Case No: A2/2014/1602 & 1601

Neutral Citation Number: [2015] EWCA Civ 999
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
HIS HONOUR JUDGE SIMON BROWN QC
Claim Numbers 3BM90009 and 3YU23681

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2015

Before:

LORD JUSTICE MOORE-BICK
LORD JUSTICE UNDERHILL
and
LORD JUSTICE VOS

- -

Between:

	Blakemores LDP (in administration)	**Claimants/ Respondents**
	- and -	
	Carole Ann Scott **Christopher Balchin** **Eric Charles Walker**	**Defendants/ Appellants**

And Between:

	Carole Ann Scott **Eric Charles Walker**	**Claimants/ Appellants**
	- and -	
	Blakemores LDP (in administration)	**Defendants/ Respondents**

- -

Mr Mike O'Brien QC (instructed by **Newhall Solicitors LLP**) for the **Appellants**
Mr John de Waal QC (instructed by **Sydney Mitchell LLP**) for the **Respondents**

Hearing date: 29th July 2015

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Judgment**Lord Justice Vos:**

Introduction

1. The central issue in this case is whether the judge was right to grant summary judgment striking down the first and third appellants' negligence claims against their solicitors on the grounds that they were issued more than 3 years after they acquired "the knowledge required for bringing an action for damages in respect of the relevant damage" within the meaning of sections 14A(5) and (6) of the Limitation Act 1980.

2. Blakemores LDP ("the firm") was a firm of solicitors, which is now in administration. Two solicitors acting for the firm are relevant to the issues in the case: a Mr Geoffrey Barrett, who was an expert in the manorial law relevant to the appellants' case ("Mr Barrett"), and a Mr Michael Baxendale, a solicitor specialising in litigation ("Mr Baxendale"). Mr Baxendale still acts for the appellants but he is now with a different firm.

3. The firm acted for the appellants, who are three unrelated villagers in Ireby, Lancashire, between March 2005 and some time in 2012. Each appellant has a different procedural position that will need to be carefully distinguished. The appellants are Ms Carole Scott ("Ms Scott"), Mr Eric Walker ("Mr Walker") and Mr Christopher Balchin ("Mr Balchin").

4. The appellants instructed the firm in relation to the issues concerning two Land Registry titles numbered LA945262 (the title relating to the Lordship of the Manor of Ireby - the "Lordship title") and LAN6249 (the title relating to an area of some 360 acres of moorland overlooking the village of Ireby, known as Ireby Fell - the "Ireby Fell title"). Mr Peter Burton and Mrs Susan Burton (née Bamford) ("Mr and Mrs Burton") were registered as the proprietors of these titles respectively as from 10th October 2004 and as from 21st February 2005.

5. On 9th May 2007 the appellants and other villagers applied to alter the register by closing off both the Lordship title and the Ireby Fell title so as to correct a mistake under paragraph 5(a) of schedule 4 to the Land Registration Act 2002 (the "LRA"). When they ran out of money to fund the litigation, the appellants entered into a conditional fee agreement with the firm dated 27th April 2009. On 10th December 2010, Mr Simon Brilliant, Deputy Adjudicator, directed that the Lordship title should be closed but refused, as a matter of discretion, the application to close the Ireby Fell title. Mr Jeremy Cousins QC sitting as a deputy judge of the Chancery Division dismissed the appellants' appeal from the Deputy Adjudicator on 17th April 2012. On 14th October 2013, the Court of Appeal (Mummery, Jackson and McCombe LJJ) dismissed a further appeal (see *Walker v. Burton* [2013] EWCA Civ 1228, [2014] 1 P&CR 9, which provides a useful summary of the interesting history of the case).

6. On 11th December 2012, the firm issued a claim form against the appellants in respect of some £635,530.78 claimed for work done under the conditional fee agreement (claim number 3BM90009 – the "first action"). On 5th February 2013, the firm entered judgment in default against Mr Balchin.

Ms Scott's and Mr Walker's defence and counterclaim in the first action

7. On 8th February 2013, Ms Scott and Mr Walker served a defence and counterclaim, drafted by Mr Baxendale, in which they pleaded that Mr Barrett had been negligent in failing to advise them that, unless they filed an objection to the registration of the titles before the deadline of 21st April 2005 (the "deadline"), then even if they later proved that the registrations had been mistaken, a statutory discretion arose in the Adjudicator to HM Land Registry as to whether or not to close the registration of Ireby Fell in the names of Mr and Mrs Burton. The defence and counterclaim did not expressly claim damages for negligence, but did plead, in effect, that the firm was estopped by the events which had occurred from claiming its fees.

8. Paragraph 29 of Ms Scott's and Mr Walker's defence and counterclaim said the following, after pleading that Mr Baxendale had consulted one of the firm's partners, Mr Peter Kelly, about whether he would authorise the firm to act for the appellants under a conditional fee agreement to set aside the registration of the titles:-

> "In the course of a meeting in April 2009 Mr Baxendale explained, on a face-to-face basis, to Mr Kelly the following:-
>
> (a) That in the opinion of Mr Baxendale, Mr Barrett's negligence had caused the current difficulty in which the Villagers [including the appellants] found themselves, namely that Ireby Fell had been registered by mistake in the name of [Mr and Mrs Burton] … because the relevant deadline had been missed by Mr Barrett.
>
> (b) That the best way to try to mitigate that difficulty (and thus to mitigate the [firm's] potential liability) would be to continue to represent the Villagers in their action against [Mr and Mrs Burton]
>
> (c) That there were strong prospects of the Villagers being successful …"

9. The defence and counterclaim continued as follows:-

> "31. Mr Baxendale assured the [appellants] that [the firm] anticipated recovery of [the firm's] costs from [Mr and Mrs Burton], except possibly a small shortfall … but that no substantial shortfall would be enforced by [the firm] against the [appellants] …
>
> 32. The [appellants] placed full reliance upon the said Representations in continuing their Proceedings …
>
> 33. … Mr Baxendale explained (as he was professionally obliged to do) that he did consider that [the firm], through Mr Barrett, had been negligent in failing to advise that Objections should be filed in time, such that in reality any substantial shortfall ought not to be recoverable from [the appellants] should such arise."

10. It should be observed that it is not entirely clear from this pleading whether the term "Defendants" that I have shown above as "appellants" was intended to include the 2nd defendant, Mr Balchin. The pleading was not filed on his behalf, because he could not at that time be found. It is best, I think, to assume that the term applied only to Ms Scott and Mr Walker on whose behalf the pleading was filed.

Further procedural events

11. On 1st March 2013, the firm filed a reply and defence to Ms Scott's and Mr Walker's counterclaim. It pleaded at paragraph 24 that the firm understood the appellants' case to be that Mr Barrett was "negligent in failing to advise [the appellants] to object to Mr and Mrs Burton's original application for registration as proprietor of the [Ireby Fell title] before the latest date for doing so, 21st April 2005, and that as a result of this Ms Scott and Mr Walker have suffered loss and damage, namely the loss caused by the fact that their Application to close the [Ireby Fell title] was dismissed by the Deputy Adjudicator and on appeal". In paragraphs 25 of the firm's pleading, it alleged that the negligence claim was statute barred under sections 2 and/or 5 of the Limitation Act 1980, the date of loss being 21st April 2005 at which point the [appellants on their case] had a good cause of action" against the firm. Paragraph 26 indicated that the firm would rely on paragraph 33 of the Ms Scott's and Mr Walker's defence as showing that they had the requisite knowledge to bring the claim more than 3 years before this claim was commenced. Mr John de Waal QC, counsel for the firm, asked us to note that the firm's reply and defence to counterclaim also claimed that (a) the estoppel pleaded in paragraph 31 of the defence and counterclaim was inconsistent with the indemnity principle, (b) the firm intended to strike out or seek summary judgment in respect of both the estoppel defence and the negligence claim, and (c) that the defence and counterclaim had not at that stage been verified by a statement of truth. It is to be noted, however, that the firm

has in fact never applied, save in respect of the limitation point, to strike out the defence and counterclaim or for summary judgment against the appellants on the merits. Mr de Waal's point was that Mr Baxendale's evidence, to which I shall shortly refer, has to be read in the light of the fact that his pleading on behalf of Ms Scott and Mr Walker was under challenge.

12. On 11th March 2013, the Law Society intervened in the firm's practice, and the firm ceased to trade. On 27th March 2013, an administrator was appointed in respect of the firm.

13. On 27th August 2013, Ms Scott and Mr Walker issued an application notice seeking permission to amend their defence and counterclaim so as actually to raise a counterclaim for damages for negligence. Mr Baxendale explained in an accompanying witness statement that the claim had not been brought before because the Court of Appeal decision was awaited (as indeed it continued to be until 14th October 2013). On 16th October 2013, HH Judge McKenna accepted Mr Baxendale's undertaking to file the original defence and counterclaim verified with a statement of truth by 23rd October 2013 (though that was not in fact done until 26th November 2013). He refused to hear the application for the amendment on that occasion, and stayed the claim and counterclaim for ADR until 13th January 2014.

14. On 6th December 2013, Ms Scott and Mr Walker issued separate proceedings (claim number 3YU23681 – the "second action") against the firm claiming damages for the same negligence as they had pleaded in their defence and counterclaim to the first action.

15. On 13th March 2014, the firm issued a single application for, amongst other things, summary judgment against the appellants on their counterclaim in the first action, and against Ms Scott and Mr Walker on their entire claim in the second action. Mr Kamal Majevadia's witness statement in support of the application made clear that the challenge was based on the limitation issue. On 14th March 2014, Mr Balchin issued an application in the first action seeking to set aside the default judgment against him on the grounds that he had not been validly served with the proceedings, and that there was in any event a defence and counterclaim on the merits. No separate witness statement was served in support of this application, but the application notice was filed with a statement of truth signed by Mr Baxendale verifying the evidential statement that "[t]here is a substantive Defence and Counterclaim as the [firm] has been aware since 2012". That evidence also explained that the firm had been made aware that Mr Balchin was no longer resident at the address to which it proposed to send the papers, and that Mr Balchin had only become aware of the first action, when his former wife told him in February 2014 that an

application for a charging order had been served on her. Mr de Waal complained that Mr Balchin had, on his own case, delayed for 36 days between 6th February 2014 (when his new statement – to which I shall shortly refer - says that his former wife called him) and 14th March 2014 before making his application to set aside the default judgment. In the context of the litigation, it seems to me that it must have been obvious to the firm that the reference in the application to the "Defence and Counterclaim" was an indication that Mr Baxendale was saying that Mr Balchin's defence was the same as that of Ms Scott and Mr Walker as pleaded in their defence and counterclaim.

16. Both applications were heard by HHJ Simon Brown QC on 29th April 2014. The parties agreed that Ms Scott's and Mr Walker's claim for damages for negligence was statute barred as a result of the provisions of section 14A of the Limitation Act 1980 if, but only if, they had acquired "the knowledge required for bringing an action for damages in respect of the relevant damage" in April 2009 in the manner pleaded in the defence and counterclaim that I have already recited. It was, however, all the appellants' contention that they had not acquired any such knowledge at that time, and that they only knew that they could have brought "an action for damages in respect of the relevant damage" in December 2010, when they received the decision of Mr Brilliant refusing to close the Ireby Fell title.

Mr Baxendale's evidence

17. The appellants relied before the judge on a statement from Mr Baxendale dated 17th April 2014 including these paragraphs:-

> "5. … as a matter of fact, what [the firm] seek to rely upon is that at paragraph 33 of the [defence and counterclaim] it is pleaded that [the appellants] were advised of the negligence of [the firm] prior to April 2009 so that the limitation period … must have expired on 27th April 2012 if not before. …
>
> 7. As far as my own recollection of the matter is concerned, all that was said was a conversation to Ms Scott, not including Mr Walker and Mr Balchin, to the effect that [Mr Barrett] ought to have advised Ms Scott at the time to put in a formal Objection to the Registration of Ireby Fell by the deadline as extended by the Land Registry in 2005.
>
> 8. What I do not recall advising Ms Scott is that [Mr Barrett] ought to have advised that, had an Objection not been filed by the deadline, Mr and Mrs Burton (then Miss Bamford) would have obtained protection pursuant to schedule 4

Land Registration Act 2002 in regard to their position as Registered Proprietors.

9. At the time of the conversation with Ms Scott and Mr Walker, it was not clear even to me, let alone to the clients, that the Statutory Protection of a Registered Proprietor pursuant to schedule 4 Land Registration Act 2002 is something that had any potential to cause loss."

18. Mr Baxendale's statement also reiterates in slightly more detail the facts in Mr Balchin's application notice to which I have referred concerning his address and his absence of knowledge of the proceedings. He did not, however, provide any explanation for the 36-day delay upon which Mr de Waal has relied before us. To be fair, however, that does not appear to have been the thrust of the firm's argument before the judge.

19. There was no direct evidence before the judge from any of the appellants.

Section 14A of the Limitation Act 1980

20. Before considering the judge's decision, it is useful to set out the relevant parts of section 14A of the Limitation Act 1980 as follows:-

"**14A Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual**

(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.

(2) Section 2 of this Act shall not apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.

(4) That period is either—

(a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both—

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of the other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are—

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b) the identity of the defendant; and

(c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10) For the purposes of this section a person's knowledge includes

knowledge which he might reasonably have been expected to acquire—

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

The judge's decisions

21. In his first decision, the judge recited the relevant parts of Ms Scott's and Mr Walker's pleadings and of Mr Baxendale's statement. He then directed himself as to the test he should apply in considering whether there should be summary judgment by reference to a dictum of Lewison J in *EasyAir Limited v. Opal Telecom Limited* [2009] EWHC 339 (Ch). In that case, Lewison J had said that the court should consider whether a claimant has a realistic rather than a fanciful prospect of success, and that a realistic claim was "one that carries some degree of conviction" and is "more than merely arguable". Although the court should not conduct a mini-trial: "this does not mean that the court must take at face value without analysis everything that the claimant says in his statements before the court. In some cases it may be clear that there are no real substantive factual assertions made, particularly if contradicted by contemporaneous documents". The judge reflected that consistency was the "by-water which any court has to look at, and the consistency here is a consistent tale by [Mr Baxendale] and his clients, which is rehearsed in the detailed pleadings which have been attested to, not in the later statement which is a gloss and one which is inconsistent with everything before". He concluded that "the court should not take at face value three paragraphs of a statement by a solicitor some five years after the event without recourse to contemporaneous notes". He thought that was undoubtedly an unreliable piece of evidence.

22. For this reason, the judge concluded that Ms Scott's and Mr Walker's claim for damages for negligence was statute barred, because section 14A(5) provided that the "starting date" was the earliest date on which they first had both the knowledge required for bringing an

action for damages in respect of the relevant damage and the right to bring such an action. In this case, the judge decided that Ms Scott and Mr Walker had, on the face of their own pleadings been told in April 2009 that Mr Barrett had been negligent and that they had suffered damage because the objections had not been "registered" in April 2005. The damage here, in the judge's view, was the failure to register, because section 14A(7) which provided that "the material facts about the damage" for the purposes of section 14A(6)(a) were "such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment". The judge thought that the failure to register was such a fact. He compared the failure to register to a failure to invest, which was the "damage" rather than the ultimately consequential "damages".

23. In relation to Mr Balchin's application, the judge held that the claim form in the first action had been validly served on him at his last known address. That point is not appealed. Secondly, the judge held he would not set aside the default judgment on the grounds that Mr Balchin "has a real prospect of successfully defending the claim" on the basis of the alleged estoppel, because that was a "relatively shadowy aspect", and he had no material from Mr Balchin or any substantial material from Mr Baxendale in support. He could not guess whether he had any prospect of success, but it was far too late to exercise his discretion to set aside the judgment over a year afterwards "in the current climate post the *Mitchell* case" (see *Mitchell v. News Group Newspapers Ltd (Practice Note)* [2014] 1 WLR 795, and now *Denton v. TH White Ltd* [2014] 1 WLR 3926).

The appellants' arguments

24. The appellants contend that the judge was wrong to comment unfavourably on the absence of direct evidence from them, but anyway they seek the court's permission to adduce new statements, which, in effect, serve to confirm what Mr Baxendale said in his statement was his recollection of events. It was agreed that we could look at the new evidence *de bene esse*.

25. In Ms Scott's new statement, she says as follows at paragraph 2:

> "The only mention of potential negligence on the part of Mr Barrett was in the course of a brief telephone conversation between Mr Baxendale and myself, in which the other [appellants], who live at separate addresses, were not involved. Mr Baxendale informed me that he thought that Mr Barrett ought to have put in the Objections to the registration of Ireby Fell in favour of Mr and Mrs Burton within the time limit given by the Land Registry. **What Mr Baxendale did not say to me, nor was I aware of it, was that the failure to do so would lead to any loss, or make any difference to the overall outcome**, as we all thought that because we had put in an Application to vary the title at the Land Registry by closing down the Title of Mr Burton and Miss Bamford to Ireby Fell, we would

be able to get the same result as we would have done had an objection been put in in time" [emphasis added].

26. In Mr Walker's new statement, he says as follows:-

> "I also confirm that, if and to the extent that any such discussion had taken place by telephone with [Ms Scott] or otherwise, I was not a party to such telephone conversation and this was not reported back to me."

27. In Mr Balchin's new statement he confirms what Mr Baxendale had previously said, namely that he did not become aware of the first action until 6th February 2014 when his former wife called him to say that a firm of solicitors saying they were putting a charge on her home. As a result, he spoke to Mr Baxendale. Mr Balchin continues at paragraph 19 that "I certainly confirm that at no point before December 2010 did Mr Baxendale indicate, nor did I suspect in any way, that Mr Barrett might have been negligent, or that the failure to register was negligent and could cause any damage or loss". Mr Balchin's statement also gives some further evidence about the alleged estoppel, and some further explanation for his delay in applying to set aside the default judgment. In brief, after he was told about the charging order by his former wife, he had to trace Mr Baxendale to his new firm, apply for fee exemptions as he was on benefits, and chase the "relevant authorities" who were slow in dealing with the matter. Ultimately he paid the fee himself in order to get the application issued.

28. The appellants' main contention is that the judge was wrong to disregard the verified evidence of a solicitor on a summary judgment application as to what happened in April 2009. There was, they say, no evidence to the contrary, and the question of whether the negligence claim was statute barred should proceed to a trial.

29. In relation to the legal question, the appellants rely on the House of Lords' decision in *Haward v. Fawcetts* [2006] 1 WLR 682, where Lord Walker said this at paragraph 61 in relation to *HF Pension Trustees Ltd v. Ellison* [1999] PNLR 894:-

> "Until the FMC scheme trustees knew that they had received seriously incorrect advice which overlooked the need for propriety in exercising fiduciary powers, they did not know that the interests of their beneficiaries, the scheme members, were being prejudiced. This lack of knowledge did not mean merely that they were ignorant of having a cause of action in negligence against the solicitors; more fundamentally and more relevantly, they did not know that they (on behalf of the beneficiaries) had suffered any damage at all. They did not know that what had happened was not a more or less technical reorganisation of two pension schemes, but an improper abstraction of funds, which might (if the tax was not recovered) deprive their beneficiaries of over £7m. **In short, they knew the bare facts, but they were ignorant of their real significance**. Their ignorance was at a different and more basic level than that addressed by section

14A(9)" (emphasis added).

30. On behalf of Mr Balchin, Mr Mike O'Brien QC submits that the delay of 13 months after the default judgment was caused because he simply did not know of the proceedings. In the circumstances, he has a reasonable excuse, and in all the circumstances he should be granted relief from sanctions and allowed to defend the first action and be joined as a claimant to the second action to advance the same claim as Ms Scott and Mr Walker.

The firm's submissions

31. On the limitation issue, Mr de Waal submitted that paragraphs 31-33 of the defence and counterclaim must be read as if all three paragraphs related to the same occasion, so that, properly understood, Ms Scott and Mr Walker have pleaded that they were *both* told either at a meeting or in a telephone conversation that any shortfall in costs would not be recovered against them because Mr Barrett had been negligent, so that it was obvious that they had suffered loss.

32. Mr de Waal submitted in terms that, based on this analysis of the pleading, if a witness statement (in this case from Mr Baxendale) contradicted the statement of case (in this case the defence and counterclaim) as it did, the judge had been entitled to prefer the pleading, even without cross-examination, particularly when the witness statement was made to avoid the challenge to the pleading that had been raised by the firm.

33. In relation to the law on limitation, Mr de Waal relied again on his construction of the defence and counterclaim to submit that it was obvious that both Ms Scott and Mr Walker were aware that they were in a worse position as a result of the firm's negligent failure to file the objection, because it was simply not possible to have the conversation pleaded in paragraphs 31-33 without gaining that knowledge. The burden was on the appellants to establish when they first had the necessary knowledge under section 14A.

34. Mr de Waal did not adopt what the court put to him as having been the judge's error in thinking that the conversation pleaded at paragraph 29 between Mr Baxendale and Mr Kelly had involved the appellants. But he accepted that the judge's rejection of Mr Baxendale's evidence was on the cusp of what a judge could properly do on a summary judgment application. He relied as the judge had done on the *dictum* of Lewison J in *EasyAir Limited v. Opal Telecom Limited supra*.

35. The firm objected to the admission of the new evidence on the principles in *Ladd v. Marshall* [1954] 1 WLR 1489, and said, in relation to Mr Balchin, that, without it, there was no evidence explaining the 36-day delay. 36 days was to be seen in the light of only 14 days being allowed under the CPR for the filing of an acknowledgement of service in the first place.

The issues

36. There are, in my judgment, really four main issues for this court to determine as follows:-

i) Was the judge right to reject Mr Baxendale's evidence on a summary judgment application as being unreliable in the face of the inconsistent defence and counterclaim?

ii) Was the judge right to hold that the relevant "material fact about the damage" which Ms Scott and Mr Walker needed to know to start time running for the purposes of sections 14A(6)(a) and (7) was the firm's failure to file the objection before the deadline? If not, what did they need to know?

iii) Should the new evidence from the appellants now be admitted on these appeals?

iv) Should the default judgment against Mr Balchin be set aside?

Issue 1: Was the judge right to reject Mr Baxendale's evidence on a summary judgment application as being unreliable in the face of the inconsistent defence and counterclaim?

37. In the light of the way that Mr de Waal has argued the matter, it is important first to determine what the defence and counterclaim actually meant and then whether the judge was right to reject the evidence of Mr Baxendale that was put before him.

38. It is clear, in my judgment, that the judge mistakenly thought that paragraph 29 of the defence and counterclaim was referring to a meeting with the appellants in April 2009, when it was not. The judge referred to a meeting in April 2009 "when both the defendants were made aware of the view that there had been negligence … and that the consequences were that there had not been the registration and therefore a detrimental position". That is all taken from or inferred from paragraph 29 which relates to the pleaded meeting in April 2009 between Mr Baxendale and Mr Kelly to which the appellants were not said to have been parties.

39. From this starting point, the judge concludes that Mr Baxendale's statement was inconsistent with the defence and counterclaim. Mr Baxendale explained that he had

only had a conversation with Ms Scott, and that he had told her only that Mr Barrett ought to have advised her at the time to put in a formal objection to the registration of the Ireby Fell title by the deadline. In my view, that was not inconsistent with the pleading. It merely elaborated upon what had been said at paragraph 33. It had nothing to do with paragraph 29. Mr Baxendale had made that clear at paragraph 5 of his statement in which he had said that, whilst he was not making submissions of law, he did, in effect, want to answer the firm's reliance on paragraph 33 of the pleading.

40. It will be observed, of course, that paragraph 33 does not say to whom Mr Baxendale explained the negligence. In my judgment, Mr de Waal is wrong to say that paragraphs 31-33 must be run together and read as referring to the same single occasion. There is nothing, apart from perhaps the use of the word "[f]urther" at the start of paragraph 33 to suggest that. The pleading must be given its natural meaning. The only pleading of the clients' having been told of the negligence is in paragraph 33, which does not say precisely when that happened or precisely who was told. In these circumstances, the judge's indignation about Mr Baxendale's witness statement was misplaced. Of course, it will be possible to cross-examine Mr Baxendale at some stage about it, but that does not mean that, on a summary judgment application, the judge was justified in finding that the statement was either contradictory, inconsistent with the pleading or obviously unreliable.

41. In these circumstances, there was a mistaken foundation for the judge's decision that the starting date for the limitation period was in April 2009. The correct foundation for his consideration of the limitation issue would have been that: (a) the only pleading of what any of the appellants knew was in paragraph 33 of the defence and counterclaim, (b) the appellants' solicitor had amplified that pleading from his own recollection by explaining that only Ms Scott had been spoken to, and that she had only been told that Mr Barrett ought to have advised her to file the objection before the deadline, but that (c) Ms Scott had not been told that Mr Barrett should have advised that, if no objection was filed, Mr and Mrs Burton would obtain statutory protection against closure of the Ireby Fell title. Notably, Mr Baxendale's evidence was that he did not even know that latter point himself in April 2009. That material may also be the subject of cross-examination in due course, but could not properly be rejected out of hand by the judge at the summary judgment stage.

42. The firm's submissions are not assisted by reliance on Lewison J's dictum in *EasyAir Limited v. Opal Telecom Limited supra*. It is one thing to reject witness statements on a summary judgment application because they are flatly contradicted by unchallenged contemporaneous documents. It is quite another to engage in a meticulous examination of the evidence and the pleadings with the objective of rejecting selected parts of one or other account without cross-examination. What the judge did was not on the cusp of what was acceptable on a summary judgment hearing, it was well beyond it. I would expressly reject Mr de Waal's submission that it was open to the judge to prefer the pleading to Mr Baxendale's witness statement in this case without cross-examination,

even if Mr Baxendale made the statement knowing of the firm's objections to the defence and counterclaim.

Issue 2: Was the judge right to hold that the relevant "material fact about the damage" which Ms Scott and Mr Walker needed to know to start time running for the purposes of sections 14A(6)(a) and (7) was the firm's failure to file the objection before the deadline? If not, what did they need to know?

43. Even though the judge approached the evidence inappropriately, it would still have been theoretically open to him to decide on the basis of all the evidence that, as a matter of law, the starting date for limitation purposes for Ms Scott at least was in April 2009. It is necessary, therefore, to consider carefully what he decided and whether he was correct.

44. In the judge's view, the relevant "damage" for the purposes of section 14A(5)-(7) was the firm's failure to file an objection to the registration of the titles before the deadline. The judge thought that the failure to file that objection was a "material fact about the damage" because section 14A(7) provided that such facts were, for the purposes of section 14A(6)(a), "such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment". He compared the failure to file the objection in time to a failure to invest, which was, he said, the "damage" rather than the ultimately consequential "damages".

45. I disagree with the judge's approach. In my judgment, it is important to understand the way in which section 14A is obviously intended to work. Section 14A(5) requires that the starting date is the earliest date on which the claimant had *both* the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action. Section 14A(6)(a) then says that "the knowledge required for bringing an action for damages in respect of the relevant damage" includes knowledge of "the material facts about the damage in respect of which damages are claimed". Section 14A(7) provides that "the material facts about the damage" are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

46. The first question in this case was, therefore, the factual one of what "material facts about the damage" the appellants accepted they had known in April 2009. I have already decided that the judge ought to have determined that all that was pleaded, as explained by Mr Baxendale's statement, was that Ms Scott alone knew that Mr Barrett had been negligent in failing to file the objection, but not the consequences of that failure, which even Mr Baxendale said he did not appreciate. It is to be noted that there was no pleading that Ms

Scott was acting on behalf of the other appellants or anyone else.

47. The question for the judge, therefore, was whether knowing simply that the firm had been negligent in not advising that the objection should be filed before the deadline was enough to lead a reasonable person to consider it sufficiently serious to justify his instituting proceedings for damages against the firm, assuming it to be solvent and unwilling to dispute liability.

48. Paragraph 33 of the defence and counterclaim did not plead that the appellants were told, even in outline, the consequences of the failure to file the objections. It was not said that they knew about the dangers of the discretionary decision that the Adjudicator was able to take, which might result in their being unable to succeed in closing the title. Why, therefore, one might ask rhetorically, would a reasonable person, knowing only that costs might be incurred under a CFA which the firm was saying they would not claim anyway, consider the "damage" sufficiently serious to justify instituting proceedings for damages against the firm, even if the firm was solvent and unwilling to defend?

49. In my judgment, the judge was wrong to hold that the relevant "material fact about the damage" which the appellants needed to know to start time running for the purposes of sections 14A(6)(a) and (7) was the firm's failure to file the objection before the deadline. The appellants needed to know, as became apparent at least when the decision of Mr Brilliant was available, that the effect of the failure to file the objection was to allow a discretionary decision to be made against them in relation to the Ireby Fell title. It could, I suppose, have been argued (but it was expressly not) that the appellants must have known of that consequence earlier than the actual decision of Mr Brilliant, because they no doubt attended the hearing and heard the legal argument. We do not need to be concerned about that, since it is common ground between the parties that the starting date was to be taken as either April 2009 or 10th December 2010, when Mr Brilliant's decision was promulgated. The 10th December 2010 was, of course, less than 3 years before the claim form in the second action was issued on 6th December 2013.

50. There are two reasons why the material fact about the damage in this case cannot just be the negligent advice or the failure to file the objection before the deadline. First, the appellants are not experts in land registration or manorial law. They cannot be taken to have known the obscure consequences of a failure to file an objection in time without being told what they were. It is to be noted that the firm has not argued at any stage that the appellants are to be taken to have had any extended constructive knowledge as a result of section 14A(10) of the Limitation Act 1980. No doubt that was not argued for good reason, because whatever else might be said, Ms Scott and Mr Walker had, in April 2009 and before, taken reasonable steps to obtain expert legal advice. As a result the last part of section 14A(10) means that they should not "be taken … to have knowledge of a fact ascertainable only with the help of expert advice". It seems to me, though we have

not heard argument on the point, that it is likely that the consequences of the non-filing of the objection by the deadline were indeed a fact only ascertainable with the help of expert advice.

51. The second reason why, in my judgment, the judge was wrong to think that the material facts about the damage in this case was just the negligent advice or the failure to file the objection is that that the relevant material facts about the damage have to be such as would lead a reasonable person to consider it sufficiently serious to justify his instituting proceedings for damages against a solvent firm, not disputing liability. It is highly arguable on the evidence that Ms Scott did not know anything that would lead a reasonable person to sue. She had no reason to think she would be worse off. She understood that the costs were to be covered by the firm and not reclaimed from her, the case was going to be successful, and most crucially she appears to have had no inkling that the firm's negligence had turned a clear right to have the Ireby Fell title closed into a matter for the discretion of the adjudicator.

52. In these circumstances, in my judgment, the judge was wrong to determine as a matter of law that the facts pleaded in the defence and counterclaim meant that that the starting date for limitation purposes had to be April 2009. In my judgment, a trial of the facts will be needed before that question can be properly decided.

Issue 3: Should the new evidence from the appellants now be admitted on these appeals?

53. I have left consideration of the application to adduce new evidence until now, because it seems to me that the new evidence on the question of what Mr Baxendale told the appellants is irrelevant to the outcome of the appeal. It was agreed, as I have said, that we should look at the witness statements of the appellants *de bene esse*, and I have included reference to extracts from them in my chronological account of events above. But so far as the conversations with Mr Baxendale are concerned, the statements do no more than confirm what Mr Baxendale had said in the statement that was before the judge. Since there was no basis for the judge to reject Mr Baxendale's statement for the reasons I have given, I do not need to consider whether the statements could be admitted for those purposes on this appeal.

54. The only possible relevance of the new evidence is to Mr Balchin's appeal, since Mr Balchin's new statement gives an explanation for his 36-day delay after he became aware of the default judgment. That aspect of Mr Balchin's statement is contained in paragraphs 8-15. In my judgment, those paragraphs ought to be admitted because there seems to have been no issue before the judge as to the 36-day delay. The judge was only concerned with the lengthy delay of more than a year between the default judgment itself and the application to set it aside. In the circumstances, whether the new point taken by Mr de Waal is good or bad, Mr Balchin must be allowed to provide evidence as to a

period of delay that was not specifically relied upon below.

55. In these circumstances, whilst the *Ladd v. Marshall supra* approach is well known, it is not specifically applicable here. If it were, this particular evidence could not, with reasonable diligence, have been obtained before the hearing since the point was not thought to be in issue. The evidence obviously may have an important influence on the outcome in relation to this point at least, and is apparently credible. I would admit paragraphs 8-15 of Mr Balchin's statement.

Issue 4: Should the default judgment against Mr Balchin be set aside?

56. Part 13.3 of the CPR provides as follows in relation to default judgments entered under Part 12:-

> "(1) In any other case, the court may set aside or vary a judgment entered under Part 12 if –
>
> (a) the defendant has a real prospect of successfully defending the claim; or
>
> (b) it appears to the court that there is some other good reason why –
>
> (i) the judgment should be set aside or varied; or
>
> (ii) the defendant should be allowed to defend the claim.
>
> (2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly."

57. Mr. de Waal's main point before us was, as I have said, that the delay was excessive between Mr Balchin knowing about the judgment on 6th February 2014 and making his application on 14th March 2014. The judge had simply said that a delay of more than a year from the default judgment itself was too much in the current post *Mitchell* climate. Mr de Waal also raised half-heartedly the suggestion that Mr Balchin's estoppel defence arising from his adoption of the other appellants' defence and counterclaim, could not succeed. The judge had described the defence as shadowy and had said that he could not guess whether it ultimately had any prospect of success.

58. It was common ground that the principles enunciated in *Mitchell supra* and *Denton supra* in

relation to relief from sanctions are properly applicable to an application to set aside a default judgment. That said, I think one should start with the question under CPR Part 13.3(1)(a) of whether Mr Balchin has a real prospect of successfully defending the claim. It is noteworthy that the firm has not sought summary judgment against Ms Scott and Mr Walker on the grounds that the estoppel defence has no real prospect of success. In these circumstances, whilst I would not wish to be taken as deciding anything about how the defence may turn out at trial, I do not think it can be said that Mr Balchin has no real prospect of defending the claim for this very large sum in legal fees. Moreover, it would in my judgment be unjust if Mr Balchin were to be deprived of the right to defend the claim when his co-villagers are able to do so. Notwithstanding this view, it is necessary to approach the matter as the court laid down in *Denton.*

59. On the question of whether the delay was serious or significant, it plainly was. On the question of whether there was a reasonable excuse for that delay, there was, it seems to me, such an excuse for the period up to the date upon which Mr Balchin became aware of the proceedings and the judgment on 6th February 2014. It may be commented, however, that, taken together with Mr Balchin's personal difficulties, the news that he received on 6th February 2014 must have been quite overwhelming. He was faced with a potential charging order over his former matrimonial home for an alleged debt that he was not expecting of some £627,000.

60. Nonetheless, Mr Balchin seems to have done the reasonable thing of trying to trace his former solicitor and instructing him to apply to set aside the judgment. The delay of which Mr de Waal complains seems to have been caused by Mr Balchin's application for assistance with the costs because he was on benefits. In the exceptional circumstances of this case, I do not think that Mr Balchin's 36-day delay prevents there being a reasonable excuse for the delay between the default judgment and the application to set it aside. He behaved with reasonable promptitude bearing in mind the time that already elapsed since the judgment itself. The comparison with the 14-day period allowed for an acknowledgment of service was an unrealistic one from Mr Balchin's point of view. It is to be observed that it was he who decided that he should not wait any longer for funding and that he should raise the £80 necessary to issue the application himself.

61. The third stage of the *Denton* analysis is to consider all the circumstances of the case giving particular weight to factors (a) and (b). Applying that test, I have no hesitation in concluding that the default judgment should in this case be set aside. Mr Balchin was faced unexpectedly with a very difficult situation. Even having particular regard to the need for litigation to be conducted efficiently and at proportionate cost and to the need to enforce compliance with the rules, his delay was explicable and excusable in his very special circumstances. It would be unjust, as I have said, for the judgment to stand against him, whilst his co-defendants were allowed to proceed with their defence. Accordingly, in my view, the judge was wrong to refuse to set aside the default judgment against Mr Balchin.

Conclusions

62.For the reasons I have given, I would allow both appeals and set aside the judge's orders for summary judgment against Ms Scott and Mr Walker in both actions, and the default judgment against Mr Balchin in the first action.

Lord Justice Underhill:

63.I agree.

Lord Justice Moore-Bick:

64.I also agree.