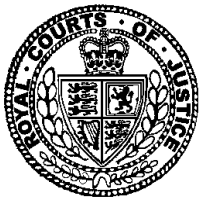

Neutral Citation Number: [2023] EWHC 2910 (KB)

Case No: QA-2022-000087

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2023

Before :

MRS JUSTICE ELLENBOGEN

- -

Between :

Ursula Riniker	**Appellant**
- and -	
Mostapha Al-Turk	**Respondent**

- -
- -

The Appellant appeared in person.
The Respondent appeared in person.

Hearing date: 23 January 2023

- -

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 17 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE ELLENBOGEN DBE

Mrs Justice Ellenbogen DBE :

1. With the permission of Martin Spencer J, the appellant appeals from the judgment of Her Honour Judge Baucher, who, by order dated 6 April 2022, struck out her appeal from the order of Deputy District Judge Morley, dated 7 November 2019, by which an interim charging order was made final and permission for which had been granted by order dated 18 September 2020 ('the Baucher Order'). The nature of the substantive appeal need not be set out in this judgment. As they did at all hearings below, both the appellant and the respondent appeared in person.

2. The Baucher Order recited the fact that the appellant had not complied with certain paragraphs of an order for directions which had been made, following a hearing, by HHJ Luba KC, dated 4 February 2021 ('the Luba Order'). By that order, the following requirements had been imposed, amongst others:

    i) The appellant was to prepare a fresh appeal bundle for the hearing of the appeal, compliant with section 6 of CPR Practice Direction 52B, the content of which was to be as specified in the order (paragraph 6);

    ii) The content of the appeal bundle was to be agreed, if possible, and, were it not to be possible, the respondent was to file and serve hard copies of an indexed and paginated supplementary bundle, no fewer than five days prior to the hearing of the appeal (paragraph 7);

    iii) No fewer than three days prior to the hearing of the appeal, the parties were to serve on each other and file with the court hard copy skeleton arguments (paragraph 8, as supplemented by requirements set out in paragraphs 9 and 10). By paragraph 11, unless a party had filed and served a skeleton argument, compliant with paragraph 8, s/he would be debarred from being heard on the appeal without the permission of the judge conducting it.

    iv) The appellant was obliged to serve on the respondent in advance, and bring in hard copy to the court for its use at the next hearing, an indexed and paginated bundle of any statutory material or caselaw to which either party had referred in his or her skeleton argument (paragraph 14).

3. The appellant had not appealed from the Luba Order, but, by four-page e-mail dated 15 February 2021, had requested that certain parts of it be set aside, under CPR 3.3(5)(a), on the basis that they had been made after the hearing, of the court's own motion, and were said to lack substantive justification for reasons which she set out. Within that e-mail, she asked that her application be considered at the full hearing of her appeal. No application had been made, formally, pursuant to Part 23 CPR and, at the time of hearing before HHJ Baucher, no part of the Luba Order had been set aside.

4. HHJ Baucher considered the appellant to have been in breach of the Luba Order. Having invited an oral application for relief from sanctions, which the appellant declined to make, of her own motion HHJ Baucher considered the principles set out in *Denton v TH White Limited* [2014] 1 WLR 3296, referring also to *Patel v Mussa* [2015] EWCA Civ 434, and refused relief from sanction, going on to strike out the appeal. It

is against that order that limited permission to appeal has been given. I shall return to the scope of the appeal later in this judgment.

5. In essence, by the ground of appeal for which permission has been granted, the appellant asserts that her application to set aside the Luba Order had been properly constituted, need not have been made under Part 23 CPR (though had been substantively compliant with that part), and that, pursuant to CPR 3.3(3), where the court proposes to make an order of its own initiative, and to hold a hearing for that purpose, it must give each party likely to be affected by that order at least three days' notice of that hearing. HHJ Baucher, it is said, did not comply with that requirement.

6. I have read the official transcript of the hearing before HHJ Baucher and the approved transcript of her judgment. I have also read the two-part transcript of the hearing which had taken place before HHJ Luba KC, on 4 February 2021. That hearing had been listed to consider the substantive appeal from the order of DDJ Morley, but the appellant had been unable to produce, for the court or the respondent, copies of the authorities and statutory materials upon which she intended to rely and the respondent had not complied with an earlier requirement that he produce a skeleton argument. Having heard from the parties on both such matters, Judge Luba KC adjourned the hearing, stating that he would also make an unless order requiring the respondent to provide a skeleton argument. He concluded the hearing by stating that his order would be sent out by post to the parties. That order, dated 5 February 2021, included the directions of which the appellant was found by HHJ Baucher to have been in breach. From the transcripts with which I have been provided, it does not appear that they had been canvassed with the parties in the course of the hearing before Judge Luba, though paragraph 11, in so far as it related to the respondent, had been the subject of submissions and paragraph 14 broadly reflected the basis upon which the hearing of the appeal had been adjourned, at least in so far as it required the appellant to produce a bundle of legal materials upon which she herself wished to rely.

The parties' submissions
The appellant

7. The appellant produced detailed skeleton arguments, supplemented by focused oral submissions. In summary, she contended that, albeit made following a hearing at which both parties had been present, the directions made by Judge Luba KC which she had applied to set aside had been made of his own motion, and without the benefit of the parties' submissions. In such circumstances, she had been entitled to make, and had made, an application under CPR 3.3(5)(a) to set aside the affected parts of his order, in a form compliant with paragraphs 2.1 and 3.2 of PD 5B. Having done so, Judge Luba's order ought to have been deemed suspended pending the determination of her application, and she ought not to have attracted criticism for not having complied with it. Furthermore, she submitted, albeit that her application had in fact complied with Part 23 and PD 23A, neither of which obliged a party to use Form N244, CPR 3.3(5)(a) did not require that an application be made in the form for which Part 23 provided (and would, otherwise be redundant). Accordingly, Judge Baucher had improperly (1) refused to consider, or (2) rejected, her application. The fee payable upon issue of an application made on Form N244 was not required in circumstances in which the substantive application related to matters on which the court had not sought prior submissions at a hearing and which, thus, sought to achieve the court's

compliance with the rules in accordance with which it ought to operate and which litigants had the right to expect. By contrast, the fee required for the lodging of Form N244 reflected the need for the court to list a hearing 'purely' for the benefit of the applicant. In any event, submitted the appellant, any failure to comply with Part 23 (should compliance have been required) would have constituted no more than an error of procedure which, per CPR 3.10, would not have invalidated any step taken in the proceedings and would have been capable of remedy by the court. In the appellant's submission, she had been under no obligation to apply for relief from sanction, or to have appealed from the Luba Order. In any event, Judge Baucher had misapplied the principles set out in *Denton v TH White* [2014] EWCA Civ 906 and had had regard to irrelevant caselaw. She had mechanically addressed limbs one and two of the *Denton* test and had been unable meaningfully to address limb three having been unaware of the material background to the appeal and of the case papers. Her approach had denied the appellant's right to a fair hearing under Article 6(1) ECHR and section 6(1) of the Human Rights Act 1998. It followed that her order should be set aside and the substantive appeal from the order of Deputy District Judge Morley reinstated for hearing.

8. In support of the above submissions, the appellant relied upon a number of earlier decisions, some of which being simply examples of cases in which an application made under CPR 3.3(5)(a) had been considered on its merits, or a direction given that the affected party could apply for the substantive order to be set aside, varied or discharged within seven days, in accordance with CPR 3.3(5)(b). On the points of principle, she pointed to the dicta of Dyson LJ (as he then was), in *Collier v Williams* [2006] EWCA Civ 20, in particular those at [29] and [36], submitting that his logic applied equally to orders made of the court's own motion:

> *'29. …if it were decided by this court that an applicant cannot, as a party affected by an order, invoke CPR 3.5(5), but is obliged to appeal if he wishes to challenge an order made without a hearing, that would deter applicants from asking for their applications to be disposed of without a hearing.'*
>
> …
>
> *36. We would point out …that there is no express provision which prevents an unsuccessful applicant from asking the court to reconsider the matter (rather than appeal) in the event that the court makes an order without a hearing even where the applicant has requested a hearing, ie in a case to which CPR 23.8(c) unquestionably applies.'*

The appellant further relied upon a judgment of Deputy Master Henderson; *Al-Hasani v Nettler & Another* [2019] EWHC 640 (Ch), relating to an application under CPR 3.3(5)(a) to set aside a costs order which had been made without a hearing [172]:

> *'…the Claimant had a right to have the order set aside or varied, either directly under CPR 23.10 or indirectly under CPR 23.8(c), CPR 23A PD 11.2 and CPR 3.3(5). In my judgment, on the Claimant's application I should consider the matter afresh. That is because the purpose of the various rules is to ensure that justice is done by enabling*

> *a party to be heard who was not given the opportunity to be heard. If that opportunity was restricted by requiring the applicant to show a change of circumstances or that relevant facts had not been taken into account or that extraneous factors had been or that no reasonable tribunal could have made the order sought to be set aside or varied, then the opportunity to be heard would be unfairly and unjustly curtailed.'*

9. In the course of her oral submissions, the appellant took me through those paragraphs of the Luba Order which she had applied to set aside and explained the bases of that application. Her explanation need not be rehearsed in detail, but may be summarised as arising from her belief that, as at the date of the Luba Order, she had already provided all necessary and relevant material, to the court and the respondent, in an appropriate form, and in accordance with earlier orders, and ought not to have been obliged to do so again, at further cost, whether or not in a different format. Furthermore, she had not had access to a photocopier during the pandemic, which had provided a practical obstacle to compliance with certain directions.

The respondent

10. The respondent did not demur from the appellant's position that the paragraphs of the Luba Order which she had applied to set aside had not been the subject of prior discussion or submissions. He acknowledged that he had received a hard copy of the appellant's skeleton argument in advance of the hearing before Judge Baucher and could not be sure whether he had also received an electronic copy, though he thought not. Whilst formally objecting to the appeal from the Baucher Order, and stating his presumption that Judge Baucher had acted correctly and that he wished to support her reasons, the respondent told me, *'I want a hearing which will determine the underlying issues; the injury she has caused to my property. I want that to happen. I just want to face her and talk about what transpired in 2007 in the simplest way possible and that's why I've been pressing for a court of record.'* I understood that statement to indicate that he desired a hearing of the appellant's substantive appeal from the order of DDJ Morley.

Discussion and conclusions

11. As I have noted above, from the transcripts which I have seen and the parties' submissions, it would appear that the directions within the Luba Order to which Ms Riniker takes objection were made without prior representations being invited from the parties, at least in significant part. The matter had had a protracted history and it would seem likely that, given the judge's view of the need for an adjournment, he considered it sensible to make directions designed to ensure that the substantive appeal would be effective when re-listed and that all relevant documentation and submissions would be collated in a form readily accessible and comprehensible by the court and both parties.

12. The appellant's e-mail to the court, dated 15 February 2021, copied to the respondent, had, as its subject, the County Court claim number; the title of proceedings; and the words *'Application under CPR 3.3(5)(a)'*. In upper case letters, it was marked, *'FOR THE ATTN. OF JUDGE SAUNDERS WHO RESERVED THIS CASE TO HIMSELF BY ORDER OF 18.9.20.'* It opened with the following text, in bold typeface:

> *'Appellant's application, as of right, under CPR 3.3(5)(a) to vary the Court's Order of 4/5.2.2021 by setting aside some parts of the Order which were made by Judge Luba QC's of his own initiative not at, but after the aborted hearing of 4.2.21.*
>
> *NB. This Application is made within 7 days of service of the above Order.'*

Having set out the chronology dating from the grant of permission to appeal, the appellant went on to identify those parts of the Luba Order which were said to have been made on his own initiative, together with detailed reasons for her contention that each ought to be set aside. She concluded her e-mail with a request that the court not waste any more time and cost, but deal with her application under CPR 3.3(5)(a), at the full hearing of her appeal. Her name, postal address and telephone number appeared at its foot.

13. CPR 3.3 provides:

> '**Court's power to make order of its own initiative**
> **3.3**
> (1) Except where a rule or some other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.
> (Part 23 sets out the procedure for making an application)
>
> (2) Where the court proposes to make an order of its own initiative –
> (a) it may give any person likely to be affected by the order an opportunity to make representations; and
> (b) where it does so it must specify the time by and the manner in which the representations must be made.
>
> (3) Where the court proposes –
> (a) to make an order of its own initiative; and
> (b) to hold a hearing to decide whether to make the order, it must give each party likely to be affected by the order at least 3 days' notice of the hearing.
>
> (4) The court may make an order of its own initiative, without hearing the parties or giving them an opportunity to make representations.
>
> (5) Where the court has made an order under paragraph (4) –
> (a) a party affected by the order may apply to have it set aside, varied or stayed; and
> (b) the order must contain a statement of the right to make such an application.
>
> (6) An application under paragraph (5)(a) must be made –
> (a) within such period as may be specified by the court; or
> (b) if the court does not specify a period, not more than 7 days after the date on which the order was served on the party making the application.

> (7) An application under paragraph (5)(a) shall be considered at an oral hearing unless the court decides and states in an order that the application is totally without merit.
>
> (8) If the court decides under paragraph (7) that the application is totally without merit, an application under paragraph (5)(a) may be made for reconsideration without an oral hearing; and
>
> (9) If the court of its own initiative strikes out a statement of case or dismisses an application (including an application for permission to appeal or for permission to apply for judicial review) and it considers that the claim or application is totally without merit –
> (a) the court's order must record that fact; and
> (b) the court must at the same time consider whether it is appropriate to make a civil restraint order.'

14. Thus, under rule 3.3(4), Judge Luba KC had power to make an order of his own initiative, without having given the parties an opportunity to make representations, but, having done so, rule 3.3(5)(a) was engaged. That rule is silent on the form which an application thereunder must take, but contains no express derogation from the general rule set out in CPR 23.3(1), nor permission of the nature contemplated by 23.3(2)(a), recited below:

> '**Application notice to be filed**
> 23.3—(1) The general rule is that an applicant must file an application notice.
> (2) An applicant may make an application without filing an application notice if—
> (a) this is permitted by a rule or practice direction; or
> (b) the court dispenses with the requirement for an application notice.'

15. For the purposes of Part 23, rule 23.1 defines 'application notice' to mean 'a document in which the applicant states his intention to seek a court order' and 'respondent' to mean '(a) the person against whom the order is sought; and (b) such other person as the court may direct'. Thus, it does not direct service on an individual simply by virtue of his or her status as a party to proceedings. Rule 23.3 sets out the general rule that an applicant must file an application notice, which, per rule 23.4(1), must be served on each respondent, as defined.

16. Rule 23.6 sets out that which an application notice must include:

> '**What an application notice must include**
> 23.6 An application notice must state—
> (a) what order the applicant is seeking; and
> (b) briefly, why the applicant is seeking the order.
> (Part 22 requires an application notice to be verified by a statement of truth if the applicant wishes to rely on matters set out in his application notice as evidence.)'

It is supplemented by paragraphs 2.1 and 2.6 of PD 23A:

> ‘**Application notices**
> 2.1 An application notice must, in addition to the matters set out in rule 23.6, be signed and include:
> (1) the title of the claim,
> (2) the reference number of the claim,
> (3) the full name of the applicant,
> (4) where the applicant is not already a party, his address for service, including a postcode. Postcode information may be obtained from www.royalmail.com or the Royal Mail Address Management Guide, and
> (5) either a request for a hearing or a request that the application be dealt with without a hearing.
>
> (Practice Form N244 may be used.)
>
> …
>
> 2.6 If the application is intended to be made to a judge, the application notice should so state.’

17. Paragraphs 2.1 and 2.3 of PD 5B provide:

> **Communications and documents which may be sent by e-mail**
> 2.1 Subject to paragraphs 2.2 and 2.3, a party may e-mail the court and may include one or more specified documents to or in that e-mail.
> …
> 2.3 In the County Court—
> (a) if a fee is payable in order for an e-mailed application or other document to be filed with the court, a party must, when e-mailing the court—
> (i) both—
> (aa) provide a Fee Account number which the party has authority to charge for the applicable fee; and
> (bb) authorise the court to charge the applicable fee to that Account; or
> (ii) outline the preferred method of payment (credit or debit card) and provide the court with a contact number to take payment over the telephone.
>
> (Further information about using the Fee Account service may be found at: https://www.justice.gov.uk/courts/fees/payment-by-account)’

Additional ‘technical specifications’ are set out at paragraphs 3.1 to 3.6, which I need not set out.

18. By paragraph 2.4 of PD 5B, the following provision is made:

> 2.4 The court may refuse to accept any application or other document, including any attachment, e-mailed to the court where—
> (a) …;
> (b) a fee is payable pursuant to paragraph 2.3(a) and—
> (i) the sender has not complied with paragraph 2.3(a); or

(ii) the sender has complied with paragraph 2.3(a) but the court has not been able to charge or take the fee; or
(c) the sender has not complied with paragraph 2.3(b) to (d).'

19. Having regard to the above provisions, it is clear that:

i) Part 23 does not require that an application notice take a particular form. The use of Practice Form N244 is permitted, but not mandated, by paragraph 2.1 of PD 23A. In filing a document which satisfied the definition in rule 23.1, the appellant had filed an application notice.

ii) That application notice had complied with the requirements imposed by rule 23.6. (There had been no need for a statement of truth in the absence of a wish to rely upon matters set out in that notice as evidence.)

iii) The notice had also complied with the requirement made by paragraph 2.6 of PD 23A and with all requirements imposed by paragraph 2.1 of that PD, other than that for a signature (whether or not by mechanical means, as permitted by CPR 5.3 and 5A PD.1).

iv) Whilst it is not clear whether the application had been formally served on the respondent to this appeal (inasmuch as it is not clear whether all requirements imposed by paragraph 4.1 of PD6A had been satisfied), it had been copied to him and, as the orders sought were not being sought against him, he was not a respondent for the purposes of rule 23.1.

v) In the absence of the appellant's compliance with paragraph 2.3(a) of PD 5B, paragraph 2.4 of that PD conferred a discretion upon the court to refuse to accept her application, but did not oblige it to do so. In fact, the court had not refused to accept it when submitted, or sought payment of a fee.

20. Thus, the only omissions from the mandatory requirements for an application notice had been the appellant's signature and, this having been an application made by e-mail, the information required by paragraph 2.3(a) of PD 5B.

21. I reject the appellant's submission that an application made under CPR 3.3(5)(a) need not comply with Part 23, both as a matter of principle and having regard to the wording of the rules and practice directions considered above. The distinction for which she contends between an application to set aside an order made of the court's own motion and an application on the applicant's initiative is misconceived. First, the court is not acting in breach of the CPR by making an order without hearing from the parties; it is acting in accordance with the power expressly conferred by rule 3.5(4). Secondly, there is good reason for the requirement that an application have the content prescribed by Part 23 and PD 23A, in the absence of which it is likely to be difficult for the court and other parties to proceedings to understand the nature and bases of the application being made. Thirdly, there is no reason why a fee should not be payable where an applicant applies to set aside orders which, properly considered, might well have substantive merit. None of the authorities on which the appellant relied was concerned with the way in which an application under CPR 3.5 is to be made, as distinct from the

substantive right to bring it. The fact that an application is required to comply with Part 23 does not render the rule which confers the entitlement to make it redundant.

22. CPR 3.10 provides:

> '**General power of the court to rectify matters where there has been an error of procedure**
> 3.10 Where there has been an error of procedure such as a failure to comply with a rule or practice direction-
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
> (b) the court may make an order to remedy the error.'

23. Under that rule, the court has power to waive an error and to declare the irregular document to be valid, notwithstanding its irregularity. As the editorial notes to Part 3 observe, such an order is likely to be made in cases in which the defect is neither serious nor significant and has had no prejudicial effect on the other party.

24. At paragraph 8 of the transcript of her judgment, Judge Baucher said this:

> *'In relation to the order of HHJ Luba,* [the appellant] *says that she was not required to comply with it because she made an application pursuant to CPR3.1.5a* [sic] *to set aside HHJ Luba's order. She submits that part of the order was made in the attendance of the parties and part in their absence. I know not what directions were or were not considered in front of the parties, but what I do know is that the hearing was on notice, both parties were present, and, in any event,* [the appellant] *has not made an application pursuant to CPR 23. She has simply written to the court on 15 February 2021, a four-page e-mail setting out why she is not happy with HHJ Luba's decision. That is not an application. It is therefore not an extant application. The appellant, like a represented party, should have made an application to set aside the order.* [The appellant] *says, "the Court should have ordered me to do so". It is not for the Court to advise parties in relation to matters. Further, the appellant, in the absence of the variation of that order, should have complied with the order of HHJ Luba.'*

25. So far as apparent from the transcript of the hearing before her and from her judgment, Judge Baucher did not analyse the requirements for a validly constituted application to set aside the Luba Order. She did not direct her mind to the nature and/or effect of any procedural irregularity in the application notice, or, hence, to whether an order to remedy it could and should be made. That was an error of law; on any reasonable view, the absence of a signature in the particular circumstances, and the appellant's failure to have set out whether her preferred method of payment was by credit or debit card, were minor and had caused no prejudice to the respondent, who had made no submission to the contrary. The court itself had not refused to accept the application on the basis of the latter defect, as it could have done, and the first occasion on which the application had arisen for substantive consideration had been before Judge Baucher, almost 15 months after it had been filed. In accordance with the overriding objective, such defects

could and should have been waived, enabling the substantive application to be heard, if appropriate with a requirement that the appellant pay the requisite application fee.

26. That error was compounded by Judge Baucher's conclusions that: (1) the appellant required relief from sanctions for her non-compliance with the Luba Order; (2) relief should not be granted; and (3) in consequence, her appeal should be struck out, each of which constituting a further error of law. Those conclusions were set out at paragraphs 9 to 14 of the approved transcript of her judgment:

> *'9. I have invited Ms Riniker today to make an application for relief from sanction. She has indicated there is no need for her to do so. However in assistance to her as a litigant in person, I am going to consider the case on the basis that she has made an application for relief from sanction. In other words, in accordance with the Denton principles and consideration of CPR 3.9, should the Court grant relief from sanction for failure to comply with the order of HHJ Luba?*
>
> *10. Going through the three-stage approach, (a) is the breach significant? In this instance it is significant because this Court needs the opportunity to prepare prior to hearing any submissions. Ms Riniker has said in her submissions she believes this to be an extremely difficult matter. She has referred to no less than nine legal authorities that she wishes to rely upon, and she says that it is very complex from the legal perspective. It follows, therefore, that it is essential that the Court has the appeal bundle, the transcript of the proceedings and the skeleton arguments from the parties and the bundle of legal authorities, all as per the order of HHJ Luba. Therefore, is it significant? Yes.*
>
> *11. Is there good reason for it? The only reason is that Ms Riniker believes that she did not need to comply with the order and that it was sufficient just to write to the Court in a four-page letter explaining why she did not. At no stage did she appeal that decision or make an application to set it aside. On appeal she would have needed to persuade the higher court that it was a decision which the judge was not entitled to make. It clearly was. Why, because the whole idea was to case manage this, as she puts it, "complex appeal" so that whoever heard it could proceed. A similar view would have been taken I have no doubt on a formal application to set the order aside. In the absence of compliance with HHJ Luba's order this appeal cannot proceed.*
>
> *12. I then have to turn to all the circumstances of the case and Denton mandates that the application for relief from sanction will not automatically fail because the Court will consider all the circumstances of the case, so as to enable it to deal justly with the application. However, I have to give particular weight to the need for (a) litigation to be conducted efficiently and at a proportionate cost and to enforce compliance with rules, practice directions and orders. In addition, the promptness of the application is a relevant circumstance to be weighed in the balance along with all the circumstances. The reality is there has not been an application and my invitation to do so was not considered, but I have done so in accordance with the overriding objective.*

> *13. In summary I have to take into account the seriousness and significance of the breach and the explanation. The more serious and significant the breach is, the less likely it is that relief will be granted unless there is good reason for it. The Court of Appeal in the case of Patel v Mussa [2015] EWCA Civ 434 considered whether a judge at first instance was entitled to strike out a permission to appeal matter in the absence of a bundle and skeleton argument, albeit those who were provided at a very late stage and the Court of Appeal upheld that case management decision.*
>
> *14. In my view, there is no good reason for this breach. It is serious and given the lengthy history in relation to this matter and the very careful order drawn by HHJ Luba to ensure that such did not occur and the appeal could proceed, I have no hesitation in refusing relief from sanction. It follows that the appeal will be struck out.'*

27. As to those conclusions, in circumstances in which an application (albeit one containing minor procedural errors) had been made to set aside the relevant parts of the Luba Order under CPR 3.3(5)(a), but had yet to be determined, the appellant's non-compliance with that order, without more, could not be said to require an application for relief from sanction, or the court's consideration of CPR 3.9 of its own motion. At the very least, and following the waiver of the minor procedural errors which I consider to have been appropriate, it was incumbent upon Judge Baucher to consider the substantive merit in the application to set aside the Luba Order before proceeding to address the issue of relief from sanctions. That she did not do.

28. Further, in my judgement, her approach to the application which she deemed to have been necessary was itself flawed. The court has discretion to grant relief from sanctions of its own initiative, where no application has been made, though such discretion will be exercised sparingly: *Hadi v Park* [2022] EWCA Civ 581. I bear in mind that decisions as to whether or not to grant relief from sanctions are discretionary and highly case-sensitive. Appeal courts will not interfere with a lower court's decision on such matters unless satisfied that the lower court erred in law, erred in fact, or reached a conclusion which fell outside the generous ambit within which reasonable disagreement is possible. (See, for example, *Abdulle v Commissioner of Police of the Metropolis* [2015] EWCA Civ 1260.) On an application for relief from sanction, the well-known guidance set out in *Denton* requires a three-stage assessment: first, the identification and assessment of the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages r.3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages; secondly, consideration of why the default occurred; and, thirdly, evaluation of all the circumstances of the case, so as to enable the court to deal justly with the application, including the needs identified by CPR 3.9(1)(a) and (b), namely that litigation be conducted efficiently and at proportionate cost; and to enforce compliance with rules, practice directions and orders.

29. In this case, stage one required the judge to have regard to the seriousness and significance of the relevant non-compliance with the Luba Order, which, in turn, essentially, required consideration of the bases for the appellant's application to set the relevant parts aside; if the material in question had already been provided by the appellant in suitable form and/or could not be provided in an alternative format for

practical reasons, those were matters material to the gravity and significance of the non-compliance, which were likely to have rendered it unnecessary to spend much time addressing stages two and three. Judge Baucher proceeded on the basis that it was 'essential' that the directions imposed by Judge Luba be complied with, without considering whether the material already filed would enable her to consider the appeal, or how practicable compliance with any of his directions was. Without having undertaken that exercise, she could not properly have concluded that the appellant's non-compliance had been serious.

30. In any event, for the purposes of stage two, non-compliance had occurred because the appellant had made an application to set aside the Luba Order, the determination of which, at a hearing (as required by CPR 3.3(7)), she awaited and which necessarily entailed a challenge to the need for compliance — a good reason. Judge Baucher concluded that no appeal or application to set aside had been made. Of course (see above), it had not been necessary to appeal, and the judge's conclusion was informed by her erroneous characterisation of the appellant's e-mail dated 15 February 2021. Similarly, she had not been in a position to 'have no doubt' that a similar view would be taken on an application to set aside because she had not considered (a) that application in detail, or (b) any alternative means by which the aims of the Luba Order could be satisfied.

31. With the exception of the matters to which the judge expressly alluded at paragraph 12 of the transcript, no further circumstances were identified as having been material to her assessment at stage three. When considering all the circumstances of the case for that purpose, it is difficult fairly to conclude that it was the appellant's non-compliance which had prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost. In my judgement, Judge Baucher's approach to each limb of the *Denton* test and the conclusion which she reached at each stage fell outside the generous ambit within which reasonable disagreement was possible. For the sake of completeness, whilst, in all the circumstances, both points are moot, I do not consider that the judge erred in:

    i) having made reference to *Patel v Mussa*, by way of example of a case in which the Court of Appeal had upheld the lower court's right to impose a severe sanction for a litigant's non-compliance with case management orders; or in

    ii) failing to have acted in accordance with the notice requirement imposed by CPR 3.3(3) — she had made no proposal to hold a hearing to decide whether to make an order of her own initiative; rather, she had raised the matter in the course of a hearing which had been listed for a different purpose.

32. Furthermore, under CPR 3.8(1), 'Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.' The only direction within the Luba Order which carried a sanction in the event of non-compliance was paragraph 8. The sanction imposed was set out in the unless order made by paragraph 11 (with emphasis added):

'UNLESS a party has filed and served a skeleton argument complying with paragraph 8 of this Order they shall be debarred from being heard on the appeal without the permission of the Judge conducting the appeal'.

Thus, even if Judge Baucher had concluded, permissibly, that relief from sanction was required and ought to be refused, the nature of the sanction imposed by paragraph 11 of the Luba Order required her to go on to consider whether she should, nevertheless, permit the appellant to be heard on the appeal. She did not consider that question, instead ordering that the appeal be struck out, without considering the proportionality of the Draconian sanction which she herself had decided to impose. That, too, was an error of law.

Disposal

33. It follows that the appeal is allowed and I turn to consider the appropriate disposal, itself engaging consideration of a further ground of appeal for which the appellant contended that, on a proper construction of his order, Martin Spencer J had not refused permission. In broad summary, and recognising that the way in which it was articulated was more nuanced, that ground was that, Judge Saunders having reserved the matter to himself, the appeal from the order of DDJ Morley and related applications ought to have been listed before him, such that Judges Luba and Baucher had each lacked jurisdiction to determine the appeal, and to make the orders which each of them made. The simple answer to this point is that it is clear that Martin Spencer J did not permit that ground of appeal to proceed, at paragraph (iii) of his observations understandably describing the challenge to the jurisdiction of either judge as being 'misconceived'.

34. In my judgement, the appropriate order is that the substantive appeal from the order of DDJ Morley be reinstated. The appellant's application to set aside the relevant provisions of the Luba Order be listed for substantive consideration by a Circuit Judge, at the earliest practicable opportunity, at an inter partes hearing at which any necessary and appropriate further or alternative directions should also be considered. Given the time which has elapsed since the making of the appellant's application and the fact that, at no point prior to the hearing before Judge Baucher did the court refuse to accept that application under paragraph 2.4 PD 5B, I do not make that listing contingent upon payment by the appellant of the fee which would usually be payable.

35. The appellant is to file a copy of this judgment and of the order which reflects it at the Central London Civil Justice Centre, as soon as reasonably practicable and no later than seven days from the date on which that order is sealed.

Costs

36. At the end of the hearing, each party made contingent submissions as to costs. On the hypothesis that she would succeed in her appeal from the Baucher Order, the appellant submitted that costs should follow the event, and would be lower than those which would have been charged and recoverable by a lawyer. She invited me to consider the fact that she did not have an office and needed to travel to a library in order to undertake certain research and to photocopy documents. She stated that she had made a *'tremendous commitment to it all and* [had] *put in a tremendous amount of work'.*

Nevertheless, she had discounted the sum claimed to exclude time engaged in reading irrelevant judgments or born of the need to make additional photocopies, when the copier had malfunctioned.

37. The total sum claimed in costs and expenses is £4,645.07, of which £579.07 represents disbursements. The balance represents a total of 214 hours variously engaged in research; preparation; drafting documents and attending the hearing of her appeal, charged at the hourly rate of £19.00 for which paragraph 3.4 of PD 46 provides.

38. The respondent told me that all he wanted was recompense for injury to property. The appellant had submitted enormous expenses, so whatever she wanted from him, he wanted from her. Whilst stating that he could not establish dishonesty on the appellant's part, he considered that half of the time for which she had claimed had been fabricated. Acknowledging that she had spent a lot of time dealing with the appeal, so had he. Even if she were to succeed in her appeal, she should not recover any expenses, he submitted.

39. I consider it appropriate that costs should follow the event; the respondent maintained his formal resistance of the appeal throughout and the assertion recorded at paragraph 10 above, was not made until the end of his submissions.

40. I bear in mind the provisions of CPR 46.5, concerning the costs of litigants in person, including rules 46.5(4)(a) and (b), which require me to have regard to the time 'reasonably spent' on doing the work in question. I do not doubt the appellant's commitment to her appeal, or the fact that she has undertaken a great deal of work in relation to it, both of which evident from the papers and her submissions, but I do not accept that all such time has been reasonably spent, or that the sum to which it gives rise is proportionate to the issues engaged on appeal. Doing the best that I can on summary assessment, I consider it appropriate to award the applicant her disbursements in full, in addition to a sum representing 30 hours' work, namely £570.00. I order that the respondent pay the total sum (being £1,149.07) to the appellant, in cleared funds, within 28 days of the date of this judgment, that is by 4:00pm on 15 December 2023.