a man who should be forced to have records. He has to pay tax. How is he paying tax? What is he paying tax on? If he cannot produce any evidence of his income, even though he says he is a self-employed cab driver, that does not mean that he is impecunious; rather the reverse. He clearly has money if he is working, so where is it and why is there no evidence of it?

15 All these matters, in my judgment, are extremely serious. It is not just a question of being a couple of days late. It is the whole way that this case has been prepared on behalf of the claimant with or without his cooperation.

16 Finally, and the overriding concern, that I have and I had when I read the papers, is that this is a road traffic accident from 2014. It was issued at the last minute in 2017 but it must have been clear to those instructing Mr Peter, Lincoln Harford, that if impecuniosity was going to be part of this case, then the information relating to it was going to be needed at the beginning, so they have had plenty of time. *They have had months if not years to get this information and to ask the claimants for the information. Why they did not do so is not a matter for me but it should have been available and they should have told the claimant what the court needed if he was going to plead impecuniosity and there is no reason why it should not have been prepared properly and it clearly has not been.*"

(Italics provided)

15. In these circumstances, the DJ refused relief from sanctions. That meant that, at the forthcoming trial, the claimant would not be able to claim credit hire charges, and would only be able to recover basic charges, of the sort explained in *Zurich*. However, the appellant appealed against the DJ's order, which removed any prospect of the trial date being maintained.
16. The appeal was heard on 2 October 2019. In an *ex tempore* judgment, the judge upheld the DJ's conclusions. He said that he considered her decision in relation to CPR 6.26 and deemed service was right. By reference to the application for relief from sanctions, he explained how and why the DJ was entitled to exercise her discretion in the way that she did.
17. Permission was subsequently granted for this second appeal. Of course, in cases where a Circuit Judge has upheld the decision of a District Judge, it is the original judgment (here, the judgment of the DJ) that must be the primary focus of the second

appeal: see Lewison LJ in *Surrey v Barnet and Chase Farm Hospitals NHS Trust* [2018] 1 WLR 5831 at paragraph 2.

THE LAW

Correct Approach to Appeals against Case Management Decisions

18. This is an appeal against the case management decision of a District Judge. As the judge rightly noted, the scope for any such appeal is limited. This court will not interfere if it concludes that the decision maker has “applied the correct principles and has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge”: see Lawrence Collins LJ in *Walbrook Trustee (Jersey) Limited v Fattal* [2008] EWCA Civ 427 at [33].

Service

19. CPR 6.20(1)(b) identifies that one of the methods by which a document may properly be served is “first class post, document exchange or other service which provides for delivery on the next business day, in accordance with Practice Direction 6A”. Paragraph 3.1 of that PD provides:

“3.1 Service by post, DX or other service which provides for delivery on the next business day is effected by –

- (1) placing the document in a post box;
- (2) leaving the document with or delivering the document to the relevant service provider; or
- (3) having the document collected by the relevant service provider.”

20. CPR 6.26 sets out the provisions for deemed service. The relevant part of the table is in the following form:

“6.26 A document, other than a claim form, served within the United Kingdom in accordance with these Rules or any relevant practice direction is deemed to be served on the day shown in the following table

Method of service	Deemed date of service
1. First class post (or other service which provides for delivery on the next business day)	The second day after it was posted, left with, delivered to or collected by the relevant service provider provided that day is a business day; or if not, the next business day after that day...
3. Delivering the document to or leaving it at a	If it is delivered to or left at the permitted address on a business day

permitted address	before 4.30p.m., on that day; or in any other case, on the next business day after that day
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21. The importance of deemed service, and the way in which it effectively overrides actual service in the scheme of the CPR, can be seen from *Godwin v Swindon Borough Council* [2001] EWCA Civ 1478, [2002] 1 WLR 997. In that case, the claim form was served by First class post on 7 September 2000. The relevant order specified that it must be served by 8 September 2000, which was already an extension beyond the expiry of the limitation period. The deemed service provisions meant that it was deemed to be served the second day after it was posted, which in that case was 11 September 2000 (because 9/10 September was a weekend). It was therefore found to be out of time. That was so, despite the fact that it was common ground that the claim form had actually been served/received on 8 September 2000.
22. In his judgment at [60] - [61], Rimer J identified two purposes for the rules relating to deemed service: the first was the fixing of a convenient day from which time would run, during which the party served with the document was entitled to respond to it in accordance with the rules; and the second was that, unless the rules positively provided for a deeming provision as to the fact and time of service, “there will in many cases be practical difficulties in the way of a claimant proving his entitlement to judgment”.
23. In *Anderton v Clwyd County Council (No 2)* [2002] EWCA Civ 933, [2002] 1 WLR 3174, Mummery LJ summarised the purpose of the deemed service provisions in this way:
- “36... The objective is to minimise the unnecessary uncertainties, expense and delays in satellite litigation involving factual disputes and statutory discretions on purely procedural points.”
24. We were also referred to the more recent decision of *Kennedy v National Trust for Scotland* [2019] EWCA Civ 648, [2020] QB 663 which dealt with specific points as to service, and was not of direct relevance to the present appeal.

Relief from Sanctions

25. Rule 3.9 provides as follows:
- “(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
- (a) for litigation to be conducted efficiently and at proportionate cost; and
- (b) to enforce compliance with rules, practice directions and orders.
- (2) An application for relief must be supported by evidence.”
26. The leading case is *Denton v White*, noted above. That provides for the now familiar three stage test. First, the court has to identify and assess the seriousness and

significance of the failure to comply with the order in question; secondly, it must consider why the default occurred; and thirdly, it must evaluate all the circumstances of the case.

27. Mr Peter referred to a large number of the paragraphs in the joint judgment of Lord Dyson MR and Vos LJ. It is unnecessary to set them all out. However, at [26] – [28] they dealt with the issue of significance which, as we shall see, loomed large in Mr Peter’s submissions. They said:

“26. Triviality is not part of the test described in the rule. It is a useful concept in the context of the first stage because it requires the judge to focus on the question whether a breach is serious or significant. In *Mitchell* itself, the court also used the words "minor" (para 59) and "insignificant" (para 40). It seems that the word "trivial" has given rise to some difficulty. For example, it has given rise to arguments as to whether a substantial delay in complying with the terms of a rule or order which has no effect on the efficient running of the litigation is or is not to be regarded as trivial. Such semantic disputes do not promote the conduct of litigation efficiently and at proportionate cost. In these circumstances, we think it would be preferable if in future the focus of the enquiry at the first stage should not be on whether the breach has been trivial. Rather, it should be on whether the breach has been serious or significant. It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which "neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation". Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most useful measure of whether a breach has been serious or significant. But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example of such a breach is a failure to pay court fees. We therefore prefer simply to say that, in evaluating a breach, judges should assess its seriousness and significance. We recognise that the concepts of seriousness and significance are not hard-edged and that there are degrees of seriousness and significance, but we hope that, assisted by the guidance given in this decision and its application in individual cases over time, courts will deal with these applications in a consistent manner.

27. The assessment of the seriousness or significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past. At the first stage, the court should concentrate on an assessment of the seriousness and significance of the very breach in respect of which relief from sanctions is sought. We accept that the court may wish to take into account, as one of the relevant circumstances of the case, the defaulter's previous conduct in the litigation (for example, if the breach is the latest in a series of failures to comply with orders concerning, say, the service of witness statements). We consider that this is better done at the third stage (see para 36 below) rather than as part of the assessment of seriousness or significance of the breach.

28. If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater importance.”

28. Mr Peter also relied on the passages in which Lord Dyson MR and Vos LJ warned against the opportunistic reliance on the minor mistakes of the other side. They said at [41] – [43]:

“41. We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by the new rule 3.8(4).

42. It should be very much the exceptional case where a contested application for relief from sanctions is necessary. This is for two reasons: first because compliance should become the norm, rather than the exception as it was in the past, and secondly, because the parties should work together to make sure that, in all but the most serious cases, satellite litigation is avoided even where a breach has occurred.

43. The court will be more ready in the future to penalise opportunism. The duty of care owed by a legal representative to his client takes account of the fact that litigants are required to help the court to further the overriding objective. Representatives should bear this important obligation to the court in mind when considering whether to advise their clients to adopt an uncooperative attitude in unreasonably refusing to agree extensions of time and in unreasonably opposing applications for relief from sanctions. It is as unacceptable for a party to try to take advantage of a minor inadvertent error, as it is for rules, orders and practice directions to be breached in the first place. Heavy costs sanctions should, therefore, be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions...”

29. A useful illustration of the *Denton* principles in action can be found in the decision of this court in *Oak Cash & Carry Limited v British Gas Trading Limited* [2016] EWCA Civ 153. There, Jackson LJ addressed a number of issues, three of which might be said to have a direct relevance to the present appeal.
30. First, he concluded at [38] that, when the court was considering the seriousness/significance of a breach of an Unless Order, it should not look at the Unless Order in isolation. He said at [39] that “in order to assess the seriousness and

significance of the breach of an Unless Order it is necessary also to look at the underlying breach” (ie the reason that the Unless Order was made in the first place).

31. Secondly, also when dealing with seriousness and significance at [41], Jackson LJ said that “the very fact that X has failed to comply with an Unless Order (as opposed to an ‘ordinary’ Order) is undoubtedly a pointer towards seriousness and significance.”
32. Thirdly, he expressly acknowledged that, when considering all the circumstances of the case (the third stage of the *Denton* test), the court had to have regard to the promptness or otherwise of the application for relief from sanctions: see [54], as well as paragraph 36 of the joint judgment of Dyson MR and Vos LJ in *Denton*.

THE FIRST ISSUE: SERVICE

33. Neither the DJ nor the judge had a copy of the Royal Mail Scheme. I respectfully consider that, without sight of it, they reached the incorrect conclusion that the Royal Mail’s “Signed For 1st Class” service was not either First class post, or alternatively, another “service which provides for delivery on the next business day”. There are several reasons for that.
34. First, there is Royal Mail’s own description of the “Signed For 1st Class” service in the Scheme. They describe it as First class post: it is simply a version which is signed for. In every other way, particularly in respect of delivery, both services are described using the same words. It would be very difficult to suggest that “Signed For 1st Class” post was not simply a species of First class post, and therefore to be treated as such by r.6.26.
35. Secondly, I am in no doubt that, even if it was not First class post as such, it was – in the words of r.6.26 - “another service providing delivery on the next business day”. That is the delivery date which Royal Mail aims to deliver both First class post and “Signed For 1st Class” post: see paragraph 9 above. Therefore, both are services which are “providing delivery on the next business day”.
36. Thirdly, I consider that any attempted distinction between the two First class services based on actual delivery would be wrong in principle. That would ignore the concept of “deemed service” in r.6.26, and the effect of the decisions in *Godwin* and *Anderton*. I note that, at paragraph 31 of his judgment, the judge said:

“The whole purpose of Rule 6.26 in so far as it relates to 1st class post is to eliminate arguments about whether a document was actually delivered on the following day or the day after or the day after that, because of the vicissitudes in the way in which the postal system works. Essentially, it provides a simple solution to that form of dispute.”

I respectfully agree with that analysis. As a matter of logic, that analysis demonstrates why questions of actual delivery must be irrelevant to the “Signed For 1st Class” service. As the authorities make clear, it was to get round the sorts of difficulties that can arise in proving actual service or delivery that r.6.26 was created in the first place. Service deemed to have occurred on the second business day after posting avoids the need for the court to have to explore when the document was in

fact served/delivered/signed for/acknowledged. The deeming provision is there to provide certainty, and to make the actual circumstances of delivery or receipt irrelevant.

37. In his submissions, Mr Fardy repeatedly referred to the way in which a ‘signed for’ delivery service “rectified the problems” with First class post. However, the deemed service provisions mean that in reality there are no “problems” with First class post. On the contrary, the deemed service provisions were themselves designed to get round the problems of proving delivery.
38. Fourthly, there is nothing in r.6.26 that refers to items being “signed for”. That is not a concept recognised by the CPR. Although there is a reference later in r.6.26 to “delivery of the document to or leaving it at the relevant place” (paragraph 20 above), I am satisfied that that envisages the personal delivery of the item to the relevant place by the litigant or his/her representative. It does not envisage delivery by any kind of postal or third party carrying service.
39. That leads on to the point made by my Lady, Lady Justice Rose, during the course of argument. As she pointed out, the rules work on the basis that an item is served either by way of First class post (or a similar service) or alternatively, by actual delivery. The latter must have the restricted meaning to which I have referred, because otherwise it could be said that every item is “delivered” to the relevant address, including those items sent to that address by post. In order to give effective meaning to the “delivery” section of the table at r.6.26, it must mean actual delivery as opposed to an item sent in the post or via a similar carrying service.
40. Fifthly, solicitors serving documents need to know that, when they put something in the First class post, the deemed service provisions of the CPR have been triggered. It makes no sense to suggest that, by using the “Signed For 1st Class” service, a solicitor is in a worse position than if he or she had used ordinary First class post; that, although they had posted the document in time, they were obliged constantly to check with the intended recipient that it had actually been received and signed for within the time limit prescribed by the rules or the court’s order.
41. Finally, I would be concerned that any other result would mean that an unscrupulous intended recipient could evade service altogether, simply by refusing to sign for the document in question. Solicitors use the “Signed For 1st Class” service presumably for added protection, because they obtain a record of receipt. It would be entirely counterproductive to conclude that the use of this service had the opposite effect and could allow an intended recipient to avoid service altogether.
42. For all those reasons, therefore, I conclude that the Royal Mail’s “Signed For 1st Class” service is caught by r.6.26, either because it is included within the rubric “First class service” or because it is “another service which provides for delivery on the next business day”. Either way, the same deemed service provision set out in r.6.26 applied to the service of the Reply in this case. The Reply was deemed to have been served on the second day after it was posted, namely 6 April 2018.
43. In those circumstances, the appellant failed to comply with the mechanics of the Unless Order, albeit the default was one of two days’ duration, rather than the five

days identified by the DJ and the judge. Whether that makes any difference to the result, of course, depends on a consideration of the three-stage test in *Denton v White*.

THE SECOND ISSUE: THE EXERCISE OF THE DJ'S DISCRETION

44. As is often the way in this sort of appeal, I consider that there is a short answer and a long answer to this issue, although they both give rise to the same result. The short answer is that, in my view, even allowing for the necessary adjustment from 5 days delay down to 2 days, the DJ considered all the relevant matters required by r.3.9 and *Denton* and reached conclusions that she was quite entitled to reach. Applying the test set out at paragraph 18 above, it would therefore be impermissible to interfere with her exercise of that discretion, even if this court might have approached some of the material in a slightly different way. The long answer involves looking at the matters that the DJ considered and, on a detailed analysis, concluding not only that they were findings under the *Denton* test open to her, but that they were also the correct findings.
45. I therefore propose to go at what I hope is a reasonable pace through the three-stage test. However, this process will take a little longer than I would have wished, because a number of points of principle were raised in argument which are by no means confined to this case, but which I consider to be flawed. I therefore need to explain why.
46. The first thing to do is to identify the nature of the breach. Mr Peter accepted that there was a breach because the Reply was not served in time, and he agreed that the breach was serious. Although he sought to argue that it was not perhaps as serious as some breaches in other cases, I consider that there is no room in this part of the test for such fine gradations. All that matters is that the breach in failing to serve the Reply on 4 April was (and is agreed to be) serious.
47. Mr Peter did not accept that there was any other breach of the Unless Order and maintained that the breach that he did accept, although serious, was not significant. But in my view, there was a more fundamental breach of the Unless Order than the delay in service.
48. I consider that, on analysis, the Reply, even when served, did not comply in substance with the Unless Order¹. That Order required the Reply to set out "all the facts" relied on in support of the assertion of impecuniosity. The appellant was a minicab driver, and that was the source of his income. So, the Reply needed to set out what his income was and what his expenditure was, and how those figures meant that he could not afford to hire a replacement vehicle. Yet all the Reply said on this topic was at

¹ It should not be forgotten that this was a breach of an Unless Order. In the general run of civil litigation, such orders are not common. They are generally made because the judge considers that, without making an Unless Order, there is a real risk that the party who is subject to the Order will not comply with it. It is for that reason that Jackson LJ concluded in *Oak Cash & Carry* that the breach of an Unless Order was a pointer to its seriousness and significance. I respectfully agree with that analysis.

paragraph 5, which stated simply that “As he earned cash as a minicab driver, he expended the same on bills and daily living allowances for his family”. Nothing else of relevance was provided. No figures for income were pleaded at all.

49. For completeness, I should say that this position was not improved by the appellant’s subsequent witness statement for the trial, served well before the hearing before the DJ in August 2018, where on the same subject, the appellant just said:

“I had no money to repair or buy another car and all my accounts were close(d) to their overdraft limits and my credit cards had reached the maximum credit card limit. I have a bad credit rating as I have outstanding credit card bills so I could not get a loan.”

50. Although this issue was dealt with by the DJ and by the judge under stage 3 of *Denton* (in particular the DJ’s comments which I have set out in italics at paragraph 14 above), I consider that they may arise more conveniently under stage 1, particularly given Mr Peter’s focus on the question of the significance of the breach. If I am right and the Reply did not comply with the substance of the Unless Order in any event, the significance of the breach could hardly be greater².
51. Mr Peter disagreed with that analysis of the Reply and repeatedly drew a distinction between a pleading and the evidence required to support it. Stripped of its repetition, that argument was to the effect that a claimant in the position of the appellant was entitled to assert impecuniosity by way of a bald statement, and then seek to adduce evidence later on to embellish it. He said that, although that might mean the case would go badly for the appellant at trial, he should not be shut out from pursuing his claim for credit hire in court.
52. I consider that there are a number of fundamental errors in that submission. The first is that it seeks to get around the clear wording of the Unless Order, which required the pleading of “all facts in support of any assertion” of impecuniosity. On this issue, therefore, there was no room for any gap between the pleading and the statement. Secondly, the submission seemed to be based on the incorrect notion that a claimant was entitled to advance a rubbishy case in stages, from pleading to witness statement to trial, presumably in the hope that, by the time the trial came on, there was a commercial imperative on the part of the respondents to settle the case.
53. Thirdly, Mr Peter’s approach ignored the respondents’ position. They are entitled to know the case they have to meet. They should not be expected to have to prepare for a trial where the critical item of claim depends on a one line assertion, and hoping that, as a result of the cross-examination of the appellant, the judge will reject the claim. That is not how civil litigation is supposed to work post-CPR. And fourthly, the

² This approach is in line with Jackson LJ’s conclusion in *Oak Cash & Carry* that the breach of an Unless Order has to be looked at in the context of the circumstances in which the Order was made, rather than in isolation. The appellant and his advisers were always aware that he needed to plead and prove impecuniosity, in order to be able to recover his claim for credit hire charges, but they failed to grapple with the issue both before and after the Unless Order was made.

argument was unsupported on the facts. I have already set out the one line assertion in the Reply (paragraph 48 above) and the equally unrevealing evidence in the witness statement (paragraph 49 above). So the Reply did not in fact herald a witness statement with more detailed support for the impecuniosity claim.

54. Accordingly, I consider that, even if the Reply had been served on time, the document itself failed to comply with the substance of the Unless Order. Even if it is taken together with the witness statement, the Reply created precisely the situation that the Unless Order was designed to avoid: a simple assertion of impecuniosity, with no facts set out to support it. The breach of the Unless Order was therefore serious and significant.
55. In the light of my conclusions under stage 1 of *Denton*, it is perhaps unnecessary to deal in detail with the other submissions that Mr Peter made as to the significance of the breach. But I should briefly address two points of principle that he raised because I consider that each derived from a misunderstanding of the law.
56. Mr Peter submitted that, because the default period – on my finding that the deemed service provision applied – was only two days and not five, that could not be a significant breach. In this context, he relied on *Khandanpour v Chambers* [2019] EWCA Civ 570, where the delay was one of seventeen hours, a delay described by this court as ‘minor’. However, there were in that case a number of compelling mitigating factors (such as the relevant party being the victim of a knife attack at the time the order expired, and the fact that a major part of the court’s order was complied with in time) which do not arise here. More generally, seriousness and significance can never be a simple function of the period of default. It would be wrong in principle to suggest a sort of sliding scale that automatically allowed defaults of, say, 2 or 3 days, but not defaults of, say, a month. The period of default is a factor to be considered when assessing seriousness and significance, but it is no more than that.
57. Mr Peter also submitted that the failure to comply with the Unless Order was not significant because it had no effect on the court proceedings. In my view, there are two answers to that.
58. I consider that, in advancing this submission, Mr Peter misread paragraph 26 of *Denton*. It is certainly right that Lord Dyson MR and Vos LJ said that there are many circumstances in which materiality, which they define as having an effect on litigation generally (not only the litigation in which the application is made), will be the most useful measure of whether a breach is serious or significant. But they were very clear that it cannot be limited to that consideration, because they immediately went on to say that there will be breaches which are significant or serious even though they have no effect on litigation, such as a failure to pay court fees. They expressly rejected the submission that seriousness and significance could only be measured by whether the breach had imperilled the timetable or affected the course of the litigation. Thus, the effect of the breach on litigation generally is just one way in which significance can be measured: it is not the only way.
59. If a breach was required adversely to affect the court timetable before it could be called serious or significant, that would be uncomfortably and unacceptably close to the pre-CPR regime, where the defaulting party could get away with repeated

breaches of court orders simply because the other side could not show that they had suffered specific prejudice as a result. That is not now the law.

60. Moreover, as a matter of fact, I consider that, in the present case, the failure did have an effect on the course of the litigation. First, if the appellant had properly addressed the question of his impecuniosity before or in accordance with the Unless Order, the trial would have gone ahead as scheduled in November 2018. The breach might therefore be said to have had a calamitous effect on this litigation.
61. Even if the breach in this case had been confined to the delay in service, that would not make it insignificant. Parties to civil litigation need to make clear the important elements of their respective cases at an early stage. Gone are the days of ambush and keeping important points up your sleeve. The aim of much civil litigation is to bring about a cost-effective settlement. If a claimant delays in providing critical information, particularly where he has been ordered to provide it by way of an Unless Order, that delay adversely affects the other side's ability to take a view about the strength or weaknesses of the claim they face. The effect on the litigation in question should not be measured simply by whether or not the trial date can still be met; in properly run litigation, the aim must be to avoid having a trial date altogether.
62. For all these reasons, I conclude that, given the background to the making of the Order, and the fact that it was an Unless Order with which the appellant failed to comply, the breach was serious and significant.
63. Stage 2 of *Denton* requires a consideration of whether or not there were good reasons for the default. The DJ rightly found that there were no such reasons here. One explanation offered in the application form was that the appellant's solicitors mistakenly thought that they could rely on CPR 7.5 and that by completing the step prescribed there (of posting the document before midnight on 4 April), they had served the Reply on that day and therefore in time. That was wrong on two counts: first, because the rule applies only to the service of claim forms; and secondly because service is not effected on the date the step is taken but on the second business day after the step is taken). The other explanation was a reference to the difficulties of getting the appellant to come into their office to finalise the necessary instructions. With great respect, those excuses are of 'the dog ate my homework' variety and cannot possibly explain or justify why the Unless Order was unnecessary, let alone why it was not subsequently complied with.
64. In those circumstances, having found a serious and significant breach and no reason or excuse for it, stage 3 of *Denton*, namely a consideration of all the circumstances of the case, becomes critical.
65. The first matter relevant to stage 3 was the delay in the making of the application for relief from sanctions (as per *Oak Cash & Carry*). Here there was a total delay of two months in the making of this application (6 April to 5 June 2018). That is despite the fact that the appellant's solicitors knew, and acknowledged on 17 April, that such an application was required. The need to act promptly if a party is or might be in breach of a Court Order is axiomatic: 23 PDA 2.7 requires action when that party knows the application is "necessary and desirable". In my view, in the present case, that was before and certainly not later than 17 April. In a case with a trial date fixed for November, to allow weeks and months to go by before even making the application

for relief from sanctions was unsupportable. The delay in making the application therefore militates strongly against granting relief from sanctions.

66. The most significant element of the stage 3 review in this case comes back to the appellant's consistent failure to grapple with the issue of impecuniosity, which was a critical part of his case. District Judge Walder made the Unless Order to avoid the appellant simply coming to court at trial and saying: "I didn't have any money". For the reasons I have set out at paragraphs 48 - 54 above, the Reply merely perpetuated that stance. This was the point being made by the DJ at paragraphs 13-16 of her judgment, set out at paragraph 14 above.
67. Therefore, in considering all the circumstances of this case, I conclude that the appellant and his solicitors have never engaged with the need properly to plead and prove his impecuniosity in support of the claim for credit hire charges. They did not do that at the outset of the claim; they did not do so when the subject of an Unless Order; and they have not done so subsequently. In those circumstances, there was no basis on which the court could grant the appellant relief from sanctions.
68. Finally, for completeness, I should deal with Mr Peter's submission that, in reliance on the passages in *Denton* set out at paragraph 28 above, the delay was the responsibility of the respondents, because of their unreasonable refusal to allow an extension of time in respect of the Unless Order. It follows from the preceding paragraphs that I do not consider that the respondents acted in any way unreasonably in this case; on the contrary, they were entitled to require the appellant to make the necessary application and then to oppose it.
69. However, I should also say that, in my view, Mr Peter considerably over-stated what the court said in *Denton* about the need for restraint on the part of the innocent party. Lord Dyson MR and Vos LJ were careful to say at [41] that mistakes should not be taken advantage of in circumstances where the failure was neither serious nor significant, where a good reason was demonstrated, or where it is otherwise "obvious that relief from sanctions is appropriate". That is a relatively high bar. It was emphatically not designed to give *carte blanche* to a defaulting party to blame the other side for the delays caused by its own breach.

CONCLUSION

70. Although I consider that the DJ and the judge were wrong about the status of "Signed For 1st Class", it makes no difference to the outcome of this appeal. In my view, for the reasons I have given, they were right to refuse the appellant relief from sanctions. If My Ladies agree, this appeal will therefore be dismissed.

LADY JUSTICE NICOLA DAVIES:

71. I agree.

LADY JUSTICE ROSE:

72. I also agree.