



Neutral Citation Number: [2019] EWHC 2716 (QB)

Appeal Ref: QA/2019/000008

Case no.: D35YJ854

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE CENTRAL LONDON CIVIL JUSTICE CENTRE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/10/2019

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

Between :

Andreas Michael

- and -

Eleanor Lillitos

Appellant

Respondent

Annette Cafferkey (instructed by **PLP solicitors**) for the **Appellant**
Tom Restall (instructed by **Debenhams Ottoway**) for the **Respondent**

Hearing date: 10 October 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE STEYN DBE

Mrs Justice Steyn :

1. This is an appeal against an order made by Recorder E. Cohen, sitting in the Central London Civil Justice Centre, on 9 November 2018, by which he refused the Appellant's application for relief from sanction. Permission to appeal was granted following consideration of the papers by Stewart J on 2 August 2019.

Factual and procedural background

2. The Appellant is an accountant. The Respondent has been the Appellant's landlord in respect of business premises at 497 Green Lanes for more than 30 years.
3. In February 2017, the Respondent issued a claim by which she sought rent arrears from the Appellant in respect of the 1st and 2nd floors of 497 Green Lanes. The amended claim form issued on 7 March 2018 sought the sum of £62,946.46 plus costs. This figure was made up of:
 - i) Rent arrears of £36,000 claimed to be due in respect of the 1st and 2nd floors of 497 Green Lanes;
 - ii) Reimbursement of £15,782.24 in respect of business rates which the Respondent had paid to the local authority and for which she claimed the Appellant was impliedly responsible; and
 - iii) Interest on these two principal sums.
4. In his defence and counterclaim:
 - i) The Appellant pleaded that in or about 2008, a ceiling in the property collapsed. As a result, the Appellant returned possession of the 2nd floor to the Respondent and the sum payable by way of rent reduced to £300 per month.
 - ii) The Appellant's case was that this sum of £300 per month was further reduced to account for accountancy services that the Appellant provided to the Respondent and her husband. He contended he was entitled to set off these fees.
 - iii) The Appellant also sought to set off damages for the disrepair of the property and costs which he had incurred in relation to its repair.
 - iv) As regards the claim for business rates, the Appellant's case was that there was no express or implied clause in the tenancy agreement imposing responsibility for business rates upon him.
5. In August 2018 the Appellant issued a claim for a new lease under Part II of the Landlord and Tenant Act 1954.
6. On 12 September 2017 District Judge Dias, sitting at the County Court at Edmonton, made an order consolidating the two claims and making provision for the service of an amended defence and counterclaim by the Appellant and a reply and defence to counterclaim by the Respondent.

7. The recital to the order made on 12 September recorded:

“AND UPON the Defendant agreeing to pay £300 per calendar month to the Claimant in mesne profits in respect of the first floor of the subject property, with neither party admitting as to liability for the same and without prejudice to the parties’ contentions regarding the monies payable under the terms of occupation of the subject property; such payment of £300 per calendar month shall be made by bank transfer.”
8. I draw attention to the fact that this recital recorded that payments should be made by bank transfer. It did not specify when those payments should be made. Miss Cafferkey, Counsel for the Appellant informed me that the method of payment was not the subject of discussion at the hearing on 12 September 2017.
9. Following this order, on 1 November 2017, the Appellant made a payment by cheque in the sum of £600, in respect of September and October. On 21 November 2017, the Appellant made a further payment by cheque in the sum of £300 in respect of November.
10. On 10 January 2018, the Respondent issued an application for an unless order on the basis that the Appellant has failed to pay instalments due on 1 December 2017 and 1 January 2018. In the application, the Respondent also relied upon the fact that the payments in respect of September and October had been late and had not been made, as agreed, by bank transfer.
11. The matter came before Deputy District Judge Naidoo for a case management conference on 28 February 2018. The Respondent had not, at the time of the hearing, received any payment in respect of December, January or February. The Appellant’s evidence was that he had sent a cheque to the Respondent for £900 (i.e. covering those three months) the day before.
12. The Deputy District Judge made an order that:

“Unless the Defendant (i) pays to the Claimant by bank transfer the sum of £1,200 by 4pm on 1 March 2018 and (ii) thereafter pays to the Claimant by bank transfer the sum of £300 by 4pm on the first day of each month, the Defence and Counterclaim shall be struck out and judgment entered for the Claimant.”
13. The Deputy District Judge also made various case management orders, addressing pleadings and all other stages to trial, as well as an order for a stay of proceedings for 1 month to enable the parties to engage in alternative dispute resolution, including mediation, if agreed.
14. The Appellant duly complied with para 1(i) of the unless order by making a payment of £1,200 by bank transfer, by the required time.
15. As the Judge found, the Respondent received a cheque from the Appellant in “very early March 2018” in the sum of £900 (Judgment, para 11). The Respondent questions whether the Appellant had in fact sent the cheque prior to the hearing on 28

February 2018, given the envelope in which it arrived had a postmark of 1 March 2018. The Judge considered that the precise date did not matter; it was clear the Respondent received the cheque in very early March and forwarded it to her solicitors on 15 March 2018.

16. The Appellant did not make a payment of £300 by bank transfer on 1 April 2018. On 4 April 2018, the Respondent's solicitors wrote to the court in these terms:

“Pursuant to the Order dated 28 February 2018, copy enclosed, paragraph 1 directed that unless the Defendant pay the Claimant the sum of £300.00 on the first day of each month, the Defence and Counterclaim shall be struck out and judgment entered for the Claimant.

The Defendant has failed to pay the sum of £300.00 on 1st April 2018, or at any time thereafter. As a result, the Defence and Counterclaim has automatically been struck out.

We therefore enclose our request for judgment in this matter. Judgment has been requested in the sum of £63,252.90 which is representative of the amount claimed (as per the amended claim form issued on 7 March 2018) and interest from the date of issue to today's date, amounting to £306.44. ...” (emphasis added)

17. The Respondent's solicitors letter informed the court that the Appellant had failed to pay the sum of £300 on 1 April. The letter made no reference to the fact that the Claimant's solicitors were holding a cheque in the sum of £900 made by the Appellant in favour of the Respondent. I suggested to Mr Restall, Counsel for the Respondent, that stating in a letter to the court that the Appellant had failed to pay the sum of £300 on 1 April 2018 without mentioning that the Respondent had, nearly a month earlier, received a cheque in the sum of £900 from the Appellant, which cheque her solicitors still held for her, was lacking in frankness. Mr Restall candidly explained at the hearing before me, on instructions, that the Respondent's solicitors had forgotten that they had the cheque. This was not a point of which the Appellant was aware until the oral hearing before me or of which Recorder Cohen was made aware.
18. It is apparent that by 20 April 2018 the Respondent's solicitors had realised they still held the cheque because on that date they wrote to the Appellant's solicitors in these terms:

“We look forward to receiving a response to our letter dated 11 April 2018, to include the Booking Form and Mediation Agreement, alongside your cheque for £540.00 made payable to CEDR Services Limited.

On a separate note, you may recall that at the hearing on 28 February 2018, your client told the court that he had sent a cheque to Mrs Lillitos in respect of the December 2017, January 2018 and February 2018 rent. This cheque was subsequently superseded by the bank transfer of

£1,200 which was made by your client on 1 March 2018, as per the Order dated 28 February 2018. We therefore enclose the cheque in order that you may destroy it or return it to your client. We also enclose a scan of the envelope which, as you will note, was date stamped by Royal Mail on 1 March 2018.”

19. The Respondent’s solicitors did not send the Appellant’s solicitors a copy of their letter of 4 April 2018 to the court, or otherwise inform the Appellant that they had applied for judgment.
20. On 18 May 2018 judgment was entered in favour of the Respondent. Deputy District Judge Hussain’s order was drawn on 8 June 2018 and states: “Judgment for the Claimant in the sum of £63,252.90 plus interest of £306.44 and costs of £3,247.33”. The Appellant received this order on 12 June 2018, having been unaware until then that the Respondent had applied for judgment.
21. On 19 June 2018 the Appellant made a bank transfer to the Respondent in the sum of £1200, in respect of rent due for April, May, June and (prospectively) for July, and set up a standing order for subsequent months. The Appellant issued an application for relief from sanction on 21 June 2018.
22. The Appellant’s application was heard by Recorder Cohen on Friday 9 November 2018 and he gave an *ex tempore* judgment (“Judgment”). He refused the application. An issue subsequently arose as to whether the entirety of the consolidated claims had been struck out. The Respondent submitted that it had been, whereas the Appellant contended that his claim for a new tenancy had not been struck out. Having considered this additional issue on the basis of written submissions the Judge made an order dated 5 December 2018 that:

“The Defendant’s application for relief from sanctions is dismissed, so that his Defence and Counterclaim to the Claimant’s claim for arrears of rent and interest remains struck out and the Judgment given against him on 18th May 2018 stands.”
23. The Appellant’s Notice was filed on 29 November 2018. As I have said, permission to appeal was granted on the papers.

The test to be applied on this appeal

24. In accordance with CPR 52.21(1), this appeal is limited to a review of the decision of the lower court. CPR 52.21(3) provides:

“The appeal court will allow an appeal where the decision of the lower court was –

 - (a) wrong; or
 - (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.”

25. There is no suggestion that r.52.21(3)(b) applies, so the question in this case is whether the Judge's decision to refuse relief from sanction was wrong. This is a review, not a re-hearing.

Relief from sanction: the applicable principles

26. CPR 3.9(1) provides:

"(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders."

27. The court's first task is to identify the "failure to comply with any rule, practice direction or court order" which has triggered the operation of CPR 3.9(1): see *Denton v TH White Limited* [2014] 1 WLR 3926 at [23].

28. In *Denton* the Court of Appeal explained at [24]:

"A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]'."

29. The Court of Appeal observed (at [26]) that at the first stage of the enquiry, the focus

"should be on whether the breach has been serious or significant. It was submitted on behalf of the Law Society and Bar Council that a test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which 'neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation'. Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most useful measure of whether a breach has been serious or significant. But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example of such a breach is a failure to pay court fees.

We therefore prefer simply to say that, in evaluating a breach, judges should assess its seriousness and significance.”

30. Further, at the first stage, “the court should concentrate on an assessment of the seriousness and significance of the very breach in respect of which relief from sanctions is sought” (*Denton*, at [27]).
31. At the second stage, the court should consider why the failure or default occurred: *Denton* at [29]. If there is a good reason for it, the court will be likely to decide that relief should be granted.
32. At the third stage, the court must consider all the circumstances of the case so as to enable it to deal with the application justly. In doing so, the court must “give particular weight to the two important factors expressly referred to in CPR 3.9(1), namely, ‘(a) the requirement that litigation should be conducted efficiently and at proportionate cost, and (b) the interests of justice in the particular case’” (*Denton* at [35]).

The grounds of appeal

33. The Appellant relied on two grounds of appeal. A third ground only arose if the Appellant’s lease claim was caught by the order giving judgment against him. As the Judge determined that point in the Appellant’s favour, Miss Cafferkey, Counsel for the Appellant, confirmed that the third ground of appeal has fallen away.
34. The two grounds pursued are:
 - i) The Judge erred in assessing the seriousness and/or significance of the breach; and
 - ii) The Judge erred in considering all the circumstances of the case.

Ground 1: seriousness or significance of the breach

35. At first instance, the Appellant’s primary argument was that “since payment was made by cheque, it cannot be said that actually there was a breach at all because a cheque is to be treated in the same way as a bank transfer” (judgment, para 14). The Judge rejected that argument, stating at para 14:

“It seems to me clear that there is a substantial difference, and that it is properly to be inferred that the precise reason why payment was to be made by a bank transfer was to avoid any problems that might arise as to whether or not a cheque had or had not been sent, and precisely at what stage it had been received. It seems to me that it cannot be said that the two are the same.”

36. The Appellant had relied on “old authorities to the effect that payment by cheque is deemed the same as payment by cash”. The Judge rejected this as “not relevant in the context of an order which expressly provides for the mode of payment” (Judgment, para 6).

37. On this appeal, the Appellant accepts that he breached the unless order by not making the payments by bank transfer on 1 April, 1 May and 1 June 2018. However, Miss Cafferkey submits on his behalf that (a) the breach which the Judge relied on was not a failure to pay, but the failure to pay by the correct method and (b) this was not a serious or significant breach.
38. The Judge did not positively find that the Appellant had made the requisite payments, albeit by the wrong method. He considered the submission that the cheque for £900 received in early March 2018 should be regarded as payment in accordance with subparagraph (ii) of paragraph 1 of the unless order and said at para 12:

“It seems to me that there are problems about that particular scenario. First of all, it was not suggested at the time on behalf of the defendant that this payment should effectively be attributed to the requirement under clause 1 of the order and, in fact, so far as that is concerned it would have been open to the defendant or his solicitors to write saying, ‘Please accept payment of the cheque in addition, to satisfy the further payments which were due’ but that was in fact not done. Complaint is made about the fact that the cheque was held on to by the claimant or her solicitors, and not returned until a later stage, and it is suggested in some way that that should not have occurred had there been an intention not to accept it by way of payment. However, the onus was very much upon the defendant it seems to me, bearing in mind that the primary obligation was to make payment by bank transfer. Furthermore, as has been submitted to me today by counsel for the claimant, limb two in paragraph 1 of the order in fact required payment to be made on the first day of each month of the sum of £300, so that there was in effect a default each time there was non-payment, and he pointed out that payments were not made in relation to April, May, and June. However, even if the position was as postulated by counsel for the defendant, no reason was given for no payment having been made in May or June, so that the arguments being put forward on behalf of the defendant only goes so far in any event.”

39. Nevertheless, the Judge addressed the question whether the breach was serious or significant on the assumption that the default was the method of payment. At paragraph 15 he said:

“For similar reasons it seems to me that paying by cheque if the cheque payment can properly be said to be identifiable with the payments in question, which it seems to me to be doubtful for the reasons that I have already given, but even assuming that that is the case, it seems to me that it cannot be said that the breach was not serious or significant. There was a reason for the payment having to be made by a bank transfer as set out in the order. Therefore, I am satisfied that this was a significant breach within the first stage of the test in *Denton*.”

40. Miss Cafferkey submitted that the Judge erred in drawing the inference that the requirement to make payments by a particular method (bank transfer) was imposed to meet the mischief to which he referred in paragraph 12 and was a significant element of the order. She submitted that (i) the reference to bank transfer had been included in the recital to the 12 September 2017; (ii) the need for payments to be by bank transfer had not been the subject of discussion at the September hearing; (iii) the Appellant had made payments following the September order by cheque, without any objection being taken; (iv) the Respondent's application for an unless order, and the draft order attached to it, did not specify the method of payment; and (iv) there was no evidence that there had been any discussion about the method of payment at the February hearing.
41. In my judgment, the Judge was entitled to draw such an inference. First, it is clear that there was an issue at the hearing on 28 February as to whether the Appellant had in fact sent a cheque to the Respondent the day before. Secondly, the Respondent's application for an unless order emphasised that the payments in respect of September and October 2017 were not made "as agreed by bank transfer" and that the Appellant "failed to pay the instalment due on 1st November 2017 by direct transfer but eventually paid direct to the Claimant by cheque". Thirdly, the fact that the draft order did not include reference to the requirement to pay by bank transfer does not assist the Appellant. On the contrary, it supports the inference that on 28 February the deputy district judge considered the method of payment sufficiently important to amend the terms of the draft order.
42. Miss Cafferkey submitted that in reaching the conclusion that this was a serious and significant breach the Judge had placed undue weight on the fact that this was an unless order. The Judge emphasised that the order breached was an "unless order" in his Judgment:
- "5. ... First of all, it is not simply an order which has been breached, but which the defendant requires further time within which to pay. It is expressed as an unless order, and that was after hearing representations from legal representatives on both sides. Unless orders are orders under which it is made plain that non-compliance will usually result in the sanction which applies. Therefore, it is of more significance than just an ordinary order, which merely provides, for example, for payment by a particular date with which there has been non-compliance. ..."
- "13. ... I must turn to the three-stage test in *Denton*. However, I do so bearing in mind particularly that this was an unless order, and unless orders are intended to make it plain to the party, the subject of the order, that if there is non-compliance then there is a very substantial risk that the sanctions will come into play, and no relief will be given in relation to those sanctions. "
43. Miss Cafferkey referred to *British Gas Trading Ltd v Oak Cash & Carry Ltd* [2016] 1 WLR 4530 in which Jackson LJ (with whom the other members of the Court agreed) said:

“41. The very fact that X has failed to comply with an “unless” order (as opposed to an “ordinary” order) is undoubtedly a pointer towards seriousness and significance. This is for two reasons. First, X is in breach of two successive obligations to do the same thing. Secondly, the court has underlined the importance of doing that thing by specifying an automatic sanction in default (in this case the draconian sanction of strike out).

42. On the other hand, as Mr Weston rightly says, not every breach of an “unless” order is serious or significant. In *Utilise TDS Ltd v Davies* [2014] 1 WLR 3926 the claimant was just 45 minutes late in complying with an “unless” order. He filed his budget by 4.45pm rather than 4pm when it was due. The Court of Appeal held that a delay of only 45 minutes in compliance was “trivial”. The court also noted that, contrary to the district judge’s view, there was no underlying breach of the rules on which the “unless” order was attached.”

44. It is, of course, correct that not every breach of an unless order is serious or significant. However, the Judge did not determine that the breach was significant simply because it was a breach of an unless order; he addressed the significance and duration of the breach.
45. I accept the Appellant’s submission that it is important that in this case there was no underlying breach of any rule or court order: the original breach was of an agreement between the parties. The Judge did not specifically refer to this factor, but I bear in mind, as is apparent from the judgment, that this application was heard late on a Friday, during a busy list. The Judge observed: “*I shall not be mentioning every submission made, either by counsel for the claimant or counsel for the defendant, during the course of their submissions to me, but that does not mean that I have not taken into account everything that has been said to me by way of submissions*” (Judgment, para 2). In my judgment, this does not demonstrate any error in the Judge’s conclusion that the breach was significant, but it is an important factor to be borne in mind when considering the proportionality of the sanction.
46. Miss Cafferkey placed substantial reliance on the fact that the breach had no impact on the efficient conduct, or conduct at proportionate cost, of this litigation or any wider litigation. She submitted the Judge failed to consider this aspect at all and that this failure was a serious flaw.
47. The nature of the breach was such that the Judge was bound to be aware that it was incapable of having any impact on the conduct or cost of the proceedings. That he was aware of this is reinforced by the terms in which he referred to CPR3.9, citing both (a) and (b), and then referring to (b) as “significant in the present case” (Judgment, para 9). The Appellant has not demonstrated an error in finding, at the first stage, that the breach was significant, but the fact that the breach had no impact on the proceedings is a further important factor when considering the proportionality of the sanction.
48. The final factor Miss Cafferkey relied upon in support of the first ground was the lack of impact of the breach on the Respondent. It seems to me that the limited impact on

the Respondent does not render the conclusion that the breach was significant wrong, but it is one of the matters to be considered in the context of the third stage of *Denton*, which is the subject of ground 2.

49. The Appellant did not make payments by bank transfer on 1 April, 1 May or 1 June 2018. He failed to do so in circumstances where an unless order had been imposed on 28 February 2018. The Appellant had written “Dec 2017 Jan 2018 Feb 2018” on the back of the cheque, indicating those were the months to which he intended his cheque to be attributed. The Appellant did not ask for his cheque to be attributed to April, May and June 2018 or make the bank transfers when the cheque was returned by the Respondent’s solicitors on 20 April 2018. In the circumstances, I consider that the Judge made no error in concluding that the breach was significant.

Ground 2: all the circumstances of the case

50. Addressing the third stage of *Denton*, the Judge said:

“17. I do, however, take into account all the circumstances of the case, bearing in mind that I am required to deal justly with the application, and I bear in mind all of the circumstances. I bear in mind that the amount of the counterclaim is substantial, and that this will be a substantial detriment to the defendant if he is not allowed to pursue that counterclaim. However, nevertheless, I also take into account that this was a clear unless order made in the context of the case as a whole, where there had been previous non-payment otherwise the unless order would not have been made, and that this gave a clear indication to the defendant that it had to be strictly complied with on this occasion if he was to be permitted to pursue the counterclaim.

18. Taking all the considerations into account, taking into account the fact that payment was made by cheque, nevertheless, it seems to me that the importance of compliance with that order overrides the prejudice to the defendant. In other words, the defendant only has himself to blame in not having regard to the clear point of the order. This is not a case where, for example, there was simply a minor breach of the order. The breach occurred over a reasonable period of time, which is something I have to bear in mind in evaluating these circumstances.”

51. Miss Cafferkey’s essential submission under this head was that the refusal to grant relief from sanction was unduly draconian and the impact on the Appellant of being denied the opportunity to defend the claim or pursue his counterclaim, is wholly disproportionate.
52. I have reached the conclusion that this ground of appeal is well-founded. I have borne in mind that the breach was significant, and the Appellant was not able to demonstrate any good reason for his default. An unless order had been imposed (against which the Appellant pursued no appeal) and the Appellant should have been aware of the importance of strict compliance. The Appellant failed to comply with the method of

payment required by the order on three occasions over three months. In addition, although he had sent a cheque for £900, it was returned to him and the Appellant failed to ensure that the Respondent received that sum of money on time.

53. Nevertheless, in my judgment it was wrong not to grant relief from sanction.
54. First, although the breach was significant, in the circumstances, it was near the bottom of the range of seriousness:
- i) The breach did not prevent the litigation being conducted efficiently and at proportionate cost. It did not in any way disrupt the conduct of the proceedings. This is one of the two factors which is of particular importance and which should be given particular weight at the third stage when all the circumstances of the case are considered. It was less serious than the non-payment of court fees. It pointed in favour of the grant of relief. See *Denton* at [32] and [64].
 - ii) Although this was a breach of an unless order, there was no underlying breach of a rule or court order. This was not, therefore, a case of successive breaches of court rules or court orders. This is a significant factor when assessing whether the importance of compliance with the court order was such as to justify preventing the Appellant defending the claim or pursuing his counterclaim.
 - iii) When the application for judgment was made on 4 April 2018, although the Appellant had not made the requisite payment by bank transfer, he had made a payment for three months' rent by a cheque which had already by then been held by the Respondent/Respondent's solicitors for a month without any indication being given that the Respondent intended to return it.
 - iv) Although it was reasonable for the Judge to consider that the onus was on the Appellant to ask for the cheque to be accepted as payment in lieu of a bank transfer, as the Court of Appeal emphasised in *Denton*, there is an onus on both parties to work cooperatively with each other. If the Respondent's solicitors had not forgotten that they held a cheque for three months' rent (a fact of which Recorder Cohen was not made aware), it seems likely that an application for judgment would not have been made and, in any event, it could not properly have been made without drawing the court's attention to the fact that the cheque was held.
55. Secondly, the severity of the sanction imposed on the Appellant is a weighty consideration:
- i) As a result of the refusal of relief from sanction, judgment has been given against the Appellant in the sum of £63,252.90, plus interest and costs. That is a substantial sum.
 - ii) The Appellant has raised serious issues by way of defence and counterclaim. In particular, (a) he contends that there is no basis for implying a term into the tenancy agreement that he is responsible for business rates; (b) he seeks to set off accountancy fees; and (c) he seeks to set off damages for disrepair and the

costs he claims to have incurred in carrying out repairs. Being precluded from pursuing his defence and counterclaim is a very substantial detriment. I acknowledge that the Judge clearly had in mind the prejudice to the Appellant.

- iii) The Appellant's evidence is that if judgment is not set aside, it would be likely to force him into bankruptcy and to stop practising.

56. Thirdly, as regards the impact of the breach on the Respondent:

- i) Although the Respondent did not receive the sums of £300 per month on the first of the month for three months, the breach was remedied prior to the hearing of the Appellant's application for relief from sanctions. In addition, the Appellant had paid the rent for July ahead of time and set up a standing order to ensure strict compliance going forward with the unless order.
- ii) It can also fairly be said that the Respondent chose, deliberately, to return the cheque on 20 April without making any reference in that letter or subsequently to the fact that the rent had not been paid. This was consistent with the Respondent's solicitors' decision not to copy the Appellant's solicitors into correspondence with the court or otherwise inform them that they had sought judgment, so as to avoid (as Mr Restall put it) "tipping off" the Appellant, which would have been likely to have resulted in the breach being remedied earlier.

57. Fourthly, it is also important to consider the consequence for the Respondent of the decision to refuse the Appellant relief from sanction:

- i) In paragraph 36 of the Respondent's Reply to Amended Defence and Defence to Counterclaim:

"The Claimant admits that the Defendant is entitled to set off in diminution of the rent unpaid by the Defendant to the Claimant, the Defendant's reasonable fees for accountancy services provided by the Defendant to the Claimant. It is denied that the sum of £12,230.00 claimed by Defendant is properly due to the Defendant or has even been properly demanded by the Defendant. The Defendant is put to full proof of his reasonable fees for the services provided by the Defendant to the Claimant."

- ii) The effect of giving the Respondent judgment in the full amount claimed without any deduction for the Appellant's accountancy fees is that (even leaving aside the merits of the other points of defence and counterclaim) the Respondent is receiving a windfall. Mr Restall disputed this, submitting that it was incorrect that the Respondent had obtained more than, on her own pleading, she could obtain at trial. He pointed to the fact that the Respondent took issue not only with the reasonableness of the fees, but also averred that invoices had not been provided. However, it is apparent from the pleadings that the Respondent accepts that accountancy services have been provided by the Appellant and that he is entitled to set off his reasonable fees, albeit there is a dispute about the amount of the set-off.

Conclusion

58. In my judgment, in all the circumstances, the sanction was wholly disproportionate and it was wrong not to grant relief. Accordingly, I allow this appeal.