Neutral Citation Number: [2015] EWHC 441 (QB)

Case No: QB/2014/0409

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
HIGH COURT APPEAL CENTRE
ON APPEAL FROM THE CHELMSFORD COUNTY COURT
ORDER OF HHJ LOCHRANE DATED 9 JUNE 2014
COUNTY COURT CASE NUMBER: 3CM01019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 February 2015

Before :

MR JUSTICE SWEENEY

- -

Between :

	HOME GROUP LIMITED	**Claimant / Respondent**
	- and -	
	MARIE MATREJEK	**Defendant / Appellant**

- -
- -

Charlotte Brazier (instructed by **Home Group Limited Legal Services**) for the **Claimant / Respondent**
Sally Blackmore (instructed by **Miles & Partners LLP**) for the **Defendant / Appellant**

Hearing date: 28 October 2014

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Judgment**Sweeney J:**

Introduction

1. In October 2013 the Claimant/Respondent (hereafter "the Respondent"), a social housing provider with charitable status, began a possession claim in the Chelmsford County Court against the Defendant/Appellant (hereafter "the Appellant") who is one of its tenants. On 28 April 2014 the Respondent failed to attend a Directions Hearing before HHJ Lochrane, who thus dismissed its claim with costs. On 9 June 2014 the judge granted the Respondent relief from those sanctions pursuant to CPR 3.9, including re-instating the claim. This is an appeal against that decision. Permission was granted, out of time, by

Spencer J on 10 October 2014. In consequence the trial, which was otherwise due to commence 27 October 2014, has been adjourned pending the outcome of the appeal.

2. At the hearing below on 9 June 2014 the leading authority in relation to the then relatively recently amended provisions of CPR 3.9 was correctly recognised to be *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537 ("*Mitchell*"). It is, nevertheless, common ground that the appeal must be decided in accordance with the subsequent clarification and amplification of *Mitchell* in the conjoined appeals in *Denton v TH White Ltd* [2014] EWCA Civ 906 ("*Denton, Decadent & Utilise*").

3. CPR 3.9 provides that:

"*(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."

4. There are two, overlapping, Grounds of Appeal - namely that the judge:

(1) Misdirected himself by failing to properly apply CPR 3.9.

(2) Took into account irrelevant considerations.

5. During the course of the hearing I was also referred to a number of other authorities in which the approach to relief from sanctions after the implementation of the Jackson reforms (including the amendment of CPR 3.9) was considered. They included, in chronological order: *Murray & Stokes v Neil Dowlman Architecture Ltd* [2013] 3 Costs LR 460 ("*Murray*"); *Durrant v Chief Constable of Avon & Somerset Constabulary* [2013 EWCA Civ 1624 ("*Durrant*"); *R (Royal Free London NHS Foundation Trust) v Secretary of State for the Home Department* [2013] EWHC 4101 (Admin) ("*Royal Free*"); *Associated Electrical Industries Ltd v Alstom UK* [2014] 3 Costs LR 415 ("*Associated Electrical*"); *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] 3 Costs LR 588 ("*Chartwell*"); and *Yeo v Times Newspapers Ltd* [2014] EWHC 2853 (QB) ("*Yeo*").

6. Whilst I have considered all the authorities, I bear in mind that at [24] of the judgment in *Denton, Decadent & Utilise*, the Court of Appeal expressed the hope that the guidance that it went on to give as to the three stages by which a judge should address an application for relief from sanctions would avoid the need in future to resort to earlier authorities.

7. In granting permission to appeal, Spencer J observed that the permission was not lightly given in relation to what was a case management decision but that, even applying the more nuanced approach required by *Denton, Decadent & Utilise*, it was arguable that, at the second stage, there was no good reason for what was a serious or significant breach, and that it was also arguable that the judge's approach, at the third stage, to "all the circumstances of the case" was impermissibly broad.

Outline facts

8. In November 2002 the Appellant was granted a tenancy of 17 Ploughman's Lane, Great

Notley, Braintree, Essex by the Respondent.

9. In October 2011, following alleged incidents of an anti-social nature, the Respondent applied for an injunction against the Appellant. On 9 November 2011 the Appellant formally undertook not to cause any further nuisance or annoyance to her neighbours. That undertaking was later extended to 31 December 2012.

10. The Respondent asserts that, nevertheless, incidents of anti-social behaviour continued. In particular, in May 2013 the Appellant was arrested for a racially aggravated public order offence against a neighbour, and was convicted of that offence on 9 August 2013. In addition, in September 2013 the Appellant was arrested for another public order offence – to which she pleaded guilty on 16 October 2013.

11. In the meanwhile, on 23 August 2013, the Respondent had served a Notice of Seeking Possession on the Appellant. As already touched on, possession proceedings were commenced in October 2013. Directions up to the listing questionnaires stage were made without a hearing on 30 December 2013, and a Defence was filed by the solicitors then representing the Appellant on 31 January 2014.

12. By an Order dated 12 February 2014 (which HHJ Lochrane made of his own motion after perusing the file) the possession claim was listed for directions "**on the same day as the Children Act 1989 proceedings CM13P01378 on 28 April 2014…**" (emphasis as in the order itself). The Children Act proceedings, which related to two of the Appellant's children who were living with her, had been brought by their father, and also involved the local authority. Those proceedings had been triggered, to some extent, by the allegations made by the Appellant's neighbours. The judge's purpose in ordering that both cases be listed on the same day was so that the hearings in them could take place one after the other, and that each could be managed so as to ensure that they could be dealt with at "more or less the same time in the hope that it would render the matter somewhat less complex" – with the eventual result of the possession claim being known prior to the determination of the Children Act proceedings. That purpose was not, however, made clear in the Order. Nevertheless, the Order did make clear that it was made of the court's own motion, and that either party could, within seven days, apply to vary it or set it aside. Neither did.

13. However, the Respondent's in-house solicitor, who was conscious of the Respondent's limited means, could see no purpose in a Directions Hearing on 28 April. Accordingly, on 14 February 2014 the Respondent wrote to the Appellant's then solicitors indicating that it considered that there was no need for the hearing on 28 April, and that (if the Appellant's then solicitors were happy for it to do so) it proposed to write to the court to say so, and to indicate that it would wait for the case to be listed for trial after 28 March 2014. The Appellant's then solicitors replied that same day to the effect they did not want to write to the court to seek to vacate the hearing on 28 April until it was clear how long the trial would need to be listed for, that it would be better to wait a little over a month until the evidence was in before formally agreeing the time estimate, and that there was plenty of time before 28 April to agree an Order.

14. On 27 March 2014 the Respondent sent a Listing Questionnaire to the court indicating that the possession claim was ready for trial, and that the Respondent did not believe that any further directions were necessary. The Respondent also paid all requisite court fees. The

Appellant failed to file a Listing Questionnaire, as required, on 28 March 2014, which was just prior to her then solicitors ceasing to act for her. Neither party complied with the court's direction for witness statements to be served on 14 March 2014.

15. On 16 April 2014, the Respondent wrote to the court noting that the matter had been listed for directions on 28 April 2014. The letter stated that "….We are uncertain why this matter has been listed for directions when both parties have already complied with directions given in December 2013…..", and asked for urgent confirmation that the parties did not need to attend the hearing and that the case would urgently be listed for trial. On three occasions thereafter the Respondent telephoned the court for a response, but all without success.

16. In the week of 21 April 2014 the Appellant's now solicitors (who had taken over her case on 28 March 2014) were informed that the Appellant's public funding certificate had been transferred to them. On Thursday 24 April 2014 they wrote to the Respondent indicating that they had just been instructed, and that the fee-earner dealing with the matter was on annual leave, and requested the Respondent's consent for the Directions Hearing to be adjourned. The Respondent replied that same day indicating that it did not believe that any further directions were required before trial, attaching its letter to the court of 16 April 2014 in relation to the proposed Directions Hearing, and stating that the court had just telephoned to say that the file was being sent to the judge that same day. Later that day the Appellant's now solicitors wrote urgently to the court stating they had been informed by the Respondent of the Respondent's letter of 16 April asking for the hearing on 28 April to be vacated, and of the fact that the file was being considered by a judge. The Appellant's solicitors indicated that the case papers had only just been received and stated that, given that the relevant fee earner was away until 28 April 2014, that it agreed with the request that the Directions Hearing be vacated (although it did not agree that the only direction required was for a trial date) and asked that it be adjourned to the first open date after 14 days in order to allow the Appellant to apply for an extension of time to file a Listing Questionnaire, and for the parties to agree such directions as may be needed to save time and expense for the court and the parties. The Appellant's solicitors copied the letter to the Respondent.

17. On Friday 25 April 2014 the Respondent telephoned the court again and was "again informed that no further action had been taken" – i.e. that the Directions Hearing was still going to be listed on 28 April. The Respondent's solicitor nevertheless genuinely believed that the matter would not be dealt with on that date (due to the fact that the court had been informed that no directions were required, and that the Appellant's new solicitors had also written to the court asking for the hearing to be vacated) and so decided not to attend and not to instruct anyone else to do so. She did not inform either the court or the Appellant that no-one would be attending on behalf of the Respondent.

18. The Appellant also contacted the court on Friday 25 April to try to establish whether the court required the parties to attend on 28 April. No response was obtained other than an indication that the file was before the judge and that the case was still in the list for 28 April. In those circumstances those representing the Appellant instructed counsel to attend the hearing.

19. As a result of the Respondent's non-attendance at the hearing before HHJ Lochrane on Monday 28 April 2014 he was not able to manage the Children Act proceedings and the possession claim in the way that he had intended. During the hearing in relation to the

possession claim he made reference to having read the file and to being aware that both sides had tried to avoid the hearing. In the result, he dismissed the claim with costs – but with permission to apply to vary or set aside within seven days from the date of service of the Order. Hence, by a written application dated 6 May 2014 (which was within the time limit) the Respondent applied for the claim to be reinstated.

The hearing on 9 June 2014

20. As already indicated, *Mitchell* was correctly recognised to be the leading authority, and argument was advanced on both sides in relation to it – albeit that other authorities were also cited.

21. In his judgment HHJ Lochrane set out the background, including the lack of clarity as to the reason for the Order that he made on 12 February; the measure of sympathy that he had for the Respondent in consequence; and the fact that the result had accrued to the Appellant's advantage in that the Children Act proceedings were now going to be concluded prior to the possession claim and would thus involve the assumption that the Appellant would continue to live at 17 Ploughman's Lane and that, if the Children Act proceedings were resolved in her favour, then she would be able to rely in the possession claim on the fact that the children were living with her. The judge then continued:

> "12. *So the claimant seeks relief from sanctions and I remind myself, as Ms Blackmore for the defendant has helpfully reminded me and provided a bundle containing materials, that the overriding objective now requires that in applying the rules I must attempt to deal with cases justly and at proportionate cost, in the context also of saving expense and, importantly, allotting appropriate share of the court's resources and enforcing compliance with the rules, practice directions and orders. And Part 3.9 - as now amended following the reforms initiated by Jackson LJ – requires me in respect of any application for relief from sanctions imposed for failure to comply with any rule, practice direction or court order to consider all the circumstances of the case so as to enable the court to deal justly with the application, including the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with the rules practice directions and orders. I am well aware of the authorities which make it plain that those two specific requirements are to be seen as the primary focus of the court before consideration of the rest of the circumstances of the case.*
>
> *13. Ms Blackmore submits to me it is correct that this cannot be described as a "trivial" breach; the order was specifically disobeyed and disobeyed in the context of the claimant simply assuming that that the court would go along with its suggestion, which it turns out has cost it dear. I suspect that it is not a mistake that the Claimant (or its employees) will take (sic) again. The lack of resources too is not an issue, it seems to me, as the authorities make plain. The inability of the Claimant to marshal its resources sufficiently to deal appropriately and efficiently with its cases is not an excuse that will assist it.*
>
> *14. Nevertheless, it does seem to me that there is some merit in considering this application for relief from sanctions. The bottom line of course remains that these cases need to be dealt with justly and the reality is that if this action remains dismissed there is nothing to stop Home Group re-issuing and,*

indeed, if it were doing its duty to its other residents it would seem to me that it is imperative that it re-issues to have these matters litigated.

15. *The impact of the continuing dismissal of this claim does not necessarily impact against the claimant itself. The force of failure to address the possession issues really falls on a collection of thoroughly innocent parties, theoretically, those neighbours who are, at least allegedly, significantly inconvenienced (if found proven) by Ms Matrejek's relatively appalling behaviour. So consideration of the justice of the case, it seems to me, needs to look very carefully at what can be achieved for the real victims of this process if the allegations are found proven – that is the neighbours and not the claimant.*

16. *Further expense and delay would clearly be involved in the re-issue of the proceedings and, as Ms Brazier for the claimant rightly points out, would also impact on the public purse in the sense that Ms Matrejek would not need to go through the process of obtaining Legal Aid covering her defence in that way. So it seems to me that for the purposes of justice there is some considerable force in thinking carefully about allowing relief from sanction and that applies too in the context of ensuring that that as far as possible, given what has occurred already, the litigation should be conducted efficiently and at proportionate cost. It would be thoroughly inefficient, it seems to me, to put the claimant in a position of having to re-issue and attract yet further additional costs in the protection of the interests of the other occupants of its properties.*

17. *The importance of course is that the claimant has failed to comply with an order of the court somewhat deliberately and the mitigation, it seems to me, that can arise in respect of that is limited to the perhaps explicable misunderstanding of the court's purpose and the fact that the order was made without greater elaboration of the court's purpose and in the absence of the parties themselves at the time, Nonetheless one cannot ignore of course that no query was raised and it seems to me that without too much effort it should have been relatively clear to the educated observer that the court had some particular interest in mind.*

18. *Anyway, it seems to me on balance, applying the various provisions, it is appropriate in the circumstances to allow relief from this sanction and to reinstate the possession claim with a view to having (it) heard over three days before me at the end of October. So the matter will be reinstated. The order for costs of 28 April will be varied to the extent that the claimant will pay the defendant's costs of that hearing and the claimant will pay the defendant's costs of this application and this hearing. Those will be the subject of assessment if not agreed."*

22. The judge refused the Appellant's immediate application for permission to appeal – stating that there must be appropriate occasions for relief from sanctions, and that he had applied the terms of the rules and taken into account the authorities. In his brief written reasons he said:

"*Applicant's default was a misguided attempt to save costs based upon an apparent*

misunderstanding of an earlier court order which was, on one reading, potentially partially valid. The Applicant's default had affected the course of the litigation but that was to the significant advantage of the Respondent in the circumstances. The otherwise innocent neighbours allegedly adversely affected by the Respondent's behaviour would be deprived of a hearing within a reasonable time if the Applicant was required to start again. While the fault was not trivial, there was just about a reasonable excuse and the justice of the case required the reinstatement of the claim. The Respondent had no realistic prospect of succeeding in any appeal against a case management decision in the court's discretion".

23. In the result the judge also ordered that the case be fixed for trial on 27 October 2014, and gave the parties permission to rely on evidence filed to date.

The Appellant's arguments

24. Ms Blackmore pointed out that significant changes to the CPR had come into effect on 1 April 2013. In particular:

    (1) CPR 1.1 was amended to include reference to the need for matters to be dealt with "at proportionate cost" (CPR 1.1(1)).
    (2) CPR 1.1(2) was amended to include specific reference to the need to enforce compliance with court orders rules and practice directions.
    (3) CPR 3.9 was amended so that the nine particular circumstances that a court was required to consider when deciding whether to grant relief from sanctions were removed and concentration placed instead on the need for the court to 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 dealt with justly and at proportionate cost and (b) the need to enforce compliance with rules practice directions and orders.

25. Ms Blackmore submitted that the effect of the judgment in *Denton, Decadent & Utilise* is as follows:

    (1) The guidance in *Mitchell* at [40] & [41] (that relief would be granted if the default is trivial provided that an application is made promptly, or if there is good reason for failure to comply) remains substantially sound [24].
    (2) A judge should address an application for relief from sanctions in three stages:
        (i) To identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1).
        (ii) To consider why the default occurred.
        (iii) To evaluate "all the circumstances of the case so as to enable [the court] to deal justly with the application including [factors (a) and (b)] [24].
    (3) The focus of the court's enquiry should be upon whether the breach has been "serious or significant" rather than trivial [26].
    (4) It is not the case that if there is a serious or significant breach and there is no good reason for that breach, the application for relief from sanction will automatically fail [31].
    (5) The court must consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation, or other litigation, efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief [34].

(6) The court must always bear in mind the need for compliance with rules practice directions and orders, because the old lax culture of non-compliance is no longer tolerated [34].
(7) The more serious or significant the breach, the less likely it is that relief will be granted unless there is a good reason for it [35].
(8) It is always necessary to have regard to all the circumstances of the case [36].
(9) Factor (a) and factor (b) in CPR 3.9 must always be given particular weight because anything less will inevitably lead to the court slipping back to the old culture of non-compliance [38].
(10) It is 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 [43].
(11) Judges must ensure that directions that they give are realistic and achievable [44].
(12) The practice of giving pre-eminence to the need to decide the claim on the merits should have disappeared following the *Woolf* reforms, and there is certainly no room for it in the post *Jackson* era [81].

26. Ms Blackmore further pointed out that in the first of the three conjoined appeals in *Denton, Decadent & Utilise* the court had made clear that whilst the breach was serious, and there was no good reason for it, it was still necessary for the judge to undertake the third stage and to consider all the circumstances of the case – but giving particular weight to factors (a) and (b) in CPR 3.9 in the process. In that case the court decided, significantly asserted Ms Blackmore, that the judge had fallen into error by giving pre-eminence to the need to decide the claim on the merits.

27. Ms Blackmore also drew particular attention, in chronological order, to:

(1) *Durrant* in which, at [44], the Court of Appeal concluded that the judge had placed too much weight on the potential effect on the careers and reputations of individuals and the police force if the officers concerned were unable to give evidence, and on the public interest in scrutinising the actions of police officers which, the court decided, were considerations that did not carry much weight in determining whether to grant relief from the sanction for non-compliance.
(2) *Associated Electrical* in which at [47] Andrew Smith J held that although, as between the parties, it was disproportionate to strike out a claim for late service of particulars, the emphasis in *Mitchell* on enforcement of the CPR to encourage procedural discipline led to the conclusion that the claim should be struck out and the extension of time refused.
(3) *Yeo* in which Warby J concluded that, though relief should not be granted lightly, it would be in that case because the breach was the result of an error, rather than a deliberate decision, and (once noticed) it had been promptly rectified, and its impact had been negligible.

28. Ms Blackmore also pointed out that, prior to the amendment of CPR 3.9, a finding that a failure to comply with a rule, practice direction or order was intentional was a significant factor which made the granting of relief from sanctions less likely – see e.g. *Tam Insurance Services Ltd v Kirby* [2009] EWCA Civ 19.

29. As to the general merits of the appeal, Ms Blackmore submitted that:

(1) Having failed to obtain authorisation not to attend the hearing on 28 April 2014, the Respondent decided, unilaterally, not to attend the hearing in any event. It did not

inform the court, or the Appellant's solicitors; it simply did not turn up – whereas all other parties in the two proceedings did attend. Albeit that the Respondent is a charity and short of funds, the breach was thus a deliberate flouting of the court's order and the judge found (in the language of *Mitchell*) that it was "not trivial". In the language of *Denton, Decadent & Utilise*, it was clearly a serious and significant breach, and there was no good reason to excuse it.

(2) The judge's comments, variously in argument and in his judgment on 9 June 2014, to the effect that the Respondent had "decided" not to attend; that the breach had been committed in "the tenuous hope" that all would be well; that the order had been "specifically disobeyed"; that the Respondent had failed to comply "somewhat deliberately"; that the Respondent's mitigation was "limited"; and that "without too much effort it should have been relatively clear to the educated observer that the court had some particular interest in mind", all had to be contrasted with judge's written statement of reasons for refusing permission to appeal in which he said that the Respondent had "just about a reasonable excuse".

(3) Moreover the Respondent had not asserted that it had misunderstood the purpose of the order of 12 February 2014 – it had clearly understood that it was supposed to attend – why else all the efforts to seek excusal from attendance?

(4) The Respondent's failure to attend on 28 April 2014 had had significant effects for the administration of justice and the other litigants – the court was unable to case manage as it had wanted to and its purpose in that regard was entirely frustrated; the trial date was almost certainly delayed; and other court users were inconvenienced.

30. As to Ground 1 (failing to properly apply CPR 3.9), Ms Blackmore submitted that:

(1) The judge decided that the breach was not trivial, and that the Respondent had no good reason for it. Following *Denton, Decadent and Utilise* it was appropriate for him to consider all the circumstances of the case, but he had to do so in a proper way – not one involving a review of the correctness of his decision to impose the sanction in the first place.

(2) The correct starting point was that the sanction was properly imposed (*Mitchell* [45]) – were it otherwise the judge should have considered the application under CPR 3.1(7), which he declined to do (thus confirming that he considered that his sanction had been properly imposed), and the Respondent had not sought to appeal against that decision.

(3) When the judge imposed the sanction on 28 April 2014 he was well aware of the circumstances of the case, and thus the likely impact of the sanction on the neighbours should have been considered by him as part of the determination of the appropriate sanction, as should the possibility of the Respondent seeking to re-issue proceedings (see *Durrant* at [44]). Hence those matters should have been given little if any weight in the consideration of all the circumstances of the case, yet they were key in the decision to grant relief – which thus involved an impermissible review of his decision to dismiss the claim or the taking into account of irrelevant considerations.

(4) The judge clearly gave inappropriate pre-eminence to the need to decide the claim on the merits – thereby adopting the approach that was criticised in *Denton*, and contrary to the decision in *Associated Electrical* that once there had been a breach and a sanction imposed proportionality between the parties was not a primary issue.

(5) The judge failed properly to consider the need for litigation to be conducted efficiently and at proportionate cost. It was irrational for him, as part of his consideration of factor (a), to consider the fact that the Respondent might bring fresh

proceedings - which was not asserted by the Respondent, and which (in light of *Janov v Morris* [1981] 1 WLR 1389) could readily be argued to be an abuse of process. It was similarly irrational to take into account both that the neighbours' expectations would be disappointed and that the Respondent would incur further costs by bringing new proceedings. Equally, in considering factor (a), the judge failed to take into account, properly or at all, that court time had been wasted, that the conduct of the litigation had been significantly disrupted, that the proceedings would be protracted if they were reinstated, and that the conduct of the Children Act proceedings had also been disrupted. Alternatively, when considering factor (a) he had regard to irrelevant considerations and failed to have regard to relevant considerations.

(6) The judge failed to give particular importance to or particular weight to factor (b) which, given the need to give particular importance to it (*Denton, Decadent & Utilise* at [38]) and the fact that the Respondent's breach was deliberate and very serious was startling and indicated that he had not considered factor (b) properly or at all.

(7) Given that a lack of prejudice is no longer a reason to grant relief in respect of a failure to comply with a valid order (see *Royal Free* and *Murray* at [19]) it was wrong for the judge to take into account that the Appellant might benefit from the delay and inconvenience resulting from the Respondent's deliberate breach. In any event there was no certainty that the appellant would, in fact, benefit at all – and thus it was either irrational to take it into account or irrelevant.

(8) The judge was also wrong to consider fairness as between the parties- whether because it was irrelevant or because he gave it too much weight.

(9) The appeal was broadly analogous with the first appeal in *Denton, Decadent & Utilise*. Faced with a serious and significant breach and no good reason for it, the judge should have been alive to the likelihood that relief ought to be refused, albeit that he still needed to carry out the third stage of his determination. Factor (a) militated heavily in favour of refusing relief, and factor (b) should also have strongly militated in favour of refusal. The only matters that the judge found to balance on the other side were matters that he should not have taken into account (*Durrant* at [44]). Relief ought to have been refused.

31. As to Ground 2 (taking into account irrelevant considerations) Ms Blackmore submitted that:

(1) The judge should not have given much, if any, weight to any difficulty or inconvenience to the neighbours.

(2) There was no evidence, and the Respondent did not assert, that it had not properly understood the order of 12 February 2014. The purpose of the order was perfectly clear on its face – namely for the parties in both the possession claim and the Children Act proceedings to attend on the same day for directions – that was all that the parties needed to know. It was perfectly plain that the Respondent understood that – otherwise it would not have sought the court's permission not to attend. Whilst it was not entirely clear as to the extent to which this issue affected the judge's decision, save in relation to whether the Respondent had a good reason for not attending, he mentioned lack of proper understanding a number of times and plainly considered it to be important.

32. Ms Blackmore also pointed out that the Respondent had failed to comply with the requirement in Spencer J's order of 10 October 2014 that it serve its skeleton argument by

4pm on Tuesday 21 October 2014.

The Respondent's arguments

33. Miss Brazier pointed out that, in the preponderance of the cases cited above, the court was concerned with an Unless Order, or with a sanction automatically applied by the Rules, and that in only two of the cases - *Associated Electrical* (in which the action was in its early stages) and *Decadent* (in which the appeal was allowed) – was the net result the end of the case. Having drawn my attention to [58] and [59] of the judgment in *Chartwell*, and to various aspects of the partially dissenting judgment of Jackson LJ in *Denton, Decadent & Utilise*, Miss Brazier submitted that although HHJ Lochrane did not have the benefit of the latter judgment at the time that he made his decision he had, in effect, applied the three stage process given that:

    (1) He identified and assessed the seriousness / significance of the failure to attend the Directions Hearing – concluding that, as a result, the court had been unable to manage the possession claim and the Children Act matter in the sequence that he had envisaged and within "any short space of time". As part of that assessment he had been entitled to conclude that there had been no prejudice to the Appellant in consequence – indeed that the outcome appeared to be to the Appellant's advantage.
    (2) He identified that the failure to attend had occurred because the court's rationale for listing the two matters was not "terribly" or "entirely" clear on the face of the Order - which had been made in the absence of the parties; and because the Respondent had not understood the purpose of the linked directions – which misunderstanding was "perhaps explicable". He concluded that the Respondent had attempted to alert the court and had obtained the agreement of the other side to vacate the hearing with a view to saving costs, and that no response had been received by the Respondent from the court.
    (3) He had properly considered all the circumstances of the case – including factors (a) and (b).

34. Miss Brazier further submitted that the Grounds of Appeal were, as a whole, misconceived. In particular:

    (1) The judge had, in fact, adopted the correct approach.
    (2) He had declined to review, under CPR 3.1(7), the legitimacy of his decision to dismiss the claim.
    (3) He was entitled to consider as part of "all the circumstances of the case", the Appellant's neighbours (whose position was significantly different to that of the police officers in *Durrant,* and who the judge was entitled to conclude were at risk of further anti-social behaviour).
    (4) In any event, the transcript showed that he had had CPR 3.9(a) and (b) at the forefront of his mind - including the consequences of the issue of fresh proceedings, which included the likelihood of the Appellant raising the issue of abuse of process and the consequent time and expense involved in what would amount to further satellite litigation.
    (5) By reference to [62] of the judgment in *Chartwell*, the judge's conclusion that relief from sanctions could properly be granted was within the ambit of his discretion (which was a wide one given that the sanction was not pre-prescribed) and there is no rule, even in cases involving serious or significant breach lacking good reason,

that relief from sanction must be refused.

(6) Whilst lack of prejudice to the other party alone is insufficient to justify the granting of relief from sanctions, the judge was entitled to take it into account not only at the first stage but also as part of all the circumstances of the case at the third stage of his considerations.

(7) No trial date was lost or moved in consequence of the Respondent's failure – whereas the appeal had further delayed the case proceeding to trial.

35. Miss Brazier also pointed out that the application for relief from sanctions had been made in good time on 6 May 2014.

36. During the course of her submissions Miss Brazier apologised for the late service of the Respondent's skeleton argument (which lateness, as indicated above, the Appellant had relied upon in argument). It transpired that, albeit that the ultimate responsibility to ensure service in time was the Respondent's, a significant part of the cause was an emergency in Miss Brazier's personal life. I did not seek details during the hearing, and nor did the Appellant. The late service had no effect on the conduct of the proceedings. In any event, I do not hold it against the Respondent.

The Appellant's reply

37. Ms Blackmore underlined, amongst other things, that:

(1) Whilst *Associated Electrical* and *Decadent* were argued to be the only cases at first instance to result in the end of the claim, that would have been the practical effect of the sanction in *Chartwell* too – and in that case the refusal of the appeal against the grant of relief was based on its particular facts (both sides had been at fault) and, even then, the outcome was said by Laws LJ at [66] to be an unusual one.

(2) Whilst *Decadent* was relied upon by the Respondent, the circumstances of that case were very different.

(3) In this case the judge specifically found (see his written reasons for refusing permission to appeal) that the default was "not trivial", there was no appeal by the Respondent against that finding, and the Respondent had clearly failed in its duty under CPR1.3 to help the court below.

(4) *Durrant* had not been overruled or distinguished in *Denton, Decadent & Utilise,* and it was clear that factor (a) required consideration of other court users but not third parties like the neighbours – whose position should have been considered prior to the imposition of the sanction in the first place.

(5) In any event, the Appellant was not aware of any allegations made by neighbours since the start of 2014.

(6) The Respondent's predicament was entirely the result of its own actions and whilst it may have been a harsh or tough decision to dismiss the claim it had not, given the nature of the breach, been outwith the judge's discretion.

The merits

38. This case provides a reminder of the advantage of the purpose of court orders (particularly those made in the absence of the parties) being made clear, of the need for parties to comply with court orders (however much they may have misgivings about them) whilst they still apply, and for all the known circumstances to be considered with care when

imposing sanctions.

39. The starting point is that the application for relief was made in good time.

40. The hearing below on 9 June 2014 took place at a time when *Mitchell* was recognised to be the leading authority. It is clear from [3] & [38] of the judgment in *Denton, Decadent & Utilise* that *Mitchell* was misunderstood and misapplied by some courts, that some judges were approaching applications for relief upon the incorrect basis that, unless a default could be characterised as trivial or there was a good reason for it, they were bound to refuse relief and that was leading to decisions that were manifestly unjust and disproportionate. The purpose of the judgment in *Denton, Decadent & Utilise* was to provide clarification and amplification in certain respects, and thus a more nuanced approach to relief from sanctions.

41. Whilst HHJ Lochrane did not have the benefit of the judgment in *Denton, Decadent & Utilise*, I accept that I must apply it when considering his decision.

42. The judge clearly proceeded upon the requisite basis that the sanctions had been properly imposed and had complied with the overriding objective. It equally seems to me that he did, in effect, carry out the three stage approach required by *Denton, Decadent & Utilise*.

43. As to the first stage, and albeit against the background that the Respondent believed that all that was left to do in the possession claim was to fix the trial date, the Respondent decided not to attend the Directions Hearing on 28 April when it was required to attend, failed to warn the Appellant or the court that it was not going to do so, and did not attend as required. As he made clear in his written reasons for refusing permission to appeal the judge found that the default was "not trivial". The Respondent does not appeal against that finding. Whilst there was no prejudice to the Appellant, whose own case was in some disarray at that time (and who wanted an adjournment), I nevertheless proceed upon the basis that, in the terms of *Denton, Decadent & Utilise*, this was a serious or significant default – albeit one which was plainly not, because of its particular circumstances, at the top end of the scale.

44. As to the second stage, during the course of his judgment the judge carefully examined why the default had come about. He accepted that the Directions Order which provided for the linked directions hearings had not necessarily explained "terribly clearly" the court's thinking (albeit that it should have been reasonably clear that there was at least some intention to link the two matters for some reason), and underlined that there had been no application made to vary that order (albeit, I would add, that that was against the background the parties had identified a possible way ahead without the need for such an application). He found that it was apparent that the Respondent did not understand the purpose of the linked directions process, and had attempted to alert the court and to obtain the Appellant's agreement to vacate the hearing with a view to saving costs – which was laudable. He noted that the Appellant did not understand the purpose of the linked directions hearing either, and had some interest in the matter not going ahead on 28 April 2014. The direct cause of the default had been the Respondent's decision, having written to and contacted the court without response, not to send representation "in the somewhat tenuous hope" that all would be well. It was therefore, he concluded, a failure to comply with an order of the court "somewhat deliberately", with the mitigation being limited to the "perhaps explicable misunderstanding of the court's purpose and the fact that the order was made without greater elaboration of the court's purpose and in the absence of the

parties themselves at the time". Summarising the position in his written reasons for refusing permission to appeal the judge recorded that the Respondent's default was "a misguided attempt to save costs upon an apparent misunderstanding of an earlier court order which was, on one reading, potentially partially valid" and that "…..there was just about a reasonable excuse…".

45. The judge was in the best possible position to assess the nature and effect of the Order that he had made of his own motion on 12 February 2014. He was also entitled to conclude that the Respondent did not understand the purpose of the linked directions (albeit that it plainly understood that it was required to attend). Equally, see [29](2) above, I see no necessary inconsistency between the judge's comments in argument and in his ruling, and his ultimate conclusion that the Respondent had "just about a reasonable excuse". It seems to me that that was a conclusion that he was entitled to reach.

46. Against the background of the judge's finding, in effect, that the failure was serious and significant (albeit plainly not, in my view, at the top end of the scale), and that there was just about a reasonable excuse, the third stage required an evaluation of "all the circumstances of the case so as to enable [the court] to deal justly with the application". It is clear from [12] of his judgment that he did give particular weight to factors (a) and (b) in CPR 3.9. However he was also entitled to take into account all the other circumstances – including the overall position in relation to the Appellant's case, the lack of prejudice to the Appellant, the rights of the alleged victims, and the limited extent to which court time had been lost.

47. I reject Miss Blackmore's arguments that the judge erred in various respects in his approach to factors (a) and (b), that he gave too much or too little weight to other circumstances, and that he took into account irrelevant considerations.

48. Whilst it is clear that, unlike factors (a) and (b) none of the other circumstances carried particular weight, it seems to me that, against the background of my findings in relation to stages 1 & 2, and albeit that the judge was aware of a number of the other circumstances when he imposed the sanction in the first place, on the particular facts of this case the combination of all the circumstances was capable of carrying sufficient weight to justify the judge's conclusion, in the exercise of his discretion, that the just outcome of the application was to grant relief on the terms that he did. It must, of course, be remembered that this was the exercise of discretion in the context of a case management decision and that such decisions are not lightly to be interfered with – see e.g. *Mannion v Ginty* [2012] EWCA Civ 1667 (quoted at [52] in *Mitchell*).

49. In the result, and although the balance was a fine one, it seems to me that the judge was entitled, in the exercise of his discretion, to come to the conclusion that he did.

Conclusion

50. For the reasons set out above, this appeal is dismissed. I will deal with any consequential applications administratively.