Neutral Citation Number: [2023] EWHC 929 (KB)

Case No: KA-2022-000202

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 28th April 2023

Before :

MR JUSTICE EYRE

- -

Between :

BARRY ROY PETERSON (1) **ANDREW CHARLES BLAKE (2)**	**Claimants/Appellants**
- and -	
HOWARD DE WALDEN ESTATES LIMITED	**Defendant/Respondent**

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- -

David Green (instructed by **Wiseman Lee LLP**) for the **Claimant**
Mattie Green (instructed by **Charles Russell Speechlys LLP**) for the **Defendant**

Hearing date: 19th April 2023

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on 28th April 2023.

Mr Justice Eyre:

Introduction.

1. On 23rd March 2022 the Claimants sought to make an application for an order under section 48(3) of the Leasehold Reform, Housing & Urban Development Act 1993 ("the 1993 Act") in the Central London County Court. The court declined to issue the application because the accompanying letter from the Claimants' solicitors had authorised deduction of a court fee of £308 whereas the fee in fact payable was £332. By the time the Claimants' solicitors had received the court's letter informing them of this the statutory deadline for making the application had passed. The Claimants applied for an order under CPR Rule 3.10 contending that there had been an error of procedure which the court had power to remedy under that rule. On 21st September 2022 Recorder Hansen dismissed that application having concluded that he did not have jurisdiction under rule 3.10 in these circumstances. The Claimants appeal from that decision with leave of the recorder.

2. The issue to be determined can be stated shortly namely whether a failure to pay the fee necessary to cause a claim form to be issued is an error of procedure within the scope of rule 3.10 and so an error which the court has power to remedy.

The Legislative Framework.

3. Section 39 of the 1993 Act gives the qualifying tenant of a flat the right to acquire a new lease. Section 42 provides for the tenant to give notice of his or her wish to exercise that right and by section 45 there is provision for a counter-notice from the landlord.

4. Section 48 addresses the situation where the parties have been unable to agree on the terms of a new lease or where the terms have been agreed but a new lease has not been entered. It is the latter which was the position here and that circumstance is provided for as follows at subsections (3) – (6):

> "(3) Where –
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> (a) the landlord has given the tenant such a counter-notice or further counter-notice as is mentioned in subsection (1)(a) or (b), and
> (b) all the terms of acquisition have been either agreed between those persons or determined by the appropriate tribunal under subsection (1),
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> but a new lease has not been entered into in pursuance of the tenant's notice by the end of the appropriate period specified in subsection (6), the court may, on the application of either the tenant or the landlord, make such order as it thinks fit with respect to the performance or discharge of any obligations arising out of that notice.
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> (4) Any such order may provide for the tenant's notice to be deemed to have been withdrawn at the end of the appropriate period specified in subsection (6).
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> (5) Any application for an order under subsection (3) must be made not later than the end of the period of two months beginning immediately after the end of the appropriate period specified in subsection (6).
>
> (6) For the purposes of this section the appropriate period is –
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> (a) where all the terms of acquisition have been agreed between the tenant and the landlord, the period of two months beginning with the date when those terms were finally so agreed; or

…"

5. It follows that where the terms of the new lease have been agreed but not implemented the window of time in which an application can be made opens two months after the date of the agreement and closes at the expiry of a further period of two months.

6. Section 53(1) provides thus for the consequences of a failure to make an application in the period provided for by section 48:

> "(1) Where –
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> (a) in a case to which subsection (1) of section 48 applies, no application under that subsection is made within the period specified in subsection (2) of that section, or
> (b) in a case to which subsection (3) of that section applies, no application for an order under that subsection is made within the period specified in subsection (5) of that section,
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> the tenant's notice shall be deemed to have been withdrawn at the end of the period referred to in paragraph (a) or (b) above (as the case may be). "

7. Section 1 of the Civil Procedure Act 1997 provides for there to be rules "governing the practice and procedure" to be followed in the civil division of the Court of Appeal, the High Court, and the county court. By section 2 the power to make those rules is given to the Civil Procedure Rule Committee.

8. The following rules are relevant for the purposes of this application.

9. CPR rule 7.2 which addresses the commencement of proceedings. Although an application under the 1993 Act is to be made by way of a Part 8 claim all were agreed that rule 7.2 remained the governing provision as to the commencement of the proceedings. This states:

> "(1) Proceedings are started when the court issues a claim form at the request of the claimant.
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> (2) A claim form is issued on the date entered on the form by the court".

10. By CPR Rule 3.9 the court has the power to grant relief from sanctions and then rule 3.10 provides:

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction –
>
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
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> (b) the court may make an order to remedy the error".

11. By section 92 of the Courts Act 2003 the Lord Chancellor has power to make orders prescribing "the fees payable in respect of anything dealt with by" county courts. At the relevant time the applicable fees order was the Court Fees Order 2008 as amended.

The Factual Background.

12. The Claimants are the successors in title to the previous tenant of a flat at 8 Goodwood Court, Devonshire Street, London W1 and the Defendant is the landlord of that flat. The requisite notice and counter-notice under sections 42 and 45 were served and on 25th November 2021 the parties agreed the terms of a new lease and that it should be granted to Ryan Peterson. Although that agreement was reached a new lease was not in fact granted.

13. The period for making an application under section 48 expired on 25th March 2022 being the date four months after the making of the agreement.

14. On 23rd March 2022 a representative of the Claimants' solicitors attended at the counter of the Central London County Court. That counter had been moved from its normal location because renovation works were under way and it is apparent that the move was causing some disruption to the normal running of the court counter. The court staff said that they were only accepting bankruptcy papers at the counter. The Claimants' solicitors representative nonetheless sought to deliver the application stressing the urgency of the matter and offering to pay the necessary fee either by way of the solicitors' PBA account or by use of a debit card. The court staff explained that the equipment to process such payments had not yet been transferred to the new location. They added that if the relevant papers were lodged in the court post box by 2.00pm they would be treated as having been received on that day.

15. It was in those circumstances that the Claimants' solicitors lodged in the post box a draft Pt 8 claim form for issue together with a covering letter in which they said:

> "Please accept this letter as our authority for you to deduct the court fee of £308 using our account number … which is also stated on the claim form."

16. £308 had previously been the applicable fee but there had been an increase to £332 in about September 2021. As a consequence of the solicitors' failure to authorise deduction of the appropriate court fee the court staff did not process the issuing of the claim form. Instead the claim form was returned to the Claimants' solicitors under cover of a letter of 24th March 2022 which said:

> "The new claim processing fee is £332 and not £308 so the court cannot process your new claim with the old fee".

17. The Claimants' solicitors received that letter on 30th March 2022 and the same day they drafted the application which ultimately came before the recorder. The application was issued on 31st March 2022. The application notice sought an order under rule 3.9 granting relief from sanction but reference was made to rule 3.10 in the evidence in support where the court was asked to exercise "its discretion under CPR 3.10 to grant relief in this circumstance arising from an inadvertent clerical error that we have promptly applied relief for (sic)".

18. The Claimants accept that in the circumstances I have summarised the section 48 application was not made within the period specified by section 48(5).

The Recorder's Judgment.

19. The matter came before Recorder Hansen on 29th July 2022 and he handed down his judgment on 21st September 2022.

20. At the hearing before the recorder it was common ground as it was before me that the material rule was rule 3.10 rather than rule 3.9.

21. The relief which the recorder was invited to make was an order under rule 3.10(b) to:

> "a. "Validate the step taken of presenting the Part 8 Claim Form in the manner in which it was presented; and consequently,
>
> b. To issue that claim form, with the deemed date of issue of 23 March 2022".

22. At [25] the recorder noted that rule 3.10 could not be used to circumvent the requirements of specific provisions in the CPR dealing with the same subject matter. He added at [26]:

> "However, as I have already indicated, this is not a case about service or an attempt to remedy a defect in service of originating process. There is nothing in the CPR that caters for what happened in this case or compels a particular approach. This is not therefore a case where the Claimants are seeking to use CPR 3.10 to achieve something that is prohibited under another rule in breach of the principle established by *Vinos v Marks & Spencer PLC* [2001] 3 All ER 784"

23. The crux of the recorder's conclusion that he had no jurisdiction to make the order sought is to be found at [27] where he said:

> "I accept that CPR 3.10 should be construed as of wide effect so as to be available to be used beneficially wherever the defect in question has had no prejudicial effect on the other party. However, I am not persuaded that it extends to cover the present circumstances. There has not, in this case, been any "failure to comply with a rule or practice direction" and the effect of the error in this case is that the Claim Form was issued outside the statutory limitation period. This was through no fault of the Court. The Court was quite entitled to do as it did, given the failure to tender the correct fee. I agree with Counsel for the Defendant that it is the issue of the Claim Form that marks the commencement of proceedings and it is only then that the Court's case management powers under CPR 3.10 are engaged. The matters giving rise to the issue now before the Court all took place prior to any Claim Form being issued. I therefore do not accept that there was here an error of procedure within the meaning of CPR 3.10 and I note that I have not been referred to any case where CPR 3.10 has been invoked in comparable circumstances. I believe there is good reason for this, namely that CPR 3.10 is not in play here. Nor, for similar reasons, can the Claimants resort to CPR 3.9. There has been no breach of any rule, practice direction or court order and the obstacle standing in the way of the claim is not any sanction imposed by the Court but the fact that the limitation period had expired by the time the Claim Form was issued. In any event, even if CPR 3.9 were in play, I would have refused relief in all the circumstances of the case, and in particular because of the obvious prejudice to the Defendant (see below) were I to grant relief".

24. At [28] the recorder explained that even if he had been satisfied that he had jurisdiction he would not have granted relief as a matter of discretion saying:

> "Even if I am wrong, and I do have the power to remedy the error in this case under CPR 3.10, it is a discretion which must be exercised in accordance with the overriding objective of dealing with cases justly and in exercising that discretion, I must be careful to ensure that remedying one party's error will not cause injustice to the other party. As Dyson LJ observed in *Steele v. Mooney*, that is the necessary control to ensure that the apparently wide scope of rule 3.10 does not cause unfairness. However, I am satisfied that there would be unfairness or injustice to the Defendant here, were I to exercise such power as I may have to validate the steps taken and treat the Claim Form as issued in time, because the effect of such an order would, in effect, be to extend time and/or dispense with a statutory

imitation period in an area of the law where certainty is important and the statutory time limit is absolute".

25. At [29] the recorder reverted to the question of jurisdiction in the following words:

> "In conclusion, I am not persuaded that the current state of the law permits me to treat a claim as brought or an application to the court as made in time where the correct court fee has not been paid and the Court for that reason refuses to issue the Claim Form. I do not propose to undertake a granular analysis of the case law. There are a large number of first instance cases, not all of which can be readily reconciled, and where a careful analysis of the precise facts in each case is very important in understanding the ultimate decision. However, I am satisfied that, on the present facts and the current state of the law, the failure to tender the correct court fee means that the Claimants, acting by their solicitors, did not do all that was within their power to set the wheels of justice in motion according to the procedure that is laid down for the pursuit of the relief in question: see e.g. *Page v Hewetts* [2012] EWCA Civ 805 at [35], [38]. See also Page No.2 (above) at [57]. Whilst the failure to tender the correct fee was clearly inadvertent, not abusive, it means that the application was not made in time and I cannot grant relief from the consequences that flow from that mistake".

26. At [31] – [34] the recorder made observations as to the state of the law in the following terms:

> "31. However, I cannot leave this case without making some further observations. I regard the law in this area as ripe for review by the Court of Appeal and would question whether the current state of the law in this area is entirely satisfactory. The mistake in the present case was inadvertent and understandable. There had been a relatively recent change in the applicable fee. The difference between the fee tendered and the fee actually payable was very modest, albeit not so modest (in my judgment) that I can dismiss the difference as de minimis. The claim form as issued was, in substance, the same as that provided to the Court on 23 March: see e.g. *Chelfat v Hutchinson 3G UK Ltd* [2022] EWCA Civ 455 at [55]. The only difference was the fee and the difference between the fee tendered (£308) and the fee that should have been paid (£332) was very modest. There was no suggestion of any substantive difference in terms of *"the details identifying the parties and of the claim actually being made"* (see *Chelfat* at [55]). I would also note the fact that there is absolutely no suggestion here of abusive procedural conduct.
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> "32. Counsel for the Defendant makes the point that it is not for the Court to advise as to the fee and that the onus is on the Claimant to do all within their power to set the wheels of justice in motion, and that includes tendering the correct fee. I agree on the present state of the law but would echo what a number of judges have said, and in particular would associate myself with the observations of Peter Jackson LJ in *Butters v Hayes* where he said this at [24]:
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> > "There is a division of opinion at first instance as [to] whether an action delivered but not issued in due time is brought at the date of delivery if the correct fee has not been proffered. There are perhaps three approaches. In *Page No. 2* and *Dixon* it was held that an action has not been brought because the non-payment was abusive. In *Liddle* it was held that the action has been brought because the non-payment has not been materially abusive, in the sense that it did not impact on the timing of the issuing of the claim. Each approach involves a trade-off between the advantages of certainty and an appreciation of the justice of the individual case. Tempting though it is to seek to resolve the question, it is unnecessary for us to do so for the purposes of the present appeal. That said, my provisional view is that there is force in the concerns expressed in a number of the cases about the disallowing of a claim on limitation grounds merely because of an inadvertent miscalculation of a court fee".

> 33. I would also refer to paragraph 23(4) where Peter Jackson LJ said this:
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> > (4) The decisions of this court in *Barnes* and *Page* establish that an action will be brought within the limitation period if it is delivered in due time to the court office, accompanied by a request to issue and the appropriate fee. They do not decide that an action will be brought in time if and only if it is accompanied by the appropriate fee.
>
> 34. In the light of those (albeit obiter) observations and the conflict of first instance authority to which Peter Jackson LJ referred, I have seriously considered granting this application and validating the Claim Form as if it had been issues on 23 March 2022. However, having carefully analyzed the relevant authorities, I do not consider that it is open to me to do so on the existing state of the law whether by reference to CPR 3.10 or otherwise. Each case is highly fact-sensitive but even on the most favourable view of the law (perhaps exemplified by *Althea & Co Solicitors v Liddle* [2018] EWHC 1751 (QB)), I cannot (in my judgment) treat this claim as having been made on any earlier date than the recorded date of issue, given that there is no question here of any fault being attributed to the Court. The incorrect fee was tendered, and that was a fatal error unless I regard the difference between the fee tendered and the fee payable as de minimis (which I do not). I make no secret of the fact that I reach this conclusion with no enthusiasm whatever. It seems something of a nuclear option, in these circumstances, to deprive the Claimants of what may otherwise be a meritorious claim. To penalize the Claimants for that error by refusing relief with the result that their notice under the 1993 Act will be deemed to be withdrawn seems to me to be a very harsh result. If I was unconstrained by authority, my starting point would be that the innocent miscalculation of a court fee should not, absent any possible suggestion of abuse, invariably lead to an otherwise meritorious claim being lost".

27. The recorder gave permission to appeal on two grounds. The first was that he had erred in law in defining "error of procedure" too narrowly for the purposes of rule 3.10 and excluding therefrom "the step of presentation of a claim form by a prospective claimant for issue by the court". The second ground was that as a consequence the recorder had erred in declining to make an order under rule 3.10 correcting the Claimants' error of specifying the incorrect issue fee. The recorder took the view that the first ground was arguable with a real prospect of success and that in respect of the second there was a compelling reason for the appeal to be heard. Before me attention was rightly focused on the first ground and on the issue of the proper interpretation of rule 3.10. If the recorder was right to conclude that properly interpreted rule 3.10 did not give him jurisdiction to grant the relief sought then that is an end of the matter. It will only be if I conclude that the recorder erred in his interpretation and that he did in fact have jurisdiction to grant relief that it will become necessary to consider whether relief should have been granted.

The Limited Relevance of CPR Rule 3.9.

28. I have already noted that the main thrust of the application as originally formulated was to seek relief under rule 3.9 with the reference to rule 3.10 being little more than an aside. As presented before me and before the recorder the focus was on rule 3.10. It was common ground that this is not a case where there was scope for relief from sanction under rule 3.9. That is because there was no sanction from which relief was being sought. For the Claimants Mr Green said that the potential relevance of rule 3.9 was limited to the point that the approach taken to applications for relief from sanctions pursuant to the decision in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1

WLR 3926 was to be borne in mind if the court were to get to the stage of exercising the discretion which he said it had under rule 3.10.

Jurisdiction under Rule 3.10: the Parties' Contentions in Outline.

29. For the Claimants Mr Green accepted that submitting the claim form with a letter proffering payment of a sum which was not the correct fee did not constitute the making of an application for the purposes of section 48(3) of the 1993 Act. Hence the need for an order under rule 3.10. For the Defendant Ms Green said that this was a significant concession. This was because it rendered irrelevant those authorities in which the court had been considering when a claim was "brought" for the purposes of the Limitation Act 1980 and the discussion in those cases of whether a failure to pay the correct issue fee meant that a claim had not been brought for those purposes. I agree with Ms Green as to the significance of this point. The Claimants' application was to be approached on the footing that the application had not been made in time with the central question being whether the failure to pay the fee needed to cause the claim form to be issued was an error of procedure for the purposes of rule 3.10.

30. Mr Green agreed that the central question was whether the error was one of procedure. He accepted that the existence of such an error is the basis for jurisdiction under rule 3.10 and said that the fundamental flaw in the recorder's approach was his failure to characterise the error here as an error of procedure.

31. Mr Green submitted that rule 3.10 was to be construed widely. He emphasised the use of the words "such as" in the phrase "an error of procedure such as a failure to comply with a rule or practice direction" saying that this supported the need for a wide reading of the provision and that it demonstrated that errors which did not involve breaches of a rule or of a practice direction could be errors of procedure.

32. It was an important part of Mr Green's case that "procedure" and so "an error of procedure" could include pre-action conduct and that it was not limited to steps taken after proceedings had been commenced. In this regard he pointed out that the Civil Procedure Act 1997 gave the Civil Procedure Rule Committee power to make rules governing "practice and procedure". That committee has made rules as to actions taken before the commencement of proceedings – such as rule 31.16 addressing pre-action disclosure; rule 21.10 providing for the approval of infant settlements without the need for proceedings to be commenced; and rule 23.2(4) and (4A) which provide for applications to be made before the start of proceedings. There is no suggestion that such rules are *ultra vires* and it follows, in Mr Green's submission, that "procedure" includes pre-action activity.

33. Mr Green said that not only was rule 3.10 to be read widely but sub-paragraphs (a) and (b) were to be read separately as identifying two separate and distinct potential consequences of an error of procedure. The first, in sub-paragraph (a), was the provision that an error of procedure does not invalidate any step taken in proceedings. The second, sub-paragraph (b), is that the court can make an order remedying an error of procedure. Mr Green did not accept that "any step taken in the proceedings" is confined to a step taken after the commencement of the proceedings but even if it was then sub-paragraph (b) was not so confined. Mr Green said that sub-paragraph (b) was not dependent on sub-paragraph (a) and that it had a wider scope giving the court power to remedy errors which occurred before the commencement of proceedings. Finally in terms of the

wording of rule 3.10, Mr Green pointed out that it was concerned with "an error of procedure" and not "an error in proceedings" and he submitted that "the presentation of a claim form is a quintessentially procedural act" because it was the first step towards enforcement of a legal right and the step which triggered the bringing of proceedings.

34. In addition Mr Green said that his interpretation was supported by the approach taken by Chief ICC Judge Briggs in *Manolete Partners PLC v Hayward & Barrett Holdings Ltd* [2021] EWHC 1481 (Ch), [2022] BCC 159. I will consider the effect of this argument further below.

35. For the Defendant Ms Green accepted that rule 3.10 was to be interpreted widely but said that the interpretation cannot be such as to have the effect of giving the court a power to set aside requirements laid down in statute. In that regard she referred to passages in the judgments in *Re Osea Road Camp Sites Ltd* [2004] EWHC 2437 (Ch), [2005] 1 WLR 760; *Mucelli v Government of Albania* [2009] UKHL 2, [2009] 1 WLR 276; and *Jennison v Jennison* [2022] EWCA Civ 1682 which again I will consider further below. Ms Green said that the requirement in section 48(5) of the 1993 Act as to the date by when an application must be made was such a statutory requirement. In a related point she said that a failure to comply with a statutory timetable is not an error of procedure but a failure to take a step required as a matter of substantive law.

36. Ms Green took issue with Mr Green's reading of rule 3.10. She said that sub-paragraphs (a) and (b) are not separate provisions giving different routes to validation or to the remedying of an error. Instead she said that they are stages in a single process whereby the rule first provides that an error does not invalidate steps in the proceedings unless the court orders otherwise and then provides for the court to have a power to remedy the position. This meant that rule 3.10 was to be read as concerned solely with errors occurring after the proceedings had been properly commenced. Ms Green supported that contention by referring to the context of rule 3.10 in the CPR namely that it is in rule 3 which is concerned with the court's case management powers and which she said were necessarily powers in relation to proceedings which have been commenced.

37. In addition Ms Green pointed to the operation of section 53 of the 1993 Act as indicative of the correct approach. She said that the Claimants' interpretation of rule 3.10 would enable the court to revive a tenant's notice which the statute had deemed to have been withdrawn. That would, she said, be an unusual power and one which cannot be properly seen to flow from a power to address errors of procedure.

Jurisdiction under rule 3.10: Discussion and Conclusion.

38. I reject the Claimants' interpretation of the meaning and effect of rule 3.10. As will be seen from the following analysis I do so substantially for the reasons advanced by Ms Green and for those set out with admirable concision by the recorder.

39. The Claimants' argument derived from the terms of the Civil Procedure Act 1997 does not advance matters and in so far as it is relevant it operates as a factor against the Claimants' position.

40. The fact that the Civil Procedure Rule Committee has made rules about pre-commencement actions does indicate that as a matter of language and for the purposes of the 1997 Act a reference to "practice and procedure" can include steps which are to

be taken before proceedings have been commenced. That does not, however, assist materially in the construction of rule 3.10 which must be read as a whole and in its context.

41. It is of note that the error made in this case by the Claimants' solicitors did not relate to a rule made by the Civil Procedure Rule Committee. The error was not a failure to comply with some requirement laid down in the CPR. Instead it was a failure to take a step which the Lord Chancellor had required to be taken before the court staff would issue a claim form. It was a failure to take steps required by reason of the Court Fees Order 2008 made under powers derived from the Courts Act 2003 and by reason of the Lord Chancellor's control of the staff of HMCTS. Those matters do not necessarily mean that the error was not an error of procedure in abstract (though they do suggest that is not an apt description) but they do strongly indicate that the error was not an error of procedure within the meaning of rule 3.10. Rule 3.10 was a rule made by the Civil Procedure Rule Committee by virtue of its powers under the 1997 Act. It is difficult to read that Act as giving that committee the power to set out the consequences of a failure to comply with rules lawfully imposed by others. I accept that it would arguably be within the committee's powers for there to be a procedural rule specifying that certain steps could not be taken unless there had been compliance with other non-procedural rules. Nonetheless even if the committee's powers extended that far the Act cannot, in the absence of express words, be read as authorising that committee to empower the court to remedy an error consisting of a failure to comply with rules lawfully imposed by others. I will return to this point below when I consider the effect of the order sought and the consequences of the approach for which the Claimants contend. It suffices here to say that this is an indication that the error here was not an error of procedure for the purposes of rule 3.10.

42. Rule 3.10 is to be read widely. In *Steele v Mooney* [2005] EWCA Civ 96, [2005] 1 WLR 2819 Dyson LJ giving the judgment of the court explained, at [18] – [24], that the term "error of procedure" is not to be given "an artificially restrictive meaning" and that "procedural errors are not confided to failures to comply with a rule or practice direction". It is to be noted that the error in that case consisted of a failure to include reference to the claim form in an application made after the commencement of proceedings for an extension of time to serve the particulars of claim and supporting documents. Dyson LJ explained that an error in the drafting of an application could be an error of procedure even though it did not amount to a breach of a rule or of a practice direction.

43. Although the meaning of rule 3.10 is not to be artificially restricted that meaning must be ascertained by reading the rule as a whole and in context. In that regard Ms Green was right to point to the rule's location in Part 3 of the Rules and, accordingly, in that part of the CPR concerned with the court's case management powers. Such powers are necessarily concerned with events after proceedings have been commenced. This is not conclusive as to the proper interpretation of rule 3.10 but it is an indication in that regard.

44. I reject Mr Green's contention that sub-paragraphs (a) and (b) are to be seen as dealing with two separate and distinct potential situations following the making of an error in procedure. Instead I am satisfied that they are to be seen as dealing sequentially with the consequences of such an error. The first consequence, at (a), is that a step taken in the proceedings is not invalidated in the absence of a court order and the second

consequence, at (b), is that the court has power to make an order remedying the error. That is the reading which accords most naturally with the language used and with the structure of the rule and not least with the use of "and" between the two sub-paragraphs. This has significant consequences because the reference in sub-paragraph (a) to the invalidity or otherwise of "any step taken in the proceedings" strongly suggests that the rule is concerned with errors made after the commencement of an action. Subject to consideration of Mr Green's argument founded on *Manolete Partners* to which I will turn below it is hard to envisage an error of procedure occurring before commencement which could even arguably and even absent the saving provision of rule 3.10(a) properly be regarded as having invalidated a step taken after such commencement.

45. What light does authority throw on the approach to be taken?

46. The bundle of authorities contained sundry decisions concerned with the question of when a claim had been "brought" for the purposes of the Limitation Act 1980 and with the question of the impact which a failure to pay the correct court fee had on whether and when a claim had been so brought. Rightly I was not taken to those authorities in any detail. The question of when a claim is brought for limitation purposes does not advance matters here. That is because the Claimants have accepted that the actions on 23rd March 2022 did not amount to the making of an application for the purposes of the 1993 Act and that an order under rule 3.10 is required. Those decisions are, however, of note to this extent. If the Claimants' argument as to the scope of rule 3.10 is correct then that provision would at least potentially have been relevant to the claims in those other cases but there does not appear to have been any attempt to invoke it in those cases.

47. In *Re Osea Road Camp Sites Ltd* a Pt 7 claim form had been issued seeking relief in respect of alleged unfair prejudice in the conduct of the affairs of that company. This was contrary to the requirement imposed by section 459 of the Companies Act 1985 that such relief be sought by way of petition. Pumfrey J concluded that the requirement was mandatory and was imposed by the Companies Act. He then had to consider whether the court had power to dispense from the requirement. The claimant there had sought to rely on rule 3.10 but Pumfrey J held that it did not assist saying, at [15]:

> "It seems to me, as a matter of construction, that the words "error of procedure" relate here to errors in the procedure established by the CPR themselves. It does not seem to me that the words are apt to relate to requirements imposed by statute other than the statutes underlying the CPR perhaps, but in any event not to apply to section 459(I) of the 1985 Act. Failure to use the prescribed route to commence proceedings in relation to unfair prejudice does not seem to me to be merely an error of procedure. It seems to me to be a failure to use the mechanism provided for the purpose. I am, therefore, quite satisfied that CPR r 3.10 does not give me jurisdiction to dispense with the requirements of section 459(I)".

48. In *Jennison v Jennison* the claimant had commenced proceedings as the personal representative of the estate of the late Graham Jennison. She had done so before the resealing in England and Wales of the grant of probate which she had obtained in New South Wales. The question was whether the proceedings should in those circumstances be struck out by reason of the claimant's alleged lack of standing at the time the proceedings were commenced. The Court of Appeal rejected that argument having concluded that by reason of the principle in *Chetty v Chetty* [1916] AC 604 the

claimant's title derived from the will of the deceased and that the claimant had standing from the date of the death of the deceased.

49. Newey LJ considered whether if the court had concluded that the claimant did not have standing to issue the claim it could nonetheless have used rule 3.10 to allow the proceedings to continue. Newey LJ noted the decision of Stewart J in *Kimathi v Foreign & Commonwealth Office (No 2)* [2016] EWHC 3005 (QB). [2017] 1 WLR 1081. There Stewart J had held that the court's powers under Pt 3 of the CPR could not be used to validate proceedings which were otherwise a nullity as a matter of substantive law (in that case proceedings had been brought in the name of a deceased individual personally rather than in the name of that individual's personal representative). Newey LJ, with whom Coulson and King LJJ agreed, confirmed the correctness of that approach saying, at [59]:

> "I, too, consider that Stewart J was right that the "wide discretion" conferred by CPR Part 3 cannot be used to validate a nullity. CPR 3.10 applies in relation to "an error of procedure such as a failure to comply with a rule or practice direction". Dyson LJ explained in *Steele v Mooney* [2005] EWCA 96, [2005] 1 WLR 2819 that CPR 3.10 "gives a non-exhaustive definition of a procedural error as including a failure to comply with a rule or practice direction" and that "procedural errors are not confined to failures to comply with a rule or practice direction": see paragraphs 18 and 20. Even so, CPR 3.10 is not applicable where the proceedings that have purportedly been brought are to be regarded as a nullity. CPR 3.10 allows existing proceedings to be regularised, not the creation of valid proceedings. It is not, to use words of Stewart J, "a cure-all for every defect however fundamental, whether or not it is one of law, and whether or not the authorities have previously determined that there is a nullity". As Stewart J noted, nothing in *Maridive* suggests otherwise: in that case, Mance LJ stressed that the claim with which the Court was concerned was, "though irregular, not a nullity"

50. The consideration of the effect of rule 3.10 in *Jennison v Jennison* was not necessary for the decision in that case. The view expressed was, nonetheless, one which was arrived at after consideration of the authorities and was one with which the other members of the court agreed and it must carry considerable weight. The circumstances in that case were different from those of the current case because the consideration of rule 3.10 was as to its applicability on the premise (contrary to the conclusion reached) that proceedings had been commenced but had been found to have been a nullity. However, those could be regarded as being circumstances whether there was potentially more scope for applying rule 3.10 than in the current case because there proceedings had been commenced whereas here the application was not issued.

51. In *Mucelli* the issue was whether there had been a failure to file notice of an appeal against an extradition notice within the period specified in the Extradition Act 2003. The House of Lords held that the notices in question were out of time. At [74] Lord Neuberger noted the limited scope of rule 3.10 and other provisions of the CPR saying:

> "On the face of it, at any rate, there is a clear and unqualified statutory time limit, namely seven days, and there would therefore seem to be no basis upon which it could be extended. In that connection, viewed from the English and Welsh perspective, I would refer to the Civil Procedure Rules, which contains provisions whereby the court can extend time for the taking of any step, under CPR r 3.1(2)(a), can make an order remedying any error of procedure, under CPR r 3.10, or can make an order dispensing with service of documents, under CPR r 6.9. However, these powers cannot be invoked to extend a statutory time limit or to avoid service required by statute, unless of course, the statute so provides. Apart from

> being correct as a matter of principle, this conclusion follows from CPR r 3.2(a) which refers to time limits in "any rule, practice direction or court order", and from CPR r 6.1(a) states that the rules in CPR Pt 6 apply, "except where…any other enactment…makes a different provision".

52. It is apparent that Lord Neuberger was there expressing his understanding of the scope of rule 3.10 and as such the assessment carries great weight. I note, however, that there does not appear to have been an issue about the scope of rule 3.10 in that case because the primary focus had been on whether the notices had been served in time and then on whether the Extradition Act itself gave a power to extend time.

53. In none of those cases was the court concerned with the consequences of a failure to pay the fee necessary to cause proceedings to be issued nor with deciding whether such a failure was an error of procedure for the purposes of rule 3.10. However, in those cases the court was concerned with the scope of that provision. It is apparent that there are bounds beyond which even when widely interpreted the powers under rule 3.10 cannot extend. It is apparent that rule 3.10 cannot be used to give effect to a claim which could not have effect as a matter of substantive law or by reason of a non-procedural rule. Although Mr Green sought to pass over it I have regard to Pumfrey J's assessment that for the purposes of rule 3.10 an "error of procedure" is to be seen as an error in the procedure established by the CPR.

54. Mr Green said that notwithstanding those cases light was thrown on the scope of rule 3.10 by the decision in *Manolete Partners*. In that case claims under section 423 of the Insolvency Act 1986 had been commenced using the application form appropriate to insolvency proceedings even though when properly considered a claim under section 423 was not such a proceeding. The claim should have been commenced by a Pt 7 claim form. Chief ICC Judge Briggs allowed the proceedings to be recast as a Pt 7 claim and to proceed on that basis subject to payment of the fee applicable to such a claim. In reaching that decision the judge referred to the decision of HH Judge Cawson QC in *Re Taunton Logs Ltd* [2020] EWHC 3470 (Ch), [2021] BPIR 427. In that case proceedings had been commenced by way of an insolvency application when the claim was a simple debt claim. Judge Cawson used rule 3.10 to allow the claim to continue as a Pt 7 claim. Judge Briggs explained, at [56], that bringing the claim by way of the wrong procedure did not invalidate the proceedings.

55. It will immediately be seen that the circumstances in *Manolete Partners* were very different from those of the current case and from those which Pumfrey J considered in *Re Osea Road Camp Sites*. In *Manolete Partners* the scope of insolvency proceedings was defined by the Insolvency (England and Wales) Rules 2016. Those were rules made by the Lord Chancellor under powers derived from sections 411 and 412 of the Insolvency Act 1986. However, they were avowedly "rules that affect court procedure" for the purpose of those sections and for that reason they were made after consultation with the Insolvency Rules Committee and with the concurrence of the Chancellor of the High Court. The claim had been presented in the wrong format but had been issued by the court. Indeed, properly analyzed, the relevant failure was a failure to comply with the requirements of the CPR. This was because a claim which was outside the scope of insolvency proceedings and which should have been commenced using the Pt 7 procedure had not been commenced in that way. This was a failure to commence proceedings governed by the CPR in the way in which those rules required. The power under rule 3.10 was used to regularise existing proceedings and to remedy a non-

compliance with the CPR. Even if the relevant failure is said to have been a failure to comply with the Insolvency Rules it was a failure to comply with rules which were avowedly procedural rules. Rule 3.10 was not being used to allow the initiation of proceedings which were not yet underway nor to remedy a failure to comply with rules which were not related to matters of court procedure.

56. The aspect of *Manolete Partners* on which Mr Green relies is the fact that the error in question was made at the very outset of the proceedings rather than in the course of the action. In his skeleton argument Mr Green said that the decision showed that "errors in steps taken, or purported to be taken, in originating process are capable of remedy by rule 3.10". In his oral submissions Mr Green elaborated on this pointing out that the error must have been made before the start of the proceedings because it was an error in the preparation of the material presented to the court when the issue of the application was being sought. There is force in this argument but it does not cause me to alter the view I have formed in the light of the other authorities. It is to be noted that it was not suggested in *Manolete Partners* that the proceedings were a nullity nor that the error could not be remedied. The argument was between the respondents to the claim who said that conversion to a Pt 7 claim was necessary but possible and the applicants who were contending that they had been entitled to make the claim as an insolvency application and that there had been no error needing to be remedied. It follows that there had been no argument before Chief ICC Judge Briggs as to his power to make the order he did (though it is to be noted that this point does appear to have been in issue in *Re Taunton Logs Ltd*). That explains why that judge did not receive argument on this question and why he was not referred to the authorities I have noted above. More significant are the points I have noted above that the error in that case was a failure to comply with what were clearly procedural rules and was being addressed when proceedings which were not a nullity were underway.

57. A further consideration arises out of the nature of the order which is sought and the effect which granting relief would have. I have rehearsed at [21] above the terms of the order sought by the Claimants. The effect of the relief sought is that a claim form which was not issued on 23rd March 2022 because of the failure to proffer the correct fee would be regarded retrospectively as having been issued on that date. That would mean that even though the requirements of the Court Fees Order 2008 were not met those requirements were retrospectively to be treated as having been satisfied. The relief sought would also reverse the effect of section 53 of the 1993 Act and would do so retrospectively. The tenant's notice which was deemed withdrawn at midnight on 25th March 2022 would come back into effect with the deemed withdrawal being regarded as never having happened. Mr Green accepted that the order he sought would have a retrospective substantive effect. He said that this was a consequence of the wide power to remedy errors given by rule 3.10. If that is a consequence of a proper reading of rule 3.10 then the court must give effect to it. However, it would be a surprising effect involving as it would substantial retrospective consequences and this is a potent indication that the interpretation advanced by the Claimants is not correct.

58. I am satisfied that properly interpreted an error of procedure for the purposes of rule 3.10 is limited to an error in a procedure laid down by the CPR or potentially by an equivalent procedural provision and that it is not concerned with matters occurring before the commencement of proceedings (although it can be used to remedy defects of form in proceedings once commenced). In relation to the circumstances of this case

an error of procedure does not include a failure to pay a court fee needed to initiate proceedings where the requirement to pay that fee derives not from the CPR nor from any other rule or direction made by the Civil Procedure Rule Committee but from an order made by the Lord Chancellor exercising powers deriving from the Courts Act 2003.

59. It follows that the recorder was right to conclude that he did not have jurisdiction to grant relief and to dismiss the application.

The Exercise of Discretion.

60. In light of the conclusion I have reached as to the jurisdiction under rule 3.10 the question of the exercise of discretion does not arise. However, it is to be noted that the recorder explained why even if he had concluded that he had jurisdiction he would as a matter of discretion not have made an order under rule 3.10. Mr Green submitted that the recorder did not in reality exercise his discretion or that he exercised it on a basis which was wrong in principle. He said that the error of principle consisted of the recorder proceeding on the footing that he had no power to grant relief. However, those contentions misunderstand the recorder's approach. The recorder was expressly proceeding by way of setting out as an alternative basis for the dismissal of the application his conclusion that even if there had been a power to do so it would not have been appropriate to grant relief as a matter of discretion. In doing that he was expressly contemplating the circumstances which would exist if his conclusion as to jurisdiction was wrong and expressly proceeding for the purpose of the alternative conclusion on the basis that he had jurisdiction. Mr Green also said that the conclusion expressed by the recorder as to discretion at [28] of his judgment is inconsistent with the regret expressed later in the judgment and the conclusion which he had reached. However, that does not advance matters and it was open to the recorder to conclude that it would not be appropriate to exercise a discretion in the Claimants' favour while still expressing regret at the lack of jurisdiction.

61. In light of his conclusion as to jurisdiction it is not surprising that the recorder expressed his alternative conclusion on the exercise of discretion in short terms. He did not spell out in detail the injustice which he found would be caused to the Defendant by an order in favour of the Claimants but he clearly had regard to the need for the discretion, if it existed, to be exercised in such a way as to do justice as between the parties. It cannot be said that his approach was wrong in principle nor that he arrived at a conclusion which was not open to him. In that regard it is relevant that the Claimants had left it until right at the end of the two month window for making applications before seeking to apply. They were entitled to do that and to use the full period allowed by the 1993 Act and there is some force in the point that it was sensible to give a full opportunity for voluntary implementation of the agreement made in November 2021 before coming to court (though there was no evidence provided as to the reason for the delay in making the application). Nonetheless, the difficulties which arose are precisely the kind of matters which will only cause insuperable problems when a party is seeking to make an application at the end of a time period. If the claim form and covering letter had been submitted even only a few days earlier there would have been time before the end of the necessary period to remedy the deficiency in the fee proffered. Moreover, the correct court fees are a matter of public record. One can well understand how the error arose but the position remains that the error was made because the Claimants' solicitors

were working on the basis of a fee scale which had been superseded some six months previously.

62. Thus even if contrary to the conclusion I have reached above the recorder was wrong as to his interpretation of the scope of rule 3.10 he was entitled to dismiss the application on the basis of his alternative conclusion in relation to the exercise of discretion.

The Effect of the Conclusion as to Jurisdiction.

63. Having found that rule 3.10 did not give the court power to grant relief in circumstances such as those here Recorder Hansen questioned whether the state of the law was satisfactory. In that context he noted the comments made by Peter Jackson LJ in *Hayes v Butters* and in particular the provisional view which that judge had expressed at [24].

64. If I am right in my conclusion that rule 3.10 does not give a power to grant relief in these circumstances then it is immaterial whether the state of the law is or is not satisfactory. However, a number of points fall to be made and the position does not appear to me to be as clear as the recorder appears to have felt it to be. I will express these points in the briefest of terms and only to ensure that my dismissal of the appeal is not misinterpreted as being an acceptance of the recorder's assessment as to whether the state of the law is or is not satisfactory.

65. The recorder was right to note that the effect of the correct interpretation of rule 3.10 is that there can be severe consequences in circumstances where there has been an inadvertent mistake as to the correct amount of the fee payable. In the present case the mistake was made by solicitors who were seeking to pay the correct fee and whose efforts to make immediate payment had been hampered by the dislocation resulting from the movement of the court counter in the course of renovation works. There are, however, a number of factors which are to be set in the other side of the balance when assessing the consequences of the proper interpretation of rule 3.10 in addition to those I have noted above deriving from the fact of the solicitors having left it till the end of the period before making the application. The effect of section 53 is significant. Parliament has chosen to say that if an application is not made within a particular period then the tenant's notice under section 42 is deemed to have been withdrawn. In addition parliament chose to make no provision for an extension of the time period provided in section 48. The consequence is that at the end of the four month period the landlord is entitled to proceed on the footing that there is no prospect of it being required to implement the agreement. In reaching that position parliament is to be taken to have balanced a number of considerations including the interests of tenants; the interests of landlords; and the benefits of certainty. That balance having been placed at a particular point it is not for the courts to say that the result is unsatisfactory.

Conclusion.

66. In those circumstances ground 1 fails and ground 2 also fails as being dependent on ground 1. The appeal is, therefore, dismissed.