



Neutral Citation Number: [2026] EWCA Civ 650

Case No: CA-2026-000345

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**David Pittaway KC (sitting as a Deputy High Court Judge)**  
**KB-2024-001570**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/05/2026

Before :

**LADY JUSTICE ANDREWS**  
**LADY JUSTICE WHIPPLE**  
and  
**LORD JUSTICE COBB**

Between :

**THE COMMISSIONER OF POLICE OF THE  
METROPOLIS  
- and -  
DAVID PRYOR**

**Appellant**

**Respondent**

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**Charlotte Ventham KC (instructed by Weightmans LLP) for the Appellant**  
**Simon Brindle (instructed by Ralli Ltd) for the Respondent**

Hearing date: 16 April 2026  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on [21 May 2026] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## **Lady Justice Whipple:**

### **Introduction**

1. The Commissioner of Police of the Metropolis (the “Commissioner”) appeals against the decision given on 13 February 2026 by Deputy High Court Judge David Pittaway KC (the “Judge”) refusing the Commissioner’s application for an extension of time to serve witness statements. The decision was made in the course of personal injury proceedings brought by Mr Pryor, the Respondent to this appeal, who is a serving police officer. The consequence of the Judge’s decision was in effect to bar the Commissioner from defending the claim. On 19 February 2026 I granted the Commissioner permission to appeal and adjourned the trial pending that appeal.
2. At the end of the appeal hearing, we informed the parties that the appeal would be allowed and we gave directions with a view to trial of Mr Pryor’s claim in the King’s Bench Division as soon as possible. We reserved our reasons which we said we would provide in writing in due course; these are our reasons.

### **Background**

#### ***Facts***

3. Mr Pryor was a firearms instructor who delivered training to firearms officers employed by the Commissioner. On 19 May 2021, Mr Pryor was one of a team of officers delivering a firearms training course. During the course of a training exercise, one of the attendees on the course pushed Mr Pryor to the ground as part of a simulated “take down”. Mr Pryor immediately felt pain in his right ankle. Subsequent medical investigation revealed a comminuted unstable closed fracture of his right ankle.

#### ***Litigation History***

4. On 13 May 2024, Mr Pryor commenced an action against the Commissioner claiming damages for personal injuries.
5. On 3 March 2025, a costs and case management conference took place before Deputy Master Fine who ordered a trial on liability only, directing disclosure, exchange of witness evidence and exchange of and permission for expert evidence including questions to the experts. He gave a trial window between January and April 2026. A few weeks later the trial was listed for 3 days in a 5 day window starting on 23 February 2026.
6. Deputy Master Fine ordered witness evidence to be exchanged by 4pm on 7 July 2025. On that date, at the Commissioner’s request, the parties agreed an extension of 28 days to 4 August 2025.
7. On 31 July 2025, the Commissioner (by his legal team at Weightmans) was not ready to exchange witness evidence and requested a further extension from Mr Pryor’s legal team. Mr Pryor, by his solicitors, Ralli Ltd, did not agree that request but indicated that instructions would be taken once the application for an extension with accompanying witness evidence had been sent to them.

### ***The August Application and Exchange of Witness Evidence***

8. Weightmans drafted an application for a further extension of time for exchange of witness evidence to 17 October 2025. The application notice was dated 5 August 2025, which is now agreed to have been a typographical error because the application was drafted by Weightmans and sent to Ralli Ltd and to the Court on 4 August 2025. The application was sealed by the Court on the same day. This is the “August Application”.
9. The August Application invited determination by the Master without a hearing. It was accompanied by a witness statement dated 4 August 2025 by Sadie Seabrook, a partner at Weightmans with conduct of the defence of the claim on behalf of the Commissioner. She explained that she needed in-person meetings with the various witnesses to understand how the “take-down” was performed. She said there were logistical issues because her office was in the North West while the relevant witnesses were based in Kent. She had been trying to arrange an in-person conference for around 3 months but “due to officer availability and officer training commitments” the conference could not take place before 15 September 2025 (paras 9, 10 and 13). She said that the extension of time would not impact the trial listing (para 14).
10. Mr Pryor, by his solicitors, served his witness statements on the Commissioner on 4 August 2025 under password protection. The Commissioner served his witness statements on 17 October 2025 at which point the Claimant’s password was disclosed and effective exchange of witness evidence took place. As at that date, the August Application had not been determined by the Court. Mr Pryor’s solicitors did not raise any objection to the exchange on that date.
11. On 14 November 2025, the Appellant put questions to the Respondent’s expert witness. The Respondent’s expert answered those questions on 9 December 2025. In short, by early to mid-December, the case looked like it was ready for trial in the week commencing 23 February 2026.

### ***The December Application***

12. On 16 December 2025, however, Mr Pryor issued an application seeking (i) an injunction prohibiting the Commissioner from relying in disciplinary proceedings on documents that had been disclosed in the course of the litigation by Mr Pryor; and (ii) an order requiring the Commissioner to serve revised witness statements removing passages of what was said to be opinion evidence. (I note that the notice of application did not put the proposed order in quite these terms, but in light of submissions at the hearing and by reference to other material shown to the Court, this seems to be what was sought.) This is the “December Application”. That application was supported by a witness statement of the same date by James Reilly, solicitor at Ralli Ltd with conduct of the claim on behalf of Mr Pryor.
13. From Mr Reilly’s statement, it appears that in the course of a conference with counsel, Mr Pryor had shown his solicitors various documents which were in his possession which covered tactical scenarios, his firearms training lesson plan and interception techniques. Those documents were disclosed to the defence by Mr Pryor’s solicitors because they were documents on which he intended to rely at trial. On 2 December 2025, Mr Pryor learned that disciplinary proceedings were being taken against him on grounds of improper conduct. The improper conduct was said to be the possession

and/or disclosure of confidential documents. This, Mr Reilly argued, was an improper use of documents disclosed within the litigation for collateral purposes (paras 37 and 38). Mr Reilly also complained that the witness evidence disclosed by the Commissioner contained inadmissible commentary and opinion evidence (paras 49 and 56).

14. Mr Reilly addressed the Commissioner's August Application, acknowledging that the August Application had been made on 4 August 2025 (paras 30 and 31). But he argued that the Commissioner required the Court's permission for that extension which he characterised as an application for "relief from the sanction contained in CPR 32.10" to permit the Commissioner to rely on any witness evidence at all (para 46). He outlined his client's position on the August Application in this way (emphasis added):

"57. The defendant's application, made in August for permission to rely on witness statements served significantly out of time, has not yet been dealt with and the application was made on the basis that it was to be heard without a hearing. **The Claimant's stance is neutral on the application** subject to the fact each of the statements contains inadmissible 'evidence'. If the offending passages are redacted, the Claimant cannot point to any prejudice he will be caused by the late service. However, relief should be given and permission only granted on the basis that the offending passages are redacted."

#### *Run up to the Hearing before the Judge*

15. Mr Reilly filed a second witness statement dated 3 February 2026 in support of the December Application. He detailed the procedural history referring again to the August Application for "relief from sanctions". Mr Reilly recorded that he had asked the Court to list the August Application and the December Application for a 4 hour hearing. But he acknowledged that with current listing pressures, it was unlikely that the two applications would be heard in advance of trial, and he suggested that they should be dealt with as preliminary issues at the trial. He proposed that the disputed witness statements should be put in a separate file for trial.
16. Ms Seabrook wrote to Mr Reilly on 6 February 2026. She addressed issues to do with the Commissioner's disclosure, saying that she had obtained further documents for disclosure when she met her client in conference on 18 September 2025. She said that the disciplinary proceedings were being undertaken by the Directorate of Professional Standards and "we are not a party [to] the investigation"; but in any event she said that the Court did not have the power to grant an injunction to stop those disciplinary proceedings. Of the August Application, she said this:

"The defendant's application of 4 August 2025 is not for relief from sanctions as the parties had, by consent, agreed to an extension of time for exchange of witness statements from 7 July 2025 to 7 August 2025 [a typo, should say 4 August 2025] ...

No objection to the defendant's application was raised until your application was issued over 4 months later. It is noted that no

objection is, or indeed could, be raised to the extension of time given that the claimant has suffered no prejudice.

We further note that no issue was taken with the contents of the defendant's statements at the time they were served on 17 October until your application was served 2 months later. ..."

17. It appears that the Court then listed the two applications before the Judge on 13 February. I assume this was in response to Mr Reilly's request for a hearing.
18. In advance of that hearing, Ms Seabrook filed a witness statement dated 11 February 2026. She explained the delay in finalising the Commissioner's witness statements in this way:

"5. It became apparent that to be able to properly prepare the defendant's witness statements, I would need to meet with the relevant officers in person and that an inspection of the accident locus would be helpful. The site where the accident took place is the property of the Ministry of Defence and is currently being used on a regular basis by the Ukrainian armed forces. As such, it took a significant amount of time to find an appropriate date and time when all relevant parties including two firearms instructors with training commitments could be accommodated at the site."

She explained that her clients had concerns about Mr Pryor's possession and disclosure of certain confidential documents (para 9), that the concerns about Mr Pryor's removal of sensitive documents and the disciplinary proceedings had nothing to do with her firm (para 13) and that the injunction sought by Mr Pryor against the use of these documents as part of the December Application was misconceived because these were the Commissioner's documents and anyway the court could not prevent the regulator from bringing proceedings (para 15). As to the August Application, Ms Seabrook said this (emphasis added):

"16. It appears that the claimant does not object to the defendant's application for an extension of time for service of his witness statements **which was made properly in accordance with CPR 3.1(2)(a), prior to the expiry of the 28-day extension agreed between the parties as permitted by the court.** The claimant refers to relief from sanctions being required pursuant to CPR 32.10. **The defendant will maintain that such an application is not necessary given that the application for an extension of time was filed and served before the expiry of the agreed 28-days.**"

She maintained that the evidence of the witnesses was admissible and rejected Mr Reilly's complaints to the contrary (para 20).

19. On the day before the hearing, on 12 February 2026, Mr Brindle, counsel for Mr Pryor, served a skeleton argument running to 19 pages. The Court was told this was received by the Commissioner's legal team at 3.50pm that day. Mr Brindle described the August

Application as an application for relief from sanctions, on grounds that the Commissioner had not served his witness evidence by 4 August 2025 and was therefore out of time. He also submitted that the August Application “was not made until 5 August 2025” and for that further reason was out of time (para 21). He maintained that the Defendant’s conduct of the litigation had been poor (para 26) by reason of failures of disclosure in addition to the failure to serve witness evidence on time (para 27) and that this had caused additional expense because Mr Pryor’s solicitors had to review each new batch of disclosure (para 28); further, he complained that the Commissioner had used documents disclosed by Mr Pryor as the basis for disciplinary proceedings contrary to CPR 31.22 (para 29). Mr Brindle invited the Court to refuse relief from sanction (para 35) applying CPR 32.10 read with *Denton v TH White Ltd* [2014] 1 WLR 3926 (“*Denton*”).

20. I pause here to note that Mr Brindle’s skeleton argument contained the first signal from Mr Pryor’s camp (i) that they would argue that the August Application was made on 5 August 2025 and was out of time for that reason; and (ii) that the August Application would be opposed (that being a shift from Mr Reilly’s neutral stance, see para 14 above). It was not the first indication that Mr Pryor’s legal team thought the August Application was an application for relief from sanctions, because that point had already been made by Mr Reilly and addressed by Ms Seabrook in correspondence (see paras 14-16 above).
21. On the morning of the hearing, 23 February 2026, Mr Clemens, counsel then instructed for the Commissioner, responded with his own position statement. He described the August Application as “signed on 4 August but bearing the date 5 August”. He noted that it had been filed at Court at 14.46 on 4 August 2025 which was within the agreed extension period but said that it was “shown as accepted” on 5 August. He then said this at paragraph 2.1(i):

“[...] As such, this may not, strictly, be an application for relief, but given the 4<sup>th</sup>/5<sup>th</sup> date dichotomy, and to avoid unnecessary argument on that, the court may want to approach this as an application for relief (to which D would not / cannot realistically take issue). The statements were served on 17 October 2025 in compliance with the extension sought.”

In that position statement, he analysed the delay in *Denton* terms, conceding that the failure was serious and significant, but asserting that there was a good reason for the breach and suggesting that all the circumstances of the case clearly militated in favour of permission being granted. As to the December Application, he submitted that Mr Pryor’s application for an injunction preventing disciplinary proceedings was misconceived and that issues about the content of the witness statements should be resolved by the trial judge.

## **The Hearing**

22. The Court has seen the full transcript of the hearing before the Judge. The Judge was invited to deal with the August Application first because it was agreed that if that was not successful, part of the December Application fell away. There was discussion about the timing of the August Application (that issue having been raised in Mr Brindle’s skeleton). This is the key part of that exchange:

“MR CLEMENS: Yes. Yes, My Lord, I’m very grateful for that. Can I just address further, please, what your view might be, please, on whether you want to look at this for an application for relief – it is borderline, time-wise. Or, whether you want to look at it as an in-time extension-

JUDGE PITTAWAY: Well, I think it is a relief-

[Crosstalk]

JUDGE PITTAWAY: It is a relief application because it was not issued until after 4 August.

MR CLEMENS: Yes, it was made but it – that’s why it’s perhaps better to assume, given the [inaudible] issue, that if we treat it as an application for relief-

JUDGE PITTAWAY: Well, as I understand it, and Mr Brindle will correct me if I am wrong, the application was issued on 5 August.

MR BRINDLE: That’s the date on the application-

JUDGE PITTAWAY: Date of the application-

MR BRINDLE: It’s not when the application-

[Crosstalk]

MR BRINDLE: -filing the application was made, [inaudible] the witness statements late. And they weren’t until October. It’s very clearly a relief from sanction application.

JUDGE PITTAWAY: Yes.

MR CLEMENS: All right. Can I therefore address you on that basis?”

23. It appears that the hearing then proceeded on the basis (i) that this was a relief from sanctions application because (ii) it related to an application “issued on 5 August”. For reasons I shall come to, both points were wrong.
24. Arguing for relief from sanctions, Mr Clemens said that his client should not be subject to the “draconian” effect of not being allowed to rely on witness evidence. The Judge rejected Mr Clemens’ submissions on good reason (the second limb of *Denton*) criticising Ms Seabrook’s witness statement for not going into detail about the nature of the application and not setting out the chronology in greater detail. The Judge invited Mr Brindle’s submissions only on the third limb of *Denton*. Mr Brindle argued against any relief from sanctions. He complained of a “litany of procedural breaches and errors on the part of the Defendant”, explaining that Mr Pryor was no longer neutral on the August Application because circumstances had changed and the misconduct proceedings had been brought. As to the December Application, the Judge did not hear full submissions from Mr Clemens on the content of the Commissioner’s witness statements but indicated his view during the course of argument that one witness, Mr King, offered inadmissible evidence as a “pseudo-expert” but that the remaining

evidential issues were for determination by the trial judge. The Judge heard full argument on Mr Pryor's application for an injunction to restrain disciplinary proceedings, which the Judge indicated he would not grant.

## Judgment

25. The Judge rose for a short time and then delivered an *ex tempore* judgment. He refused the August Application. He described the August Application in this way:

“2. The defendant's application is primarily for relief from sanction, for not being allowed to call witnesses at trial. Although there is some issue as to the date upon which the application was made to the Court, it is common ground that the application was not issued until 5 August, which was after the date upon which the defendant had been directed to serve the witness statements, namely 4 August 2025.”

26. The Judge referred to the cases of *Denton* and *Mitchell MP v News Group Newspapers Ltd (CA)* [2013] EWCA Civ 1573. He then said this:

“4. The defendant's application, as I have said, was made on 5 August 2025 .... after the deadline for exchange...”

27. He noted that Mr Clemens accepted that the first two parts of the two-stage test in *Denton* were satisfied (ie, that this was a serious and significant breach; and no good reason had been advanced as to why the witness statements were not served on 4 August, see para 6). As to the third stage of *Denton*, the Judge said this:

“7. Having considered the matter carefully, I accept Mr Brindle's submissions that there has been failure upon the defendant to conduct this litigation efficiently and proportionality [sic], and I accept that the submissions that he had made which show that the manner in which this litigation has been conducted by the defendant's solicitors falls below the level which one would expect competent litigation to have been conducted to comply with Deputy Master Fine's directions. It seems to me that although it will have the effect of precluding the defendant from calling evidence at the trial, that this is an appropriate case in which I should emphasise the importance of the CPR Rules being enforced, and not grant the defendant's application.

8. I am aware and conscious of the potential effect upon the trial of this decision. However, this seems to me to be a case which falls firmly within the category of cases in which it would be wrong for me to grant relief. ...”

28. The Judge turned to the December Application. He considered Mr Pryor's objection to various parts of the Commissioner's witness statements, an issue that did not arise given his refusal of the August Application, but indicated that he thought Mr King's witness statement did contain inadmissible evidence (para 8) but that the other witness statements could properly be relied on at trial (para 9); he granted an extension of time

for the Commissioner's questions to Mr Pryor's expert so that the responses were admissible at trial (para 9). He dismissed Mr Pryor's application for an order debaring the Commissioner's use of the documents in disciplinary proceedings (para 14).

29. He awarded Mr Pryor the majority of his costs of the hearing, summarily assessed at £6,167.14.
30. An order was drawn up reflecting the Judgment, including this recital:

“UPON the Court considering the Defendant's application and consequential directions dated 5<sup>th</sup> August 2025, but received by the Court office on 4 August 2025”.

That recital highlights the confusion on dates which underpinned the Judge's decision on the August Application.

### **Grounds of Appeal**

31. The Appellant now appeals against the Judgment in relation to the August Application on the following grounds:

“1. Ground One - wrong legal test. In treating the application as an application for relief from sanctions (and applying *the Denton and others v TH White and others* [2014] EWCA Civ 906 three stage test) the Judge was wrong in law.

2. Ground Two - procedural irregularity. The application of the wrong legal test amounts to a serious procedural or other irregularity.

3. Ground 3 - improper exercise of discretion, whether on a *Denton* test or not. Whilst the Appellant recognises the generous ambit of discretion in such a case management decision as this, the Judge strayed impermissibly outside that ambit, requiring this court's intervention and correction.”

32. The Grounds of Appeal are supported by a statement from Ms Seabrook, dated 17 February 2026, attaching further evidence going to the date of the August Application. The admissibility of this witness statement and exhibited evidence is disputed. The grounds of appeal are also supported by a skeleton argument from Mr Clemens emphasising that the August Application was made on 4 August 2025 and was in time, by operation of CPR 23.5; it was not an application for relief from sanctions to which CPR 3.9 applies, but instead was an application for an extension of time governed by CPR 3.1, citing *Hallam Estates v Baker* [2014] EWCA Civ 661, [2014] 4 Costs LR 660 and *Jalla v Shell International Trading and Shipping Co Ltd* [2021] EWCA Civ 1559, [2021] 10 WLUK 370 in support.

### **Respondent's Notice**

33. On 31 March 2026, Mr Pryor by his solicitors filed a Respondent's Notice seeking to uphold the Judge's decision on the August Application on further or alternative grounds, namely that this Court should not interfere with the Judge's exercise of discretion because the Judge's decision was not materially wrong in law and took account of the overriding objective and all relevant factors. In the alternative and if the

appeal succeeded, it was argued that this Court should itself refuse the extension of time but if the Court was not so minded, the Court should address the December Application and excise offending passages from the Commissioner's witness statements or remit that matter to the High Court for determination. Whatever the outcome, the costs thrown away by the late adjournment of the trial were sought.

34. The Respondent's Notice was supported by a further witness statement from Mr Reilly dated 24 February 2026. It was also supported by a skeleton argument by Mr Brindle dated 25 February 2026 which maintained that the August Application, on the evidence before the Judge, was filed, issued and made after the deadline and was out of time (para 5); that evidence showing that the August Application was in time should not be admitted because it was not before the Judge who could not be criticised for treating this as an out of time application (para 4); submitting that in any event the timing of the August Application was irrelevant because the Commissioner did need to apply for relief from sanctions (para 3). Expanding that last submission, Mr Brindle argued that the Commissioner was out of time to serve his witness evidence which was due on 4 August 2025; he was required to seek relief from sanction under CPR 32.10; and *Hallam Estates* was no longer good law in light of two more recent authorities: *Lufthansa Technik AG v Panasonic Avionics Corp* [2023] EWCA Civ 1273, [2024] 1 WLR 2012 and *Yesss (A) Electrical Ltd v Warren* [2024] EWCA Civ 14, [2024] 1 WLUK 217.

### **The Appeal**

35. At the hearing, the Commissioner was represented by leading counsel freshly instructed, Ms Charlotte Ventham KC. Mr Pryor was represented by Mr Brindle. We thank counsel for their submissions.
36. At the outset of the hearing, the Court was informed of a change of position by Mr Brindle, in that he now accepted that the August Application was made on 4 August 2025, retreating from para 5 of his skeleton (and related paragraphs). The Court was shown a sealed copy of the application notice, which had not been before the Judge, which showed that the Court seal was added on 4 August 2025. That demonstrated that the date entered on the application, 5 August 2025, was a typo. It followed as common ground that the Judge had been wrong to refer to the August Application being "issued on 5 August" because it was in fact received by the Court and issued (by sealing) on 4 August 2025.
37. Mr Brindle accepted that 4 August was within the deadline agreed by the parties. But he submitted that the August Application was still an application for relief from sanction given that the Commissioner remained in default of the direction to serve witness evidence by 4 August 2025 and could not rely on the witness evidence served after that date without permission. That was to maintain his case under CPR 32.10.

### **Issues**

38. The following issues arise for determination:
- 1) Should the Court admit the further evidence of Ms Seabrook as fresh evidence?

- 2) Was the August Application for relief from sanctions within the *Denton* line of authority?
- 3) Did the Judge go wrong in a way which was material to outcome?
- 4) If so, what order should this Court now make?
- 5) What is the appropriate costs order?

### **Issue 1): Fresh Evidence**

39. Ms Seabrook's witness statement of 17 February 2026 deals with the sequence of events leading up to the August Application and attaches various documents, including emails and electronic filing receipts from the Court, to support her evidence about that sequence of events. The Respondent objects to the admission of this witness statement on grounds that there is no application to admit it and on the basis that the witness statement contains information that could and should have been available to the Judge so that it fails the test in *Ladd v Marshall* [1954] 1 WLR 1489.
40. CPR 52.21(2)(b) gives the court a discretion to admit evidence that was not before the lower court, which discretion is to be exercised in accordance with the overriding objective. The Court will also have in mind the criteria from *Ladd v Marshall* which are now said to "*effectively occupy the whole field of relevant considerations to which the court must have regard*" (see *Terluk v Berezovsky* [2011] EWCA Civ 1543).
41. I am satisfied that it is in the interests of justice that this witness statement is admitted on appeal. Although it is right to say that this material could have been before the Judge, the material is both credible and important to an issue in the appeal, namely the date on which the August Application was made. The Court should see evidence setting out the underlying facts in fuller detail.
42. In light of it, the following sequence of events is established:
  - 1) At 11.03 on 4 August 2025, Weightmans (Ms Seabrook) emailed the application to Ralli (Mr Reilly), asking for their consent to it. Ralli did not respond to that email.
  - 2) At 14.45 on 4 August 2025, Weightmans lodged the application at Court.
  - 3) At 14.46 on 4 August 2025, Weightmans received automated confirmation of the receipt by the Court of the August Application.
  - 4) At 15.05 on 4 August 2025, Weightmans emailed Ralli saying: "Further to today's correspondence, please find attached by way of service the defendant's application", confirming that the application had been filed at court "today".

### **Issue 2): Was the August Application for relief from sanctions?**

#### *Submissions*

43. Ms Ventham draws a distinction between an application for an extension of time which is made in time, which is governed by CPR 3.1, and an application for an extension of time which is made out of time so that relief from sanctions is required, which is

governed by CPR 3.9. This, she submits, was an in time application and the Judge was wrong to approach it as an application for relief from sanctions.

44. Mr Brindle argues that the Judge was correct to approach the August Application on the basis that it was an application for relief from sanctions. He says that, regardless of the timing of the August Application, the Commissioner had failed to serve his witness evidence by 4 August 2025 so that the sanction of CPR 32.10 applied (and the Commissioner was debarred from relying on that evidence) *unless* the Court gave permission. Even if that was wrong and this was not an application for relief from sanctions, he submits that the Judge took account of all relevant factors and concluded that the Commissioner’s procedural defaults were so serious that an extension of time for service of the witness statements should not be granted and this Court should not interfere with that assessment.

### *The Civil Procedure Rules*

#### The Overriding Objective

45. As is well known, the CPR are governed by the Overriding Objective which provides, so far as relevant:

“1.1

- (1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
- (2) Dealing with a case justly and at proportionate cost includes, so far as practicable –
  - (a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence.
  - (b) saving expense;
  - (c) dealing with the case in ways which are proportionate –
    - (i) to the amount of money involved;
    - (ii) to the importance of the case;
    - (iii) to the complexity of the issues; and
    - (iv) to the financial position of each party;
  - (d) ensuring that it is dealt with expeditiously and fairly;
  - (e) allotting it to an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases;

- (f) promoting or using alternative dispute resolution; and
- (g) enforcing compliance with rules, practice directions and orders.”

46. CPR 1.1(2)(g) was previously (f), displaced by insertion of the criterion relating to alternative dispute resolution, pursuant to the Civil Procedure (Amendment No.3) Rules 2024 (SI 2024 No. 839).

### Case Management: CPR 3

47. CPR 3 contains the Court’s general case management powers. By CPR 3.1(2), the Court may, amongst other things:

“(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired.”

48. The notes to The White Book: Civil Procedure 2025 (London: Sweet & Maxwell, 2025) (the “White Book”) contain guidance on applications for an extension of time. This is said at CPR 3.1.2.1 (emphasis added):

*“Applications for the extension of a time limit before it has expired - An application for an extension of any time limit set by the CPR must be decided in accordance with the overriding objective of enabling the court to deal with the case “justly and at proportionate cost” (r.1.1(1)). Dealing with a case in accordance with the overriding objective “includes, so far as is practicable ... (f) [note: now (g)] enforcing compliance with rules, practice directions and orders” (r.1.1(2)). Sub-paragraph 1.1(2)(f) indicates a new regime in which courts are now less tolerant of litigants who fail to comply with procedural requirements. However, the robustness with which the courts should enforce compliance depends to some extent upon the stage in the proceedings at which an application for an extension of time is made. **In applications made before the relevant time limit has expired the court should not refuse reasonable extensions of time which neither imperil hearing dates nor otherwise disrupt the proceedings** (*Hallam Estates v Baker* [2014] EWCA Civ 661; [2014] 4 Costs L.R. 660). In *Jalla v Shell International Trading and Shipping Co Ltd* [2021] EWCA Civ 1559, an application to vary the substance of a case management direction as well as a time limit imposed therein was refused. Coulson LJ summarised the principles to be applied on the in-time application for an extension of time made in that case as follows: (i) the court will grant a reasonable extension if it does not impact on hearing dates or otherwise disrupt proceedings; (ii) the fact that a refusal to extend time would in practice mean the end of the claim is a factor to be weighed in the balance, but it cannot of itself warrant the grant of relief; and (iii) a claimant’s entitlement to sue a defendant is not an absolute*

right, and does not permit that claimant to fail to comply with court orders, or delay and disrupt the administration of justice ([29] and see further, para.3.9.11)”

49. The notes go on to draw a distinction between in time applications for an extension, to which the passage above applies, and applications made out of time, to which the next passage, from para 3.1.2.2 of the White Book, applies (emphasis added):

*“Applications for the extension of a time limit after it has expired - Rule 3.1(2)(a) expressly confirms the court’s power to extend time limits even after they have expired. **However, in such cases, the court decides what, if any, extension of time to allow in accordance with the principles in Denton v TH White Ltd [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926; see (R. (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633; [2015] 1 W.L.R. 2472; [2015] 2 Costs L.R. 191. As to the Denton principles generally, see the commentary under r.3.9.”***

50. CPR 3.8 introduces the sanctions regime which applies where parties are in default of a court order. It provides that:

“(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. (Rule 3.9 sets out the circumstances which the court will consider on an application to grant relief from a sanction.)

(2) Where the sanction is the payment of costs, the party in default may only obtain relief by appealing against the order for costs.

(3) Where a rule, practice direction or court order— (a) requires a party to do something within a specified time, and (b) specifies the consequence of failure to comply, the time for doing the act in question may not be extended by agreement between the parties except as provided in paragraph (4).

(4) In the circumstances referred to in paragraph (3) and unless the court orders otherwise, the time for doing the act in question may be extended by prior written agreement of the parties for up to a maximum of 28 days, provided always that any such extension does not put at risk any hearing date.”

51. CPR 3.9 provides that:

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

- (a) for litigation to be conducted efficiently and at proportionate cost; and
- (b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence.”

52. *Denton* was a case about CPR 3.9. In that case, the Court set out three stages by which an application for relief from sanction should be approached. The *Denton* test is usefully summarised in the White Book at CPR 3.9.3 in the following way:

“The guidance given in *Denton* may be summarised as follows: 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 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. 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 r.3.9(1)(a)(b). The court also gave guidance as to the importance of penalising parties who unreasonably oppose applications for relief from sanctions”

53. The difference between an in time application and an out of time application is explained further at CPR 3.9.11, noting that an in time application for extension of time will avoid breach of the rule or order and will not require relief from sanction (emphasis added):

“An in-time application for extension of time refers to an application which is received by the court office before the relevant time limit has been reached. In *Re Guidezone Ltd* [2014] EWHC 1165 (Ch); [2014] 1 W.L.R. 3728, Nugee J adopted this term as a clearer alternative to “a prospective application for extension of time” because it often happens that, if such applications proceed to a hearing, that hearing will not take place until after the relevant time limit has expired and, therefore, the extension sought is to that extent retrospective. Subsequently, the term was adopted and used by the Court of Appeal (see *Hallam Estates v Baker* [2014] EWCA Civ 661; [2014] 4 Costs L.R. 660). In that case, **the Court of Appeal held that (what are now the *Denton* principles) do not apply to an in-time application:** instead the guidance given by the Court of Appeal in *Robert v Momentum Services Ltd* [2003] EWCA Civ 299; [2003] 1 W.L.R. 1577 remains good law. **In such cases the court’s discretion to vary a time limit or deadline is to be exercised having regard to the overriding objective (as to which, see r.1.1) and without reference to r.3.9(1)(a) and (b) (i.e., the two considerations which are to be treated as having paramount importance). The addition of subpara.1.1(2)(f) into the overriding objective (“enforcing compliance with rules, practice directions and orders”) does not**

**require courts to refuse reasonable extensions of time, which neither imperil hearing dates nor otherwise disrupt the proceedings.”**

Application Notices: CPR 23

54. CPR 23 sets out general rules for applications for Court orders. It provides that an application notice must be filed unless the Court dispenses with the requirement (CPR 23.2). CPR 23.5 provides that:

**“Where an application must be made within a specified time, it is made in time if the application notice is received by the court within that time.”**

55. As to the timing of an application, the White Book contains the following note at CPR 23.5.1 (emphasis added):

**“Usually, if an application is to be made it will have to be made within a particular time limit fixed by rule, practice direction or court order, otherwise an extension of time will have to be sought. Rule 23.5 provides that **an application is made when the application notice is received by the court, and not when it is issued or when it is served on the respondent. If an application is received by a court on one day, but not date stamped until the next, it is received by the court on the earlier day** (*Hallam Estates Ltd v Baker* [2014] EWCA Civ 661, [2014] C.P. Rep. 38, CA, at [25]). Where an application must be made within a specified time, it is made in time if the application notice is received by the court within that time.”**

56. The notion that time runs from the date on which a document is *received* by the court, as opposed to being sealed or subject to some other process, manual or electronic, was confirmed in *Siniakovich v Hassan-Soudey* [2026] EWCA Civ 215, [2026] 3 WLUK 26, a case about when proceedings had been brought for the purposes of the Limitation Act 1980 (section 4A). In that case, the Court (per Andrews LJ) confirmed that “an action is brought when the claim form is **first delivered** to the court office” (para 121, emphasis added). This chimes with the language of CPR 23.5 and demonstrates a consistent procedural approach, regardless of the precise form of application or originating process, focussed on the date of receipt by the Court.
57. References to the date of issue or date of filing are not helpful. It so happens that in this case, the August Application was issued by being sealed by the Court on the same day as it was made. That is not always so, because issue is an administrative action which takes place after the application is made, sometimes with a gap of some days. The focus is, as I have said, on the date of receipt of the application by the Court.

Evidence: CPR 32

58. CPR 32.4 provides for witness statements to be served for use at trial. The White Book contains the following note at CPR 32.4.9 (emphasis added):

“*Time limits* - Rule 32.4 does not stipulate a period within which witness statements should be served. However, it is to be expected that time limits may be imposed by practice directions and orders made in individual cases ... **A time limit imposed may be altered by the court in the exercise of its general discretion to extend or shorten time limits (see r.3.1(2)(a)).**”

59. CPR 32.10 provides for the consequences of a failure to serve a witness statement or summary in the following terms:

“If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission.”

60. The notes to CPR 32.10 record that the prohibition on calling a witness whose statement has not been served amounts to a sanction in terms of CPR 3.8(1) (see 32.10.2). The notes refer back to CPR 32.4 and in particular CPR 32.4.9 which is set out above to explain further “within the time specified by the court” as it appears in CPR 32.10(see CPR 32.10.3).

#### *Case Law*

61. The difference between in time and out of time applications for extensions of time was explained in *Hallam Estates*, cited in several of the passages from the White Book set out above. In that case, a costs judge had declined to set aside an earlier order granting an extension of time for points of dispute on detailed assessment. The High Court had set aside that extension. This Court restored it. Jackson LJ said this (emphasis added):

“26. **An application for an extension of time allowed to take any particular step in litigation is not an application for relief from sanctions, provided that the applicant files his application notice before expiry of the permitted time period.** This is the case even if the court deals with that application after the expiry of the relevant period. The Court of Appeal established this principle in *Robert v Momentum Services Ltd* [2003] EWCA Civ 299; [2003] 1 WLR 1577: see in particular para 33. **This still remains the case following the recent civil justice reforms.** See *Kaneria v Kaneria* [2014] EWHC 1165 (Ch) at paras 31 to 34. I agree with those four paragraphs in the judgement of Nugee J.

27. It therefore follows that on 16 May 2013 the costs judge was dealing with an in-time application. This was a straightforward application to extend time under rule 3.1(2)(a). The principles concerning relief from sanctions which the Court of Appeal enunciated in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 WLR 795 are not applicable.

28. It behoved the costs judge to deal with the application in accordance with the overriding objective, as recently amended.

In my view the costs judge did so. The claimants made a reasonable application for an extension of time, **which did not imperil any future hearing dates or otherwise disrupt the proceedings**. The costs judge granted that application.”

62. *Hallam Estates* was heard in May 2014. *Denton* was heard the next month and the constitution of the Court hearing *Denton* included Jackson LJ, who had given the lead judgment in *Hallam Estates*. At paragraph 19 of their joint judgment, Lord Dyson MR and Vos LJ contrasted applications for relief from sanctions (citing *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] 3 Costs LR 588, a case where both parties had failed to serve their witness statements for several weeks after the due date, which was considered under CPR 3.9) with cases where an in time application is made (citing *Hallam Estates*), see para 20. At para 82 they referred back to various authorities cited at paras 18-20 of their judgment, *Hallam Estates* being one of them. Jackson LJ disagreed with the majority on one point, but he did not suggest that *Hallam Estates* should not be followed. *Denton* therefore stands as a strong endorsement of *Hallam Estates*.
63. *Denton* provides some assistance on the difference between the “ordinary” approach under CPR 3.1(2) which is governed by the overriding objective, and a relief from sanctions case, where CPR 3.9 applies. CPR 3.9 contains reference to two factors (see para 51 above: (a) litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders), and in *Denton* the majority held that those two factors, although not of paramount importance, still had *particular importance* in the context of an application under CPR 3.9, in this passage (emphasis added):
- “32. We can see that the use of the phrase “paramount importance” in para 36 of the *Mitchell* case has encouraged the idea that the factors other than factors (a) and (b) are of little weight. On the other hand, at para 37 the court merely said that the other circumstances should be given “less weight” than the two considerations specifically mentioned. This may have given rise to some confusion which we now seek to remove. Although the two factors may not be of paramount importance, we re-assert that they are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. That is why they were singled out for mention in the rule. It is striking that factor (a) is in substance included in the definition of the overriding objective in rule 1.1(2) of enabling the court to deal with cases justly; and factor (b) is included in the definition of the overriding objective in identical language at rule 1.1(2)(f). If it had been intended that factors (a) and (b) were to be given no particular weight, they would not have been mentioned in rule 3.9(1). In our view, the draftsman of rule 3.9(1) clearly intended to emphasise **the particular importance of these two factors**.”
64. *Jalla* was a case about extending time for serving pleadings where the application to extend was (just) in time. The Court (Coulson LJ with whom Edis and Underhill LJ agreed) cited *Hallam Estates* for the proposition that the court will grant a reasonable extension if it does not impact on hearing dates or otherwise disrupt proceedings (para 29). The Court also noted that there may be cases where, even though the relief from

sanctions regime is not directly applicable, still the Court may apply the *Denton* principles by analogy (para 33).

65. I come then to the two cases on which Mr Brindle relies to suggest that *Hallam Estates* is no longer good law. The first of those is *Lufthansa Technik v Panasonic*. That involved a late application to extend the deadline to provide certain information. The judge below had refused the application for extension, approaching it as an application for relief from sanctions under CPR 3.9. The Court of Appeal (Birss LJ giving the leading judgment, with which Newey and King LJJ agreed) decided that was the wrong approach, because there had been no sanction imposed by operation of any rule or order. Birss LJ said this:

“22. Many kinds of application for an extension of time in cases of breach do amount to applications for relief from sanctions, such as an application for an extension having failed to serve witness statements in the time ordered (*Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] CP Rep 36). Similarly an application to set aside a default judgment has the same character (see the recent *FXF v English Karate Federation Ltd (Practice Note)* [2024] 1 WLR 1097). However it does not follow that breach of any rule, practice direction (“PD”) or order which required something to be done within a certain time necessarily requires a relief from sanctions application ... Simply because a rule, PD or order uses a word like “must” does not on its own engage the relief from sanctions doctrine. ... one needs to look at what the default position would be if no extension of time (or other relief) was granted. If a sanction is in effect, either as a result of the express terms of a rule, PD or order, or by implication, then relief is required, but if not, not. For example in the context of witness statements (see *Chartwell*), rule 32.10 provides that if a witness statement is not served in time the witness may not be called to give evidence, unless the court gives permission. This therefore makes provision for a sanction for failure to comply with the order setting a deadline for service of witness statements.”

66. *Yesss (A) Electrical v Warren* raised the question whether a late application to rely on expert evidence of a new discipline not addressed by the existing directions was to be treated as an application for relief from sanctions. Birss LJ (with whom Asplin and Males LJJ agreed) said at para 12 that:

“an application to serve late factual witness evidence after the deadline has expired is one for relief from sanctions. That arises because, as explained in *Chartwell v Fergies* [2014] EWCA Civ 506, rule 32.10 operates as a sanction for that failure to have served a witness statement in time.”

67. The Court went on to conclude:

“33. In summary, in my judgment, the general approach to working out whether a case is covered by r3.9 is to start by identifying if a rule, PD or order has been breached. If there is none then the rule does not apply. If there has been a breach then the next task is to identify any sanction for that breach which is expressly provided for in the rules, PDs or in any

order. If there is no such express sanction then, outside the third category identified in *FXF* and the specific recognised instances of implied sanctions identified in *Sayers*, and *Altomart* (i.e. notices of appeal and respondent's notices), there is no relevant sanction for the purposes of r3.9, and so that rule does not apply. Only if there is both a breach and a sanction does r3.9 apply. It is worth noting that these circumstances are all concerned with sanctions which take effect as a result of a breach without further intervention. The court can always decide later to impose a sanction for a breach, such as a fresh order expressed as an unless order or an order for costs thrown away, but for either of those things to happen, a fresh decision would be needed".

### Discussion

68. Dealing first with Mr Brindle's submissions on the law, I find nothing in *Lufthansa* or *Yesss* to assist in the resolution of this appeal. In both cases, the question was whether any sanction had been imposed by the rules because if there was no sanction imposed, there was nothing to relieve. That question does not arise in this case because *if* the Commissioner was in breach of the order directing witness statements to be served by a particular date, then CPR 32.10 makes it clear that a sanction is imposed, namely that the party in default will not be able to rely on those witness statements without the Court's permission to do so.
69. *Hallam Estates* is on that point and answers that question. It tells us that there is no breach of a rule or order where an application to extend time for compliance with that rule or order has been made *in time*.
70. I do not detect any tension between the two cases cited by Mr Brindle, *Lufthansa* and *Yesss*, and *Hallam Estates*. They are different cases on different points. I reject Mr Brindle's argument that *Hallam Estates* is impliedly overruled by *Lufthansa* and *Yesss* and in consequence is no longer good law. Further, I consider the notes in the White Book, set out above, correctly encapsulate the position: a distinction is drawn between an application for an extension of time made within the existing deadline, which is to be determined in light of the overriding objective, and an application for an extension of time which is made beyond that deadline, which engages the relief from sanctions regime in CPR 3.9 (and see *Denton*).
71. The one caveat to that general rule is that there may be cases where, although the application is made in time, still the Court concludes that the *Denton* approach should apply by analogy if not directly. *Jalla* is an example of that sort of case.
72. The August Application, as is now common ground, was made in time. The existing order (as it had been extended by consent) expired at the close of business on 4 August 2025 and the August Application was made in advance of that deadline. It was, in consequence, an application for an extension of time to be decided according to the overriding objective, subject to the caveat that it was open to the Judge to consider whether CPR 3.9 should apply by way of analogy, in other words whether this was a case like *Jalla* which was so close to the line that the *Denton* approach should be taken. But if the Judge was going to go down that route, he needed to consider very carefully whether that was right and fair in the circumstances and whether the Commissioner had

had a sufficient opportunity to put his case on relief from sanctions, and he needed to give reasons for applying *Denton* by analogy. None of that happened.

73. Mr Brindle's case now hinges on CPR 32.10, which he says imposed a sanction on the Commissioner following the failure to serve witness statements by 4 August 2025 but I reject that argument as wrong in law. The words of CPR 32.10 are to be understood in the context of the wider rule in *Hallam Estates*. Because there had been an in time application for an extension of time, no sanction was imposed for non-service of the witness statements on 4 August 2025. Put another way, by virtue of the August Application (which was in time) the Commissioner was not in breach of the Court's deadline for service of those witness statements. If the August Application were to be refused, then (and only then) would the sanction apply. But if the August Application were to be granted, the time for compliance would be extended without any question of breach or sanction arising.

### *Conclusion*

74. The August Application was not for relief from sanctions because it was made in time.

### **Issue 3): Did the Judge go wrong?**

75. The Judge proceeded on the basis that the August Application was issued on 5 August 2025. That was an error of fact because the August Application was issued on 4 August 2025. It was also an error of law because the date of issue is not material for these purposes; the Judge should have been looking at the date on which the August Application was made (CPR 23.5). These errors led the Judge wrongly to adopt the approach set out in CPR 3.9 and *Denton*.
76. The Judge should not have applied the three-stage *Denton* test now reflected in CPR 3.9. In doing so, he made a procedural error. That also led him to make an error of substantive law because he placed particular importance on the two factors specified in CPR 3.9, whereas the correct approach was to look at all relevant factors consistently with the overriding objective (see *Denton* para 32 set out at para 63 above). These were material errors by the Judge.
77. I reject Mr Brindle's case that the Judge's decision should be maintained notwithstanding these errors. The crux of the Judge's reasoning is contained in paras 7 and 8. Those paragraphs are tainted by what has gone before where the Judge had concluded (wrongly) that the August Application was out of time, which led him (wrongly) to criticise Ms Seabrook's witness statement as being seriously defective. He went on (wrongly) to concentrate on (a) the extent to which the litigation had been conducted efficiently and proportionately and (b) the importance of the rules being observed; these were paraphrases for the two CPR 3.9 factors, but those factors were not of particular importance here. The key question for the Judge, in line with *Hallam Estates*, should have been whether the August Application would imperil any future hearing dates or otherwise disrupt the proceedings. That was not addressed.
78. The Judge's decision cannot stand in light of these material errors and must be set aside. That is to uphold the Commissioner's first and second grounds of appeal. It is not necessary to consider the Commissioner's third ground of appeal.

**Issue 4): What Order should this Court make?**

79. On an appeal, this Court has all the powers of the Court below (CPR 52.20). This Court is in a good position to determine the August Application, now being familiar with the papers and having heard full argument. This Court can and should remake the decision on the August Application.

*August Application*

80. This is not a case where it is appropriate to apply the relief from sanctions regime by analogy (as was done in *Jalla*). Although the August Application was made on the last day for compliance with the deadline, that fact alone is not sufficient in this case to import the relief from sanctions regime by analogy. This Court has had the benefit of full submissions going to the background of the case and the litigation history, and I am not persuaded that the Commissioner's conduct had been so egregious that it would be appropriate to import the greater rigour of the *Denton* regime for relief from sanctions. In my view, this is a straightforward application for an extension of time to be determined as a matter of discretion under the overriding objective, taking account of all relevant factors.

81. The following features of this case are relevant:

- a. the extension of time sought from 5 August to 17 October 2025 would not have and did not in fact imperil the trial date; nor would it have significantly disrupted proceedings: see *Hallam Estates*, *Jalla* and the notes to the White Book at CPR 2.1.2.1, set out above.
- b. There had been deficiencies in the Commissioner's conduct of the litigation, in that the Commissioner was slow to marshal his witness evidence and failed to comply with the timetable for disclosure. However, the Commissioner was not at any stage in default so far as witness evidence was concerned. And although the Commissioner was in breach of the directions about disclosure, that breach was not of the worst sort and was adequately explained by Ms Seabrook in her witness statement of 11 February 2026.
- c. Mr Pryor and his team cannot point to any substantial prejudice caused by the August Application: see Mr Reilly's witness statement dated 16 December 2025, para 57 (see para 14 above). To the extent that litigation costs were increased because witness statements were not served according to the agreed timetable, as Mr Reilly suggests in his later witness statement of 3 February 2026, that would be a matter appropriately reflected, if at all, in the costs order at the end of the day.
- d. Mr Pryor's late change of heart, moving away from a neutral stance to opposition, was consequent on his view that the Commissioner had wrongly taken disciplinary proceedings against him. Mr Pryor was entitled to change his stance, of course. But it is relevant that the reasons for doing so were unrelated to the timing of the Commissioner's witness statements and it was that timing which was the subject of the August Application.
- e. If Mr Pryor was going to change his stance, it was important that he communicated that to the Commissioner in good time before the hearing so that the Commissioner

had time to consider his own position in response to that changed stance and prepare for a contested hearing. That did not happen.

- f. To refuse the extension of time would, in effect, be to debar the Commissioner from defending this claim. That is a very significant sanction to impose on a party to litigation, which sanction should be reserved for cases which raise very serious concerns. That is not this case.

- 82. The justice of this case comes down firmly, in my view, in favour of extending time. That will ensure that the parties at trial are on an equal footing and able to participate fully by being able to call their witnesses and adduce full evidence on the facts. To refuse the August Application would be a disproportionate sanction because it would amount to a strike out of the Commissioner's case which is unwarranted as a matter of justice: there has been no failure by the Commissioner to comply with orders of the Court relating to the service of witness statements (see *Hallam Estates*); any default so far as disclosure is concerned was unrelated and relatively insubstantial; further, Mr Pryor's complaints about the Commissioner's use of the documents for disciplinary proceedings, which prompted his objection to the August Application, have been dismissed and are not renewed. Applying the overriding objective and by reference to the various criteria set out in CPR 1.1(2), I would therefore grant the August Application.

#### *December Application*

- 83. Once time for the Commissioner's witness statements is extended, the issues which were the subject of the December Application (now raised again by the Respondent's Notice) come into view. One part of the December Application, seeking an injunction to restrain the Commissioner from bringing the disciplinary proceedings, has been determined against Mr Pryor by the Judge and in relation to that part there is no appeal. The other part is now before the Court and was not decided by the Judge. That relates to Mr Pryor's argument that certain parts of the Commissioner's witness evidence should be excised.
- 84. Mr Brindle invited the Court to determine that issue or remit it to the High Court. This Court was not shown the disputed witness evidence and is not in a position to determine that issue for itself. The Court will therefore remit those questions to the High Court. It is not necessary or appropriate to direct a separate hearing in the High Court to determine those issues. They are suitable for determination by the trial judge once he or she has read in. The most practical way forward is simply for any disputed evidence to be contained in a separate bundle for trial. I would so direct.
- 85. In so doing, I would not close off the possibility that there should be a pre-trial review or other hearing in advance of trial to determine readiness for trial at which the December Application could be determined: whether to manage the case in that way is a decision for the Judge in charge of the King's Bench Division non-jury list or the trial judge once the case is allocated.
- 86. I would therefore remit the December Application, to the extent that it remains to be determined, to the High Court for determination.

## **Costs**

87. The general rule under CPR 44.3 is that the unsuccessful party will be ordered to pay the costs of the successful party. Mr Pryor is the unsuccessful party in this appeal and the starting position must be that he should pay the Commissioner's costs of and occasioned by the appeal, unless the Court makes a different order. So far as the August Application is concerned, I see no reason to make a different order.
88. I have set out in some detail the twists and turns in this litigation leading to the hearing before the Judge. So far as the August Application is concerned, that hearing went badly wrong. Both parties and the Judge worked off the wrong date and applied the wrong approach. Mr Brindle's late skeleton was the main cause of that mishap, because it was only in that skeleton that he first advanced the argument that the application was made on 5 August 2025. That assertion was incorrect. It was inconsistent with evidence from Mr Reilly and Ms Seabrook which was before the Judge. It led the Judge to the wrong legal analysis. With more time, the Commissioner's legal team might have been able to correct the position. But the lateness of the change of case meant that opportunity was lost.
89. So far as the December Application is concerned: that failed before the Judge to the extent that an injunction was sought, and in that respect the Commissioner was the successful party. It remains to be seen what the High Court will make of the part of the application seeking to exclude parts of the Commissioner's evidence and for that part there is, so far, no successful or unsuccessful party.
90. I would therefore award the Commissioner 75% of his costs before the Judge, with the remainder reserved to the High Court judge who determines the remitted part of the December Application.
91. The Judge's decision on the August Application led to an urgent appeal by the Commissioner which in turn led to the adjournment of the trial pending appeal, by my order dated 19 February. The costs thrown away by the adjournment were directly consequential on the outcome of the August Application and the consequent appeal. They should be the Commissioner's in any event.
92. By the time of the appeal hearing before this Court, the confusion about dates had been cleared up and it was common ground that the August Application was made in time. Mr Brindle nonetheless persisted in his submission that the relief from sanction regime applied. He has failed in that argument. The costs of the hearing in this Court should be the Commissioner's in any event.

## **Conclusion**

93. Subject to my Lord and my Lady's view, I would:
  - a. allow this appeal and set aside the Judge's Order;
  - b. remake the decision and allow the August Application;
  - c. remit the December Application, to the extent it remains undetermined, to the High Court;

- d. direct the disputed evidence to be put in a separate file for the trial judge;
- e. order Mr Pryor to pay the Commissioner's costs of this appeal and of the adjournment, and 75% of the costs of the hearing below, to be quantified by detailed assessment on the standard basis if not agreed.

**Lord Justice Cobb:**

94. I agree.

**Lady Justice Andrews:**

95. I also agree.