(1) CBR (Wakefield) Ltd ; (2) CBR (Leeds) Ltd; (3) Espresso Nationale Wakefield Ltd; (4) Espresso Nationale Leeds Ltd; (5) Highland View Ltd; (6) CBR (Moreley) Ltd Claimants / Part 20 Defendants v (1) Puccino's Ltd; (2) Segafredo Zanetti espresso Worldwide SA Defendants & between Puccino's Ltd Part 20 Claimant & (1) Anak Patel; (2) Bizmaker Ltd; (3) Bipin Rambhai Patel; (4) Nishaan Janak Patel; (5) Brand Italia Ltd Part 20 Defendants

JUDGMENT : John Behrens : Chancery. 30th October 2006

1. Introduction

1. The draft judgment was sent out on 22nd September 2006. It contained the usual embargo on disclosure and indicated that the handing down hearing was estimated to take an hour. The hearing was originally listed for hearing on 13th October 2006.

2. As anticipated at the hearing on 14th September 2006, the Applicants terminated their instructions of Runhams and instructed Cobbetts LLP of Leeds. Cobbetts have in turn instructed Leading and Junior Counsel, Hugh Tomlinson QC and Tom Grant. Puccino's continue to instruct Baker & McKenzie LLP and Robert Anderson QC.

3. The Applicants have invited me to reconsider my decision under my inherent jurisdiction before it is handed down. In support of the application they seek to rely on substantial additional evidence not before the Court at the hearing on 14th September 2006. The new evidence comprises:
(a) Third Witness Statement of Janak Patel dated 16 October 2006
(b) Witness Statement of Yashvin Patel dated 16 October 2006
(c) Fourth Witness Statement of Janak Patel dated 18 October 2006.
(d) Witness Statement of Greg Dawson dated 19 October 2006.
(e) Witness Statement of Nicholas Carr dated 20 October 2006.
(f) Fifth Witness Statement of Janak Patel dated 25 October 2006
(g) Second Witness Statement of Greg Dawson dated 25 October 2006

4. Puccino's have in turn filed a further witness statement from Alison Kate Stephen dated 20th October 2006.

5. The Applicants do not suggest that the conclusions that I reached in the draft judgment were in any way incorrect on the material then before me or on the submissions I then received. Mr Tomlinson QC's[1] skeleton argument is full of words such as "understandable" and "inevitable". However they contend that the material before me was seriously misleading and incomplete. They contend that the blame for this was wholly that of Runhams/Miss Egarr. They contend that the new evidence puts matters right. They admit that the conduct of this litigation was wholly unprofessional and that they have been in serious breach of orders of the Court including the Unless Order made by Judge Langan QC. However they contend that when matters are seen in the light of the new evidence this is an appropriate case to grant relief from sanctions under CPR 3.9.

6. Puccino's accept that there is jurisdiction to admit new evidence at this stage but do not accept that it is appropriate to do so. In the absence of new evidence it is inevitable that the judgment should not be withdrawn. Even if the new evidence is admitted they do not accept that it is appropriate for there to be relief from sanctions. They make the point that Runhams are not a party and have not had the chance to challenge many of the very serious allegations made in the new evidence. Secondly they do not accept that the belated attempts by Cobbetts to provide full disclosure on behalf of all 11 Applicants have been successful. Accordingly they submit that even if the new evidence is admitted the result should be the same.

2. The Law

7. It is well-established that there is clear power to recall, reconsider and alter an order before it is drawn up and sealed. This power survives the CPR but is only to be exercised in exceptional circumstances. It is equally clear that a draft judgment sent out on a confidential basis may be withdrawn. A draft judgment is not handed down. If the judge thinks his judgment is wrong he ought to withdraw it.

8. There are a number of authorities that support these propositions. They include ***Stewart v Engel***,[2] ***Robinson v Fernsby***,[3] ***Navitaire v Easyjet***[4] and ***Fisher v Cadman***.[5] I do not propose to analyse each of those case in detail. However the principles can be seen from the following passages:

2.1. per May LJ in Robinson v Fernsby

> *82. It is clear, I think, that the majority decision in **Stewart v Engel** was that the exercise of the jurisdiction to reopen and alter a judgment and order once they have been given and made requires exceptional circumstances. I am not myself convinced that there is likely in a particular case to be a substantial practical difference between the formulations of the majority and those which Clarke LJ preferred.*
>
> *83. In **Noga v Abacha** [2001] 3 All ER 513, Rix LJ had heard a complex dispute in the Commercial Court. After a lengthy trial, he had handed down a reserved judgment determining preliminary issues. The losing claimant contended that the judge had ignored binding authority and that his decision was flawed. It applied to the judge to reconsider his judgment. Rix LJ considered himself bound by Stewart v Engel, following the spirit, if not the letter, of the decision in Re Barrell Enterprises in the light of the requirements of the overriding objective, to*

[1] I hope Mr Grant will forgive me if I refer only to Mr Tomlinson QC throughout this judgment. I know he has contributed substantially to the skeleton argument and the submissions.
[2] [2000] 1 WLR 2268
[3] [2003] EWCA 1820
[4] [2005] EWHC 282
[5] [2005] EWHC 2424

regard the need for exceptional circumstances as a requirement for the proper exercise of the jurisdiction to reconsider a decision. He said at paragraph 42:

84. "Of course, the reference to exceptional circumstances is not a statutory definition and the ultimate interests involved, whether before or after the introduction of the CPR, are the interests of justice. On the one hand the court is concerned with finality, and the very proper consideration that too wide a discretion would open the flood gates to attempts to ask the court to reconsider its decision in a large number and variety of cases, rather than to take the course of appealing to a higher court. On the other hand, there is a proper concern that courts should not be held by their own decisions in a straight-jacket pending the formality of the drawing up of an order. …

Provided that the formula of "exceptional circumstances" is not turned into a straight-jacket of its own, and the interests of justice and its constituents as laid down in the overriding principle are held closely to mind, I do not think that the proper balance will be lost. Clearly, it cannot be in every case that a litigant should be entitled to ask the judge to think again. Therefore, on one ground or another the case must raise considerations, in the interests of justice, which are out of the ordinary, extraordinary or exceptional. An exceptional case does not have to be uniquely special. "Strong reasons" is perhaps an acceptable alternative to "exceptional circumstances". It will necessarily be in an exceptional case that strong reasons are shown for reconsideration."

85. On the facts and in the circumstances of that case, Rix LJ considered that to grant the application to reconsider his judgment would subvert the appeal process itself. He considered it to be wrong for a judge to be treated to an exposition such as would be presented to a court of appeal. If in such circumstances a judge should be tempted to open up reconsideration of his judgment, an appeal would not be avoided, it would be made inevitable.

2.2. per Pumfrey J in Navitaire v Easyjet

*36. There is no doubt that until the order is perfected the trial judge has jurisdiction to permit the pleadings to be amended, to hear further evidence, and to reconsider and if necessary reverse any judgment already given – see **Stewart v Engel** [2000] 1 WLR 2268. This jurisdiction, often called the Barrell jurisdiction (**Re Barrell Enterprises** [1973] 1 WLR 17), has survived the introduction of the Civil Procedure Rules and 'if very cautiously and sparingly exercised ... serves a useful purpose, fully in accord with the overriding objective of enabling the court to deal with cases "justly" ...' (see [2000] 1 WLR 2274E per Sir Christopher Slade). The availability of the jurisdiction in cases in which fresh facts are sought to be decided after judgment and before order can avoid the expense and delay of an appeal which might well result in an order for a retrial. Like the jurisdiction to admit further evidence on appeal, the jurisdiction to permit further evidence after judgment should be exercised having regard to the same kind of factors as the factors taken into account when the exercise of the discretion to permit fresh evidence to be adduced on appeal is under consideration – see the judgment of Morritt LJ in **Banks v Cox** (unreported: 17 July 2000). As Neuberger J said in Charlesworth v Relay Roads Ltd [2000] 1 WLR 230:*

*'... because it is inherently contrary to the public interest and unfair on the other side that an unsuccessful party should be able to raise new points or call fresh evidence after a full and final judgment has been given against him, it would generally require an exceptional case before the court was prepared to acceded to an application where the applicant could not satisfy the three requirements in **Ladd v Marshall** [1954] 1 WLR 1489.'*

*37. This statement of the law was approved by Sir Christopher Slade in **Stewart v Engel** (above) and also in **Townsend v Achilleas** (unreported: 1 July 2000) where Mummery LJ said this:*

*'In principle, however, it is difficult to see why there should be a more restrictive test for the reception of fresh evidence by the judge who has tried the case than would be applied by the Court of Appeal on an appeal from the judge. Indeed, there is a good case for the cautious application of a slightly more flexible test for the reasons given by Neuberger J in **Charlesworth v Relay Roads Ltd** (below) at 238 B–H. The trial judge would have the advantage over the Court of Appeal of having seen the witnesses. He would be in a better position to look at the evidence as a whole closer to the trial. In that way it might be possible to avoid the risk of the Court of Appeal having to inflict on the parties the expense and delay consequent on ordering a retrial by a different judge at a much later date.'*

*38. The statement of the principles is that of Denning LJ in **Ladd v Marshall** [1954] 1 WLR 1489 at 1491:*

'It is very rare that application is made to this court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied where fresh evidence is sought to be introduced. To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.'

*39. Mummery LJ emphasises the dual requirements of caution and flexibility. The trial judge has a real advantage in assessing the impact of new evidence on the result of the case. At the same time, I do not regard the second **Ladd v Marshall** condition as reduced in force. As this case illustrates, the potential consequences of admitting evidence may be serious. Witnesses will have to be recalled, further expert evidence assembled, and the factual basis for the judgment already delivered reviewed. The expense may be substantial. The other party in the litigation, who has ex hypothesi been successful thus far, is entitled to the satisfaction of knowing that the evidence could not have been obtained earlier when it is confronted with this additional burden.*

9. It is to be borne in mind that in this case there has not been a trial. It has been struck out at an interlocutory stage. There is no question of witnesses being recalled. On the other hand there is the additional expense of dealing with and considering further witness statements. However this factor coupled with the flexible approach

advocated by Mummery LJ seems to me to reduce the necessity for the Ladd v Marshall conditions to be met to the full before the new evidence is admitted. It was, however, accepted by Mr Tomlinson QC in his submissions that there needs to be exceptional grounds before the jurisdiction was exercised. He submitted that this was such a case.

3. The nature of the new evidence.

10. It is not my intention to set out in detail all the new evidence that the Applicants seek to admit. It may be summarised.

3.1. Evidence from Janak Patel as to the extent of his knowledge.

11. Janak Patel seeks to suggest that he was badly let down by Runhams who lied to him, did not keep him informed of the state of the litigation and failed to inform him of important orders. In particular he contends:

1. he was not informed of the extent of the Applicants' disclosure duties. He suggests that the limited specific advice he received in respect of the share arrangement was to the effect that it was irrelevant.
2. whilst he was aware that there was a CMC on 22nd November 2005 and whilst he was informed that disclosure had been ordered by 17th February 2006 he received no explanation of the precise terms of the order. He was not given a copy of the order, nor was he advised of the categories of documents required to be disclosed.
3. He did not see the list served on 17th February 2006 and it was not approved by him. He had given Miss Egarr more than 500 documents so that the list cannot have contained all those documents. Although the documents were moved to one building they were not pooled by him or any of the Applicants. In so far as they were "pooled" they must have been pooled by Miss Egarr shortly after they were given to her. He did have some discussions with Miss Egarr after Puccino's disclosed its list in mid February 2006. Miss Egarr told him that she was preparing the Applicants' list and it contained approximately 300 documents.
4. he was aware of the "without prejudice" negotiations being conducted in March 2006 but was unaware of other correspondence and court orders. In particular he was unaware of the application for an Unless Order or of the 2 hearings before Judge Langan QC in April and May 2006. Miss Egarr did not inform him of the result of hearings before Judge Langan QC, or send him a copy of the order. She did not inform him of the criticisms made by Judge Langan QC in his judgment.
5. he believed that settlement negotiations were continuing. On 11th May 2006 Miss Egarr sent witness statements to be signed. The covering e-mail described them as confirming "*that all the parties have full access to all documents*". [These are the statements from which I was invited by Mr Barker at the hearing on 14th September 2006 to infer that the Applicants were responsible for the pooling. The hearing proceeded on that basis. In fact a closer reading of the witness statements makes it clear that they do not specifically state that the Applicants pooled the documents. They state that they were all taken to one building.]. In addition he received a blank disclosure list to be signed by suitable representatives. Janak Patel arranged the necessary signatures without seeing the disclosure list.
6. he was not sent a copy of Baker & McKenzie's letter of 25th May 2006 or informed of its contents. He was not informed of the Request for Judgment even though it was faxed to Runhams on 30th May 2006. He was not informed of the judgment entered by Judge Langan QC on 7th June 2006 even though Runhams were informed of it on 12th June 2006.
7. After 12th June 2006 he had conversations with Mr Dowling the senior partner at Runhams. No mention was made of the judgment or of the need to apply promptly to have it set aside.
8. On 21st July 2006 Janak Patel spoke to Miss Egarr on the phone. She gave him a résumé of the position without mentioning the judgment. She wrote to him on 24th July. The letter does not mention the judgment and is written on the basis that the action is continuing. Thus it includes: *"I would confirm that Disclosure, that is exchange of relevant documents, is now at an end and that the only remaining procedural matter is for the disclosure of each party's witness statements."*
9. On 27th July 2006 he discovered the existence of the judgment from a third party. He also learned of the directions hearing listed for 15th August 2006. He describes himself as being shocked and appalled. He spoke to both Miss Egarr and Mr Dowling. Miss Egarr said she had no idea judgment had been entered and no notice had been given to Runhams. She told Janak Patel to keep calm and not to panic. Mr Dowling accused Baker & McKenzie of telling lies and said that the judge would see through them.
10. On 28th July 2006 Janak Patel sent an e-mail to Miss Egarr in which he described himself as being devastated that he was not made aware of the request for judgment and asked what was going on. He was again reassured by Mr Dowling who described this as the death throes of the other side. On 28th July 2006 Mr Dowling wrote to the third party a letter in which he stated that Runhams had no notice of the application and that the order was not served on Runhams. [It will be recalled that both these statements were untrue]. He went on to state that there could be little doubt that an application to set aside the judgment would succeed.
11. On 22nd August 2006 Mr Dowling sent an e-mail to Mark Green at Cobbetts with copies to both Miss Egarr and Janak Patel. In it he stated that the judgment was in respect of a failure to comply with an Unless Order. The e-mail went on: "*As there was no such "Unless" Order made (!) it will be interesting to see what explanation they can come up with on the return date in September to justify the application, of which, for the avoidance of doubt, we received no notice.*"

12. Janak Patel says he had considerable difficulty in obtaining copies of the correspondence from Runhams. He sets this out in detail. He did not in fact receive much of the correspondence until 5th September 2006 (some 8 days before the hearing listed for 14th September 2006). That correspondence was selective but it did include the letter of 25th May 2006 which had made it clear that Miss Egarr knew of the Unless Order and that she was present when it was made.
13. On 11th September 2006 (with the assistance of Cobbetts) Janak Patel obtained some papers from the Court. It will be recalled that Janak Patel made a witness statement for the hearing of 14th September 2006 dealing with the additional disclosure relating to the share agreement. A draft of his witness statement was sent to him and returned with amendments on 11th September 2006. In paragraph 6 of the proposed amendment Janak Patel said: "*I was not made fully aware of [the] order of the 22nd November 2005 nor had I seen it. Similarly I was not at all aware of the Unless Order made by [Judge Langan QC] on 5th May 2006. And I have only become, on 7th September 2006, of the correspondence exchanged between Baker & McKenzie and My solicitors and more specifically the contents of Baker & McKenzie's letter dated 25th May 2006 …*"
14. Miss Egarr replied to the e-mail on 12th September 2006. She told Janak Patel that he could not say he was unaware of the order of 22nd November 2005 because he had made a witness statement in May confirming the list of documents. The order is referred to in the list. The amendment to paragraph 6 was thus omitted.
15. On 12th September 2006 Janak Patel spoke to Mr Dowling about moving solicitors. He was annoyed. Mr Dowling strongly advised against it and threatened to exercise a lien in respect of £150,000. Janak Patel said that that sum was not owed. Runhams had already been paid over £75,000 in respect of costs. Mr Dowling said he could move to Cobbetts after the hearing but not before.
16. On 14th September 2006 Janak Patel attended the hearing. He saw for the first time the skeleton arguments, the witness statement of Miss Egarr and of Miss Gillett. He was horrified. He became more horrified when Mr Barker went through the chronology of events during the morning session. Following a conference he instructed Mr Barker to apply for an adjournment. The application was refused for reasons I then gave. After a short adjournment Janak Patel instructed Mr Barker to continue to represent the Applicants for the hearing. The hearing continued until about 4.30pm.
17. At the end of the hearing Janak Patel telephoned Cobbetts and explained what had happened. Although Cobbetts had assisted earlier in the proceedings and had received some documents from Runhams they were not formally instructed until after the hearing. Janak Patel did not feel that he could disinstruct Runhams.

12. I have set out a summary of Janak Patel's evidence. It contains very serious allegations against Runhams. Runhams have not had a chance to answer them. Indeed until the actual hearing before me on 26th October 2006 their legal representatives had not seen either my draft judgment (which was subject to an embargo)or the evidence in the application. Furthermore, as has been pointed out in Puccino's' evidence Janak Patel has an old conviction for an offence of dishonesty and has – rather more recently – had his evidence rejected by a VAT tribunal.

13. Janak Patel's evidence must be approached with caution. However there is substantial corroboration for it included within Runhams' file. In particular:
    1. There is no document or other file note that suggests that Janak Patel saw the order of 22nd November 2005, the Unless Order or the judgment earlier than he says he did. There is no letter sending him copies of them.
    2. There is no file note of any advice given as to the extent of the disclosure necessary.
    3. There are documents on the file which plainly demonstrate that Runhams were making untrue assertions about the case. These include a letter dated 11th August 2006 to Alpesh Patel, the letter dated 28th July 2006 sent to Hill Woodhouse, and the e-mail dated 22nd August 2006 sent to Cobbetts.

14. Mr Tomlinson QC told me that he had seen the whole file and that there was nothing in it to contradict Janak Patel's evidence. Mr Anderson QC accepted that in the light of the file he could not argue that Janak Patel's account was incredible. In his skeleton argument he describes Runhams' conduct as "frankly bizarre".

3.2. Events following the 14th September 2006.

15. As already noted Janak Patel consulted Cobbetts on 14th September after the hearing. The draft judgment was e-mailed to the parties on 22nd September 2006. By that time Cobbetts had not received the files from Runhams or their professional indemnity insurers. Most of the files were received on 25th September 2006.

16. Leading Counsel was instructed and, on 6th October 2006 letters were written to Baker & McKenzie and to the Court stating the Applicants' intention to apply for a review of the Draft Judgment under the *Barrell* jurisdiction and explaining the grounds for this application. Not surprisingly Baker & McKenzie declined to consent to the application.

17. On 9th October 2006 Cobbetts made the application for the Court to reconsider its judgment.

3.3. Further Disclosure

18. It is to be remembered that in paragraph 57 of the draft judgment I noted that the pooling of the documents was irreversible. This was based on Miss Egarr's witness statement where she said: *"I do not accept that the list for each of the parties for whom I act should have had a different list of documents (to reflect the documents in control of that particular party) because, as has already been made clear, all relevant documents had effectively become pooled when the litigation commenced. Even if, which I doubt, it would have been possible to identify the original recipient or creator of each of the documents disclosed, I did not understand that the Court Order required such an exercise to be undertaken and I do not consider that it would have been practical or proportionate to try to attempt it."*

19. Furthermore at the hearing on 14th September both Counsel addressed the Court on the basis that the pooling was irreversible.

20. The evidence of Mr Dawson is designed to demonstrate that the pooling was reversible. Mr Dawson is an Associate employed by Cobbetts. He was asked on 2nd October 2006 to examine the disclosure lists already produced by Runhams. He was also asked to obtain and examine any further documents that the Applicants had in their possession. He is familiar with the rules as to disclosure and has taken part in substantial disclosure exercises in commercial disputes on many occasions.

21. In his witness statement he describes his methodology. He and his team have spent a total of 250 hours in work and he has considered over 2200 documents. He has prepared separate disclosure lists for each applicant. In respect of each of the applicants he has prepared 2 separate schedules – one in respect of the documents that were previously disclosed in Runhams' lists and the other in respect of new documents not previously disclosed. He deals with the pooling in paragraph 11:

Although Runhams had not kept the documents … separate, it was possible in most cases to determine their source from looking at the document itself. For example, an original letter addressed to Highland View Limited plainly belonged to that company's list. In some cases assistance has been required of the Applicants and in other cases certain documents were held in the files of more than one Applicant, in which case that document has been included in the list for each relevant Applicant.

22. In paragraph 13 he concludes that the impression created by Miss Egarr's statement was not correct. He and his team managed to "reverse" the pooling in a comparatively short period of time. The task was neither impractical not disproportionate.

23. It is his view that the new lists which were produced and included over 2000 documents (rather than the 484 in the original lists) satisfy the Applicants' obligations as to disclosure. The lists were disclosed on dates leading up to the hearing before me. In his skeleton argument Mr Anderson QC made a number of criticisms of the new lists. In his second witness statement Mr Dawson dealt with most, but not quite all of Mr Anderson QC's criticisms.

4. Discussion

24. Mr Anderson QC submitted that this was not a proper case for the exercise of the *Barell* jurisdiction. He firstly points out that it was only after the draft judgment went against the Applicants that the matters now complained of were drawn to the attention of the Court. Both in his skeleton argument and in his oral argument he took me carefully through Janak Patel's evidence showing the state of his knowledge at various times between May 2006 and the date when the draft judgment was sent out. He submits, in effect, that Janak Patel had sufficient knowledge of the facts to have made a timely application for an adjournment before 14th September 2006, or to have requested the court not to have sent out the draft judgment on 22nd September 2006. Instead, so the submission goes, he waited till after the draft judgment was available. Thus he has been able to get "two bites of the cherry". He should not be permitted to do this.

25. I see the force in this submission, but I cannot accept it. This was complicated commercial litigation involving potentially large sums of money. Although Janak Patel had some of the information that is now before the court it is only after the disclosure of Runhams file that the full picture has emerged. The procedural history of the case is, in any event, such that an application for an adjournment of the 14th September hearing would, to put it no higher, have been most unlikely to succeed. Both Judge Langan QC and myself had expressed our displeasure at the way Runhams had conducted the litigation. I had indicated that the timetable I had set should be kept to. The application for an adjournment would have had to have been mounted by Janak Patel without the facts as he now knows them. He tried to move solicitors on 12th September without success. His application for an adjournment on 14th September failed. Whilst other litigants might have acted differently from Janak Patel I do not think he can be seriously criticised for the events prior to 14th September.

26. Janak Patel consulted Cobbetts immediately after the conclusion of the hearing on 14th September 2006. There is no evidence that either he or Cobbetts made a conscious decision to await the judgment before making any application to the court. The draft judgment was sent out on 22nd September – only some 8 days after the hearing – and there was no advance notice from the court that it would be sent out on that date. Cobbetts only received the file from Runhams on 25th September 2006. In my view neither Cobbetts nor Janak Patel can be criticised for deciding to await the file before deciding on the course to be taken. Applications such as the one before the Court are, thankfully, rare and it did not surprise me to be told by Mr Tomlinson QC that Cobbetts were not aware of the jurisdiction before they consulted him. It is to be noted that Cobbetts wrote to Baker & McKenzie and the court on 6th October 2006 only 1 day after Cobbetts consulted leading Counsel.

27. Mr Anderson QC next submitted that this is not an exceptional case and there are not the "strong reasons" necessary to exercise the jurisdiction. In paragraph 7.2 of his skeleton he gives examples of the sort of case where it can be exercised:

7.2. In the interests of finality, the jurisdiction should only be exercised in "exceptional circumstances" where there are "strong reasons" for doing so. Examples of such circumstances include: (a) a plain mistake by the judge, (b) the failure of the parties to draw the court's attention to a fact or point of law that was plainly relevant, (c) the discovery of new facts subsequent to the judgment, or (d) if the applicant can argue that he was taken by surprise by a particular point on which the court ruled adversely to him and which he did not have a fair opportunity to consider.

28. He points out that this case does not come within any of those categories. He describes the case as one where the Applicants have fallen out with their previous solicitors and where they can obtain redress from Runhams in a professional negligence action. He points out that the Applicants cannot begin to satisfy the ***Ladd v Marshall*** test for new evidence in that all the material now relied on was known at the time to the Applicants and/or Runhams.

29. Mr Tomlinson QC accepts that the circumstances of this case are unusual and that he has not found any case in the authorities where the jurisdiction has been exercised in circumstances approaching this. He submits that the circumstances of the case go far beyond a dispute between the Applicants and Runhams. They demonstrate a total failure of the basic obligations of a solicitor to his client. Not only did they not keep the Applicants informed they misled them as to the orders that had been made. These allegations are not, of course, proved but, as already noted, Runhams' file contains sufficient corroboration to make them credible for the purpose of this application. He draws to my attention the slightly more flexible approach to the jurisdiction advocated by Mummery LJ in the passage cited by Pumfrey J. He makes the point that a remedy against Runhams may not be adequate. The sums involved in this case are potentially large, though there must be some doubt about the ability of either side to satisfy a large judgment. Orders for security for costs have been made on each side. There is no confirmation that Runhams have more than the minimum professional indemnity cover of £2 million.

30. I prefer the submissions of Mr Tomlinson QC. In my view the circumstances of this case are exceptional. I shall return to Runhams' conduct at the end of the judgment; however I agree that the matter goes far beyond an ordinary dispute between solicitor and client. The evidence of Mr Dawson is important because it casts serious doubt on the evidence of Miss Egarr that it was impossible to undo the effect of the pooling. I shall return to this evidence below but it seems to me to be important in deciding whether to exercise the jurisdiction.

31. In all the circumstances it would be unjust to the Applicants and not in accordance with the overriding objective not to reconsider my judgment in the light of the new evidence and I propose to do so.

5. Breach of the Unless Order.

32. I considered the extent of the breach of the Unless Order in paragraphs 54 to 65 of the draft judgment. I shall not repeat the reasoning that led me to the conclusion that there were serious and by no means technical breaches of the Unless Order by all of the Applicants.

33. It is now accepted by Mr Tomlinson QC that those conclusions were justified. Indeed he submitted that those breaches should have been recognised at the hearing on 14th September 2006. He further accepts that the evidence of Mr Dawson reveals a more serious breach than was apparent in September. Having carried out a full and detailed disclosure exercise over 250 hours Mr Dawson and his team have thought it right to include over 2000 documents in the new draft lists rather than the 480 documents in the original lists. As Mr Tomlinson QC pointed out the doubt I expressed in paragraph 88(5) of the draft judgment has turned out to be more than justified.

34. There was considerable debate before me as to the extent to which the new lists prepared by Mr Dawson complied with the Applicants' disclosure obligations. Mr Anderson QC accepted that Mr Dawson had made a far better shot at disclosure than Miss Egarr but made two points about the new lists.

35. Baker & McKenzie had very limited time to consider the lists. In the result they carried out a limited exercise comparing the documents in the new lists with those in the lists served by Runhams. In the short time available they identified a number of documents which appeared in Runhams' lists that were not, apparently, included in the new lists. In his second witness statement Mr Dawson dealt with many of these apparent omissions but it was clear that there was at least one document in Runhams' lists that were not included. Mr Tomlinson QC made the point that Runhams' files were in a mess and it was possible that they had lost the document in question. In any event, as was demonstrated at the hearing, Baker & McKenzie do in fact have copies of all the documents disclosed by Runhams. He further made the point that this is heavy commercial litigation with a large number of documents. In such a case there will always be queries about the occasional document.

36. Mr Anderson QC's second point related to the unpooling. Whilst he accepted that Mr Dawson's exercise could have identified the source from which the documents ought to have emanated, it would not identify a case where the documents had been improperly disclosed between the Applicants. This might have been important in identifying a breach of fiduciary duty on the part of Janak Patel.

37. In his skeleton argument and in his submissions Mr Tomlinson QC drew to my attention a passage from Chadwick L J's judgment in ***Arrow Nominees v Blackledge*** [6]: *"that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the Court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules -even if such disobedience amounts to contempt for or defiance of the court - if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled - indeed, I would hold bound - to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him"*

38. He also drew to my attention, by way of example the decision in ***Douglas v Hello!*** [2003] EWHC 55 (Ch).

[6] [2002] 2 BCLC 167, paras.54-55 (Chadwick LJ)

39. In paragraphs 85 and 88(4) of the draft judgment I concluded that there was a risk that there would not be a fair trial if the judgment was set aside. In the light of the considerable work carried out by Mr Dawson and his team, and the further disclosure that has taken place since the draft judgment was sent out, I am no longer of that opinion. I agree with Mr Tomlinson QC that the fact that there may be some minor omissions in the new lists does not jeopardise the fairness of the trial. I also agree with his submission on the "unpooling". This is not a case where specific prejudice can be shown. The argument that there may be documents which had been in the wrong files is hypothetical.

6. Relief from Sanctions

40. In the light of the now admitted serious breach of the Unless Order it is necessary to reconsider the matters set out in CPR 3.9(1) in the light of the new evidence. It is then necessary to stand back and look at all the circumstances of the case in the light of the overriding objective and to see whether it is appropriate to grant relief.

6.1. (a) the interests of the administration of justice;

41. In paragraphs 68 to 70 of the draft judgment I accepted that there was a real risk that there would not be a fair trial and that Puccino's were justified in their view that further documents remained to be disclosed.

42. For reasons, I have given I am now satisfied that a fair trial is possible. I am also satisfied that Mr Dawson has made a serious and proper attempt to comply with the Applicants' disclosure obligations.

43. In his skeleton argument Mr Tomlinson QC points out that it was not the conduct of the Applicants that put the fairness of the trial in jeopardy but that of Runhams. He also points out that if the order stands the Applicants will be denied a trial at all.

6.2. (b) whether the application for relief has been made promptly;

44. In paragraph 71 of the draft judgment I concluded that it was plain that the application was not made promptly. In his skeleton submissions Mr Tomlinson QC accepts that the application was not made promptly but submits that this was the fault of Miss Egarr and not the Applicants. As already noted there is support for this submission in the file of Runhams. I shall not repeat the evidence here.

6.3. (c) whether the failure to comply was intentional;

45. I dealt with this issue at paragraphs 72 – 74 of the draft judgment. I concluded that the pooling of the documents was a deliberate decision by the Applicants which had had the effect of making it impossible for proper disclosure to take place.

46. There may be a dispute between the Applicants and Runhams as to whether the pooling was carried out by Miss Egarr (as Janak Patel now says) or by the Applicants (as was believed on all sides at the hearing on 14th September). If, as Janak Patel now says, the pooling was carried out by Miss Egarr then it was not a deliberate decision by the Applicants. Furthermore for reasons I have given, I am now satisfied that the pooling did not make it impossible for proper disclosure to be given.

6.4. (d) whether there is a good explanation for the failure;

47. In paragraph 75 of the draft judgment I concluded that there was no good explanation for the failure. Looked at from Puccino's point of view this remains the position. As between the Applicants and Runhams it may be that the Applicants are not to blame. In paragraph 15 of his skeleton Mr Anderson QC draws my attention to a passage from the White Book

> *15. Generally, a Court will not enquire into whether a failure to comply with the Rules or a Court Order is the fault of a party or his legal representative. There are good reasons for this approach: see, for example, Lord Justice Peter Gibson in* ***Training in Compliance Ltd v Data Research Company*** *[2001] CP Rep 46 at para 66, and Lord Justice Mantell in* ***Daryanani v Kumar & Co*** *[2001] CP Rep 27 at paras 29 and 30. CPR 3.9(1)(h) is an exception to this approach. However, as the notes at CPR 3.9.2 show (at page 111-112 of the White Book), it is still relevant for the Court to consider:*
>
> *1) That the other party is still affected in the same way (regardless of whether the fault is that of a party or his legal representatives);*
> *2) That an investigation into who is to blame (as between a party and his legal representatives) can be time consuming and difficult; and*
> *3) If the fault is that of the legal representative, whether the client may have a remedy against his former advisors.*

48. These are important points. However it has to be borne in mind that under CPR 3.9 the court is specifically required to have regard to the extent to which the blame attaches to the legal advisors. Furthermore (whether by luck or good management) I refused to lift the embargo on the draft judgment so as to include Runhams professional insurers until the hearing of the application. Thus there could be and was no question of the hearing being extended by any investigation of who is to blame as between Runhams and the Applicants.

6.5. (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant preaction protocol GL;

49. In paragraph 78 of the draft judgment I substantially accepted Mr Anderson QC's submissions on this point. I made the point that Runhams had conducted this litigation in a wholly unprofessional manner. I made the point that the conduct of this litigation was seriously affected. In his skeleton argument Mr Anderson QC makes the point that the failures have disrupted the proceedings and caused inordinate additional expense.

50. In his skeleton argument Mr Tomlinson QC does not seek to persuade me that my conclusion was wrong. He recognises that as a term of granting relief the Applicants must pay the costs wasted by Puccino's on an indemnity basis. I was told that these costs amounted to £85,000. I am not in a position to comment on the figure. At one stage Mr Tomlinson QC suggested that there should be a stay on the payment of these costs pending the determination of an application for wasted costs against Runhams. Following a certain amount of unfavourable judicial intervention he did not pursue the argument and I say no more about it.

51. In paragraph 79 of the draft judgment I commented that whether the defaults would continue would depend on the efficiency of the Applicants' new advisors. Mr Tomlinson QC submitted that Cobbetts were a firm experienced in commercial litigation of this sort and I could be confident that the defaults would not continue.

52. Cobbetts have only been instructed since 14th September 2006 but the initial impression they have created is favourable. They made the application within a short time of obtaining the Court file, have provided long and detailed witness statements, and (most importantly) have spent many hours dealing with the question of disclosure. It may be too early to be absolutely confident that the problems that have occurred in this case will not be repeated but, as I have said, the initial impression created by Cobbetts is very favourable.

6.6. (f) whether the failure to comply was caused by the party or his legal representative;

53. In paragraph 80 of the draft judgment I concluded that a substantial part of the blame must lie at Runhams' door. In the course of his submissions Mr Anderson QC drew to my attention the extent to which I had criticised Runhams in my judgment. He thus submitted that I had refused to grant relief in the knowledge that it was substantially Runhams' fault.

54. I still have not heard from Runhams and thus cannot attribute the blame. However Runhams' file makes very unhappy reading. If Janak Patel's allegations prove to be right then almost the whole of the blame will lie with Runhams.

6.7. (g) whether the trial date or the likely date can still be met if relief is granted;

55. It remains the position that the trial date has been lost as well as the date for the assessment of damages. Mr Tomlinson QC submitted that with a tight timetable there is no reason why this matter should not be got to trial by the middle of 2007. He made the point that the relevant events took place in 2002/2003 so that there is no reason to believe that the parties will be unable (with the assistance of the documents) to give evidence on relevant events. It is not suggested that witnesses have died.

6.8. (h) the effect which the failure to comply had on each party;

56. I dealt with this at paragraphs 83 – 85 of the draft judgment. Mr Tomlinson QC makes the point that a large judgment against Runhams may not be satisfied. Runhams is a 3 partner firm specialising (according to its web site) in personal injury litigation. Its professional indemnity insurers have refused to confirm whether it has cover in excess of the minimum £2 million. Mr Anderson QC makes the point that this is quite usual. He further makes the point that both sides have been required to give security for costs on the grounds of impecuniosity. It is thus quite possible that a large judgment against Puccino's would not be satisfied. This will affect the value of any claim against Runhams.

57. For reasons I have given I am no longer satisfied that there cannot be a fair trial if relief is granted.

6.9. (i) the effect which the granting of relief would have on each party.

58. I dealt with this in paragraph 86 of the draft judgment. In the light of the discovery exercise carried out by Mr Dawson, Puccino's will know the provenance of the documents. They will, however, be at a theoretical disadvantage that they may not discover if one of the Applicants improperly had documents that ought to have been in the possession of another. Whether they would have discovered this if disclosure had originally been carried out in accordance with the rules is also a matter of speculation.

7. Conclusion

59. In paragraph 87 I sought to conduct the final exercise advocated by Arden LJ and to consider all the circumstances of the case in accordance with the overriding objective. I gave 6 reasons why I decided to refuse relief from sanctions. 3 of those reasons (3, 4 and 5) no longer apply. I am left with the fact that there have been serious and substantial breaches of the orders of the court; that Judge Langan QC was not informed of the pooling; and the failure to act promptly with the resulting loss of the trial date. As against that I am now satisfied that proper disclosure has taken place and that a fair trial can take place. Furthermore it is well arguable that almost the whole of the blame lies with Runhams.

60. In all the circumstances it seems to me to be appropriate to grant relief from sanctions. The relief will be on terms that the wasted costs of Baker & McKenzie be paid on an indemnity basis including the costs of the application for relief. If the parties are not able to agree the amount of those costs it seems likely that there will have to be a detailed assessment with an order for a substantial interim payment.

61. At the resumed hearing when the judgment is handed down I intend (subject to any question of appeal) to set a tight timetable for trial; I hope that the parties will be able to agree directions and will liaise with the listing officer as to available dates.

62. I also intend to deal with the application for wasted costs against Runhams. If, as Mr Tomlinson QC suggested more than once, the matter can be dealt with in under 15 minutes I will deal with it at the hearing. Otherwise

directions will be given. Again I hope the parties can agree the directions and will liaise with the listing officer as to available dates. Copies of this draft judgment and all of the evidence in the application should be supplied to Runhams and their professional indemnity insurers in good time before the hearing.

63. It will be apparent from each of the two judgments that I am extremely concerned at the apparently unprofessional conduct of Runhams in their conduct of this litigation. My provisional view is that I ought to refer the documents in the application to the Professional Conduct Committee of the Law Society for them to consider whether disciplinary proceedings are appropriate. It would, however, be wrong to do that without inviting submissions from Runhams. Runhams will have the opportunity to make such submissions at the resumed hearing.