Neutral Citation Number: [2026] EWCA Civ 1025

Case No: CA-2025-000913

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE
COUNTY COURT AT MIDDLESBROUGH
District Judge Lindsay
K00MB484
ON APPEAL FROM THE
COUNTY COURT AT MIDDLESBROUGH
His Honour Judge Robinson BEM
[2025] EWCC 12

Date: 31/07/2026

Royal Courts of Justice
Strand, London, WC2A 2LL

Before:

LORD JUSTICE BEAN
(Vice-President, Court of Appeal, Civil Division)
LADY JUSTICE ANDREWS
LADY JUSTICE COCKERILL

- -

Between:

STEVEN ORTON

Claimant/Appellant

- and -

BARCLAYS BANK UK PLC

Defendant/Respondent

- -
- -

Robert Weir KC, Jonathan Butters and Thomas Westwell (instructed by **Consumer Rights Solicitors**) for the **Claimant**
Roger Mallalieu KC and Karl Nash (instructed by **Simmons & Simmons LLP**) for the **Defendant**

Hearing date: 8 July 2026

- -

Approved Judgment

This judgment was handed down remotely at 10:30 on 31 July 2026 by circulation to the parties' representatives by email and release to The National Archives.

Lady Justice Cockerill:

INTRODUCTION

1. This appeal is from an order dated 27 March 2025 of HHJ Robinson BEM ("the Circuit Judge"), and before that from a decision of DJ Lindsay sitting in the County Court at Middlesbrough. It raises essentially one question of law: what is the proper approach to rule 27.14(2)(g) of the Civil Procedure Rules ("CPR")?

2. As regards the factual basis upon which that question arises, it is whether the Appellant's conduct in discontinuing a PPI "unfair relationship" claim shortly before trial and after a deadline given by the Respondent in correspondence, amounted to "unreasonable behaviour" such as to justify an award of costs in favour of the Respondent. The District Judge held that it did; the Circuit Judge dismissed the Appellant's appeal.

Legal Backdrop: CPR

3. Part 27 of the CPR sets out the procedure applicable to cases on the small claims track. Rule 27.14 provides, so far as relevant, as follows:

> "Costs on the small claims track
>
> (1) This rule applies to any case which has been allocated to the small claims track…
> (2) The court may not order a party to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal, except –
> …
> (g) such further costs as the court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably…
> …
> (3) A party's rejection of an offer in settlement will not of itself constitute unreasonable behaviour under paragraph (2)(g) but the court may take it into consideration when it is applying the unreasonableness test."

4. In addition, CPR Part 38 which governs the procedure applicable to discontinuance of proceedings has a special approach to the Small Claims Track. The general position, under rule 38.6(1), is that "*a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant*." This rule, by virtue of rule 38.6(3), *"does not apply to cases allocated to the small claims track"*.

Legal Backdrop: authorities

5. At the heart of the appealed decision and the argument in this case is a trio of decisions relied upon to a greater or lesser extent by both the Appellant and the Respondent: *Dammermann v Lanyon Bowder LLP* [2017] EWCA Civ 269 [2017] 2 Costs LR 393, *Lea v GP Ilfracombe Management Co Ltd* [2024] EWCA Civ 1241 [2025] 1 WLR 371, and *Willow Court Management Co (1985) v Alexander* [2016] UKUT 290 (LC) [2016] L & TR 34.

Willow Court

6. *Willow Court* is a decision of the Upper Tribunal (Lands Chamber) (Martin Rodger KC and Siobhan McGrath). It was not about CPR 27.14(2)(g) but instead rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 rules"). In Tribunal proceedings there is no default disapplication of costs. Rather, costs are in the discretion of the Tribunal. That position was then modified as regards the relevant Tribunal by the provision in question, which states that that Tribunal may make a costs order only in limited circumstances – one of which is "*if a person has acted unreasonably in bringing, defending or conducting proceedings*". Another is "wasted costs".

7. The Upper Tribunal reviewed the decision of Sir Thomas Bingham MR in *Ridehalgh v Horsefield* [1994] Ch 205 at paragraph [20] of his judgment, highlighting a lengthy passage including the following:

> "'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."

8. The panel considered the provision to be sufficiently illuminated by that judgment, with only one further addition: *Cancino v Secretary of State for the Home Department* [2015] UKFTT 59 (IAC) [2015] Imm AR 574

9. At paragraph [24], the panel then said as follows:

> "…An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance given in *Ridehalgh*… The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?"

10. Again at [26] the panel deprecated over-zealousness in detecting unreasonable conduct. They then set out a "systematic" or "sequential" approach to applications under rule 13(1)

(b) at paragraphs [28]-[30], only the first of which is directly relevant to the CPR context:

> "At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable…"

11. It was also noted at paragraph [34] by reference to *Cancino* that the rule 13(1)(b) jurisdiction is reserved "*for the clearest cases and that in every case it will be for the party claiming costs to satisfy the burden of demonstrating that the other party's conduct has been unreasonable*."

12. Dealing specifically with the question of withdrawal of claims in circumstances where it is said that the litigant can achieve nothing further in the proceedings the panel at [36] cited and considered the decision of the Court of Appeal in *McPherson v BNP Paribas* [2004] EWCA Civ 569 [2004] 3 All ER 266, which concerned r.14 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001. Mummery LJ said:

> "28. …It would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed."

13. That thought was further reflected at [142-3] of the panel's judgment in *Willow Court*:

> "in tribunal proceedings there is no imputation that a claim which is discontinued was doomed to fail or ought never to have been commenced. Such an imputation is only required where it is necessary to identify a successful party so that liability for the costs which it has incurred may be shifted on to the unsuccessful party. Where, as in tribunal proceedings, there is no general rule that the winner will be entitled to an order for the payment of their costs by the loser, the withdrawal of a claim should not be stigmatised as an admission of defeat or as unreasonable. To allow such a stigma to be attached to withdrawal creates an unhelpful obstacle to the making of sensible concessions.
>
> The observation of Mummery LJ, which we have quoted in paragraph 36 above are particularly apt in this case. It is legally erroneous to take the view that it is unreasonable conduct for claimants in the Property Chamber to withdraw claims or that, if they do, they should be made liable to pay the costs of the proceedings. Claimants ought not to be deterred from dropping claims by the prospect of an order for costs on withdrawal, when such an order might well not be made against them if they fight on to a full hearing and fail."

Dammermann

14. *Dammermann* was concerned with the interpretation of CPR 27.14(2)(g). It was concerned with the rejection by a litigant of a settlement offer, which proved to be a fairly generous offer once the issue of law involved was unpicked. The Court concluded that that rejection, as the only relevant item of behaviour was insufficient to amount to unreasonable behaviour.

15. At paragraph [30], the Court of Appeal doubted whether "general guidance" on the phrased "behaved unreasonably" could be given, but went on to endorse the dictum of Sir Thomas Bingham MR in *Ridehalgh*, 232F: "*[t]he acid test is whether the conduct permits of a reasonable explanation".* The Court noted that *Ridehalgh* concerned the wasted costs jurisdiction and was not fully on point, but again said at paragraph [31] that it was apt to provide sufficient guidance in respect of CPR 27.14(2)(g). The Court went on to note:

> "*Ridehalgh* was, of course, dealing with acts or omissions of legal representatives but the meaning of "unreasonably" cannot be different when applied to litigants in person in small claims cases. Litigants in person should not be in a better position than legal representatives but neither should they be in any worse position than such representatives."

16. The Court also noted, at paragraph [32] that *"it would be unfortunate if litigants were too easily deterred from using the Small Claims Track by the risk of being held to have behaved unreasonably and thus rendering themselves liable for costs."*

<u>*Lea*</u>

17. *Lea* was not about CPR 27.14(2)(g) but instead rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 rules"). In Tribunal proceedings there is no default disapplication of costs. Like *Willow Court*, this was a case concerned with rule 12(1)(b) of the 2013 rules.

18. Coulson LJ treated Sir Thomas Bingham MR's dictum from *Ridehalgh*, quoted above, with approval at paragraph [6], before going on to quote at length from *Willow Court*.

19. Having cited those authorities, Coulson LJ found at paragraph [9] that the term "unreasonable" may include vexatious behaviour/harassment, but does not require it. He then reiterated, at paragraph [14], that it would not be appropriate for the Court to set down general guidelines on the meaning of "unreasonable" and declined to do so, stating that the case involved an application of the *Willow Court/Ridehalgh* approach. At [15] that was summarised thus: *"A good practical rule is for the tribunal to ask: would a reasonable person acting reasonably have acted in this way? Is there a reasonable explanation for the conduct in issue?"*

20. At [16] Coulson LJ explicitly rejected an argument for a wider test:

> "There is no basis for treating this rule in any different way to any other jurisdiction which operates a generally "costs neutral" regime. To the extent that a party seeking its costs under rule 13(1)(b) might argue that the test in *Ridehalgh* and *Willow Court* for unreasonable conduct (and therefore obtaining a positive costs order in their favour) is unduly restrictive, the answer is that, not only is it the test set out in the authorities, it is also consistent with a generally "costs neutral" regime."

21. At the same time he also rejected the submission eliding unreasonable behaviour with vexatious or harassing behaviour.

22. He did, though, say at paragraph [28]:

> "But it remains an appeal against an evaluative decision and, in those circumstances, this court will always allow the original court or tribunal considerable latitude before concluding that its decision

> cannot be allowed to stand. Ultimately, the test is not whether the appellate court would have come to a different decision on the facts, but whether the judge reached a conclusion which no reasonable tribunal could have reached that an appeal against a finding that some behaviour was (un)reasonable is one against a "matter of objective fact" and is therefore subject to those principles set out in *Volpi v Volpi* [2022] 4 WLR 48."

Lastminute.com v. Moskalevitch

23. A further decision to which reference will be made below is the recent decision of *Lastminute.com v. Moskalevitch* [2019] EWHC 1091 (QB) in which Yip J rejected a submission that pursuing an unsuccessful claim was unreasonable behaviour. The submission was that once the statement accompanying the defence had gone in, the claimant ought to have recognised that her claim could not succeed, and therefore ought to have discontinued, and therefore costs after the date of the statement ought to be recoverable. Yip J gave that submission short shrift:

> "I do not accept that that comes close to unreasonable behaviour. If that were the position, then essentially every defended action where a full defence is put forward, and where the claimant then proceeds, would give rise to a costs order, and that would wholly defeat the usual principle that costs on the small claims track are not recoverable. So, I do not accept that the costs below should be recoverable."

FACTUAL BACKGROUND

24. In 2004 the Appellant, Mr Orton, entered into a credit agreement with the Respondent, Barclays, and at the same time took out a Payment Protection Insurance ("PPI") policy to cover his repayments. Unbeknownst to the Appellant, the Respondent received a very high commission ranging from between 59.7% and 84.6% of the monthly premia charged on the PPI policy. The policy ended in 2010 but the credit relationship continued.

25. Mr Orton had earlier made a complaint relating to the alleged "mis-selling" of the PPI policy (in 2012). A further complaint was made on his behalf by a claims management company ("Fair Justice Claims") by letter dated 9 April 2019. This letter made allegations of mis-selling of the PPI but also a complaint about non-disclosure of commission, relying on *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61, [2014] 1 WLR 4222. The letter ultimately prompted Barclays to confirm that commission had been paid in respect of the PPI policy and to offer redress further to DISP, by letter dated 10 May 2019. This redress was subsequently paid to Mr Orton.

26. That payment did not however cover the full extent of his losses. He therefore brought a claim for the balance under ss 140A-B of the Consumer Credit Act 1974 in July 2023. The claim was for approximately £2,750 plus interest. It was framed, as Mr Weir KC said in submissions, as essentially a standard *Plevin* claim.

27. The claim was immediately listed for ENE on 9 August 2023, before a defence had been filed – essentially reflecting the point made by Mr Weir that this is the sort of claim which on the authorities might generally be expected to succeed. That Notice of Hearing clearly allocated the case to the Small Claims track.

28. That ENE was however put back to October because no defence had been filed. Barclays served a defence on 30 August 2023 relying principally on limitation, absence of unfairness (because of the redress payment) and quantum issues.

The Correspondence

29. On 30 August 2023, solicitors instructed by Barclays, Simmons & Simmons, also wrote to the solicitors instructed by the Appellants, SSB Law. That letter contained a section titled "Invitation to discontinue" which, so far as relevant, read as follows:

> "…[Y]our client's claim has no real prospect of success and should be discontinued immediately, and by no later than 4.00pm on 6 September 2023, with the resultant cost consequences.
>
> If the claim is discontinued before the deadline expressed, our client is prepared to waive its entitlement to costs. However, should your client elect not to discontinue their claim, and our client is forced to incur further unnecessary costs, our client reserves its right to apply for summary judgment or strike out of your client's claim and for a cost order in our client's favour, without further reference to you."

30. On 27 September 2023, having received no response, Simmons & Simmons again wrote to SSB Law repeating their "offer" for the Appellant to "*discontinue their claim, which will be accepted on a drop hands basis [i.e. on a basis where each party bears their own costs]*". On this occasion the deadline was set at 4pm on 4 October 2023.

31. It is worthy of note that these letters entirely wrongly (i) ignored the allocation to the Small Claims Track which had already occurred and (ii) asserted the application of a costs regime both as to discontinuance and overall costs which was explicitly disapplied by CPR 27.

32. Following this the Supreme Court's decision in *Smith v RBS Plc* [2023] UKSC 34 [2024] AC 955 came out on 4 October 2023. That decision held that the critical date for limitation was the date when the credit relationship ended: a claimant would have 6 years from that date to bring a claim. After this date limitation disappeared from the correspondence but not the pleading in this case.

33. The ENE took place (unsuccessfully) on 16 October 2023 and DJ Wood directed to trial in January 2024 confirming the prior allocation to the small claims track. There was no contention from either side that it was not suitable for the small claims track.

34. The decision in *Canada Square Operations Ltd v Potter* [2023] UKSC 41[2024] AC 679 was handed down on 15 November 2023. This was another PPI case and dealt with deliberate concealment.

35. A further letter came on 11 December 2024. That letter despite tacitly dropping limitation remained in bombastic terms asserting (wrongly in the light of the decision in Smith) *"the Claim is liable to be struck out and/or summarily dismissed for the reasons set out in the Defence, the Invitation to Discontinue and as below."* The reference to "as below" signalled a shift of emphasis to new unfairness arguments asserting that the Claimant had "*sat on his hands for 4 years*". Reliance was also placed on an alleged difficulty with proving loss in the light of non-payment of outstanding debts.

36. The letter again referred to "resultant costs consequences" of discontinuance and reserved the Respondent's "rights" in relation to costs should discontinuance not be forthcoming. There was no acknowledgement that this was a Small Claims Track case.

37. Following a change of solicitors for the claimant (owing to the demise of the original solicitors firm), the trial date was vacated. It was initially adjourned to April 2024 and ultimately relisted for 19 June 2024.

38. On 22 March 2024, Consumer Rights Solicitors, the Appellant's new solicitors, wrote to the Respondent's solicitors indicating that the Appellant would accept a settlement of £3,250 inclusive of costs. By a reply of the same day this offer was rejected citing the Defence and previous correspondence.

39. On 1 May 2024, the Appellant made a further settlement offer of £2,750 inclusive of costs. Simmons & Simmons responded on 7 May 2024 in the following terms:

> "[O]ur client is willing to extend the offer for your client to discontinue their claim on a drop hands basis provided your client files the notice of discontinuance by 4pm on 15 May 2024"

40. Following that demand, that same day the Appellant made a further offer to the Respondent of £1,990 inclusive of costs. This was followed on 20 May 2024 with a final offer of £1,690 inclusive of costs.

41. On 22 May 2024, Simmons & Simmons emailed Consumer Rights Solicitors in the following terms:

> "…[Y]our client's claim has no real prospect of success and should be discontinued immediately, and by no later than 12pm on 31 May 2024, with the resultant costs consequences. As the trial has been listed for 19 June 2024, we are instructed that unless your client files and serves a Notice of Discontinuance by no later than 12pm on 31 May 2024, we are to prepare for trial, including instructing Counsel. Once Counsel is briefed, further costs will be incurred and our client will no longer be prepared to agree to a drop hands discontinuance. Our client will also be seeking all costs incurred from your firm / your client including (but not limited to) an order pursuant to CPR 27.14(2)(g) on the basis of your firm's and/or your client's unreasonable behaviour.
>
> In the event that your client chooses not to discontinue the claim by the deadline and proceeds to trial, we put you on notice that we will be making submissions to the Court at trial that your client's/your firm's behaviour is unreasonable and will be seeking a costs order against your firm/your client. If the claim is unilaterally discontinued after on [sic] 12pm on 31 May 2024, our client will also be seeking a costs order against your firm/your client."

42. Features of the email which are notable are:

    a. A continued reliance on the Defence and previous correspondence;

    b. A continued assertion as to "costs consequences" of the discontinuance;

    c. A reversion to the case that the claim has "no real prospect of success";

    d. A deadline being imposed of less than 10 days;

    e. An implicit indication that costs might be sought against solicitors in the alternative to Mr Orton;

    f. The first reference to CPR 27 comes in the form of invocation of CPR 27.14(2)(g).

The Notice of Discontinuance and the CPR 27.14(2)(g) Application

43. In due course the Appellant and the Respondent filed and served documents they intended to rely upon on 3 and 4 June 2024. The Appellant's documents included a statement supporting the claim and his lack of knowledge of commission – this being a key issue for trial. That statement also notes that the level of commission had still not been disclosed.

44. On 7 June 2024, twelve days before the listed trial, the claimant served a Notice of Discontinuance. Evidence on this was in the witness statement of Mr Hussain, a solicitor at CRS. It was described as a "commercial decision" taken by the Appellant personally who, having reviewed the evidence served by the Respondent, came to the conclusion that there would be little benefit in proceeding to trial. That view was reached because the Appellant would need to instruct counsel, the costs of which would essentially absorb the relatively low value of his claim. In essence the Appellant could not recover Counsel's fee even if he was successful at trial and since any damages he received would be severely limited as a result, his decision was that it made little sense to waste his and court time and costs in continuing with the claim when the Respondent was obviously unwilling to make any offers. Or, to put it another way - it was not worth powder and shot given that the Respondent had been intransigent and it would now be necessary to instruct counsel, effectively wiping out any recovery.

45. On 11 June 2024, Simmons & Simmons wrote to the Court requesting that the 19 June 2024 hearing be retained, or another hearing listed, to "*consider the Defendant's entitlement to costs pursuant to CPR27.14(2)(g) and CPR 38.6*" (as noted above CPR 38.6 does not apply to cases allocated to the small claims track).

46. A hearing in relation to costs was subsequently listed for 16 July 2024. On 10 July 2024, Simmons & Simmons wrote to CRS explaining four heads under which they argued the Appellant had behaved unreasonably:

> "1. Late discontinuation – your client chose to discontinue the claim at an advanced stage, causing prolongation of the litigation process…
>
> 2. Notice of counsel fees - … we had explicitly informed your client/firm that we would be incurring counsel fees after 31 May 2024…
>
> 3. Wasted costs – the timing of the discontinuation has led to a waste of costs…Had your client discontinued the claim at an earlier stage… these costs would not have been incurred…
>
> 4. Precedent and legal principles – Courts have in the past held that costs should be awarded to the party facing unreasonable behaviour from the opposing side…"

47. The letter concluded with a demand for "wasted costs" of £850 plus VAT, those being counsel's fees to date, a deadline for acceptance of which was set at 12pm the following day. When no response was provided, Simmons & Simmons wrote on 11 July 2024 to say:

> "…we are instructed to prepare for the hearing and incur counsel's fees this afternoon, which costs our client will seek to recover from your client/firm in addition to ALL our costs incurred in defending your client's claim".

The District Judge's Judgment

48. The 16 July 2024 hearing took place before District Judge Lindsay ("the District Judge"), with judgment given the same day. She found that the Appellant had behaved unreasonably and accordingly made a costs order of £2132.88.

49. In what was acknowledged by Mr Weir to be a pithy and well-structured judgment, the District Judge accepted that:

    a. It was for the Respondent to demonstrate on the balance of probabilities that the Appellant had behaved unreasonably: [2];

    b. Discontinuance itself was not unreasonable [17];

    c. Rejection of the defendant's invitations to discontinue was not, of itself unreasonable [18];

    d. The case turned on the particular facts [22].

50. At [23-26] the District Judge expressed some difficulty with the proposition that it was a "commercial" decision to discontinue his case taken in spite of the fact that his case was "very strong". She outlined the rough basis for that "commercial" decision (that, after taking into account the cost of instructing counsel, the claim of about £2,750 would not be worth pursuing) and essentially critiqued it on the basis that these factors would have been known throughout the litigation.

51. At [27-8] she found the Claimant had behaved unreasonably when all circumstances were considered together. Three features were identified:

    a. The Claimant ignored the Defendant's final invitation to discontinue and instead completed preparation for trial;

    b. The commercial viability assessment that ultimately led to discontinuance was undertaken only after expiry of the Defendant's deadline and immediately before trial;

    c. The discontinuance was not prompted by any new evidence or altered assessment of the merits following exchange of trial evidence.

52. Pulling all the circumstances together, DJ Lindsay, at paragraph [28-9], held as follows:

> "Taking all of the matters into account that I have been through here, not just the fact that the claimant discontinued, not just the fact that the Claimant rejected the offers, in the circumstances of this case, in my judgment, taking into account all those facts and the test, I do find that the Claimant was unreasonable in failing to accept, at the very least, the Defendant's final drop hands offer on 22 May. They ignored that offer and did not respond to it…In all of the circumstances of this case, in my judgment, that amounts to unreasonable behaviour.
>
> They waited far too long essentially to take what I am told is the commercial decision that they have now taken to discontinue the case. In discontinuing as late as they did, this has meant that the Defendant, (as well as the Claimant – but this is a matter for them), have incurred further costs, which could and should have been saved by discontinuing at an earlier stage."

53. The District Judge awarded costs against the Appellant, albeit only those costs incurred after 31 May 2024, namely £2,132.88.

The Circuit Judge's Judgment

54. The Appellant's appeal against the District Judge's decision was heard before the Circuit Judge on 26 March 2025. In the course of his judgment handed down the following day he reviewed the decision in *Dammermann* and *Ridehalgh* and then focussed his analysis on the Respondent's final offer of 22 May 2024, which he described as "serious and significant" in the context of the Appellant's solicitors "previous non-engagement", and the relevance of the Appellant's "commercial reason" for discontinuance.

55. The Circuit Judge dismissed the appeal. He accepted that the crucial question was whether the claimant's conduct admitted a reasonable explanation within the approach described in *Dammermann* and *Ridehalgh*. He took the view at [49] that the Appellant's solicitors had failed to engage with the Respondent's solicitors in any meaningful way and that was a fact the District Judge was entitled to weigh in the balance. At [51] he stated that *"failing to engage with that final correspondence on 22 May 2024, in the context of the factual matrix of previous non-engagement of the substantive issues, is serious and significant, and it runs contrary to the overriding objective of the CPR."*

56. The Circuit Judge concluded at [58] that it was open to the District Judge to find that the Claimant's conduct after 22 May 2024 lacked a reasonable explanation and was therefore unreasonable, building on conclusions that:

   a. At [56] if the decision was a commercial decision it *"could and indeed should have been taken significantly earlier"*;

   b. At [57] the decision to discontinue for commercial reasons was effectively abusive because discontinuance for commercial reasons with no material change implies no reasonable intention to progress to trial throughout.

57. The Circuit Judge accordingly dismissed the appeal. Before finishing his judgment, though, he went on in obiter dicta to give further guidance in relation to CPR 27.14(2)(g), which he described as a "*useful framework…following on from, and still applying, Dammermann*". That framework was a 4-stage approach described as follows:

> "a. Stage 1: Is the alleged conduct proven on the balance of probabilities? …
>
> b. Stage 2: Is the proven conduct sufficiently serious or significant to warrant further explanation? …
>
> c. Stage 3: If the proven conduct is sufficiently serious or significant, was there a good reason which explains the said conduct? …
>
> d. Stage 4: In considering all the circumstances of the case, does any other reasonable explanation emerge for the conduct? …"

This Appeal

58. The Appellant appeals to this Court on two grounds, those being:

   a. Ground 1: the Circuit Judge was wrong to uphold the decision of the District Judge that the Appellant had behaved unreasonably for the purpose of CPR 27.14(2)(g).

b. Ground 2: In any event, the Circuit Judge erred in law in setting out, and then applying, his guidance (derived from the approach to relief from sanctions under CPR 3.9) to the question of whether a party has behaved unreasonably for the purpose of CPR 27.14(2)(g).

SUBMISSIONS

59. Mr Weir, supported by Mr Butters and Mr Westwell, on behalf of Mr Orton, submitted as the first ground of appeal that the Circuit Judge (and to that extent the District Judge too) had erred in his approach to CPR 27.14(2)(g) and that the Appellant's behaviour had not been unreasonable.

60. In essence, and as summarised in oral reply Mr Weir submitted that this approach sets a standard of conduct which is far too high and stringent for the Small Claims Track and that with the focus on speedy response to the 22 May email the courts below effectively treated the defendant's 22 May letter as if it created a Part 36-type deadline which is inimical to the costs neutral scheme.

61. Further it is submitted that a litigant may reasonably undertake a cost-benefit analysis shortly before trial and that it would be perverse if a claimant were better off pursuing a claim to trial than discontinuing it. In addition this kind of approach which effectively penalises taking a sensible approach to settlement, runs contrary to the long line of cases which make clear that resolving a case short of trial is a good thing, and one to be encouraged.

62. It was also emphasised that the so-called offers were nothing of the sort, and that there appeared to be no basis for allowing the Respondent to dictate the timeline and manufacture unreasonableness by reference to its own position.

63. It was also said that the approach to the Appellant's explanation was unjustified and lacking in logic.

64. As to the authorities, it was submitted that the Judge had read them as permitting far too wide an application, and that the cases, particularly given the context, really approximate the test to abusive or vexatious procedure; that there is a thread running through the authorities that the behaviour had to be a misuse of the Court's process.

65. On this basis it is said that judge erred even given the considerable latitude afforded to a judge on an issue of this nature. The question is one of approach and that approach errs in that it frustrates the ethos which underpins the cost neutral Small Claims Track regime.

66. In the event Ground 2 was of less significance, and indeed it was conceded that our determination on this point would make no difference to the outcome of the case. This ground was presented by Mr Weir more as an opportunity for this Court to lay down guidance on the propriety of judges in the County Court providing obiter dicta of this sort at all. On Ground 2 it was submitted that the Judge's proposed four-stage framework impermissibly glosses the language of CPR 27.14(2)(g) and lowers the threshold for a finding of unreasonable behaviour.

67. Mr Mallalieu KC, with Mr Nash, submitted on behalf of the Respondent that the decision of the District Judge was correct (and in any event one she was entitled to make), and that the Circuit Judge was right to dismiss the appeal.

68. Mr Mallalieu contends that this is not a case of principle but rather the application of undisputed legal principles to undisputed legal facts. Both judges below correctly invoked and applied *Dammermann* and *Ridehalgh* by asking whether the conduct complained of permitted a reasonable explanation. Any gloss on the "acid test" approach is not one which is properly reflected in the authorities, and was indeed deprecated in *Willow Court*.

69. Therefore even if this Court were to disagree with the result it is a decision well within range of decisions open to the District Judge and should be upheld. He also rightly reminded us that District Judges and Circuit Judges are in the front line of dealing with cases of this sort and their experience should be the more respected, reminding us also of the dictum of Coulson LJ in *Lea* at [28].

70. He points out that there is no clash with authority in that the judge neither found the fact of discontinuing to be unreasonable nor rejection of offers nor the bringing of the case to be unreasonable. What is found to be unreasonable is the absence of reasonable explanation for taking extra time to make the commercial decision against the background of knowledge of extra costs looming and no suggestion that there was anything further to wait for. It can be unreasonable not to make a decision once you have all the information you need.

71. Emphasis was placed on the fact sensitive nature of the decision and the fact that it was the overall course of conduct which justified the finding. The Respondent emphasised:

   a. Repeated invitations to discontinue;

   b. The failure to engage with the final invitation;

   c. The fact that the commercial reasons relied upon existed throughout;

   d. The absence of any material evidential development following exchange of evidence or adequate explanation of that timeline;

   e. The late timing of a commercial decision which inevitably caused avoidable costs to be incurred.

72. On Ground 2 Mr Nash skilfully advocated for the utility of the Circuit Judge's test while accepting that in general, guidelines or glosses in this context are unhelpful. He rightly pointed out that, although owing something to the *Denton* test, it was plainly a carefully and helpfully reasoned approach based upon considerable on the ground experience.

DISCUSSION

73. In appeals of this kind it is often the case that the argument on appeal would scarcely be recognised by the judge below. This case is most certainly a prime example. While DJ Lindsay will have had a long list and heard limited argument on the point in question, we have had the benefit of a full day of legal argument conducted by senior KCs on each side. Therefore, while we have concluded that the appeal should be allowed, that decision turns, at least in part, on points which were either not apparent or were not clear before the judge.

74. There are in our analysis three key points here. The first is that the starting point in considering the exercise of this power must be that it occurs within a costs neutral regime; and that starting point must be given real weight. The second is that analogies via different regimes and other rules invoking the concept of unreasonableness in different

contexts, may not be helpful. The third is that the factual background as it was contended for and recorded by the judge in some important respects does not fairly reflect the overall realities of this case.

The ethos of the Small Claims Tack

75. It is in my judgment important to commence any consideration of this rule with a firm grounding in the costs neutral regime of the Small Claims Track.

76. The Small Claims Track is designed to be different. That much is clear from the first line of Part 27 which refers to *"the special procedure for dealing with claims which have been allocated to the small claims track"*.

77. A key feature of that special procedure is the limiting of costs recoverable, which as set out above, establishes a default "costs neutral" environment: *"The court may not order a party to pay a sum to another party in respect of that other party's costs, ..., except –..."*

78. The costs aspect of the Small Claim Track is not the only way in which it is different. CPR 27.2 sets out a fairly long list of Parts of the CPR which do not apply to the Small Claims Track. Importantly, that list includes Part 36 (offers to settle).

79. In addition, as already adverted to, CPR 38.6(3) disapplies the general position on discontinuance, that a claimant who discontinues is liable for the defendant's costs incurred on or before the date on which notice of discontinuance was served on the defendant. It states in terms that this rule *"does not apply to cases allocated to the small claims track"*.

80. There is therefore (as Mr Weir observed) a benefit and burden to the Small Claims Track. It is not "Rolls Building" litigation. The Small Claims Track is designed for litigants in person as well as those with representation.

81. Because of the size of the claims involved (generally under £10,000) a very significant part of its ethos is the costs neutral scheme. That costs neutrality is not narrow. It extends to disapplying costs rules as to discontinuance, which are fairly firmly applied elsewhere, and disapplying Part 36. That is a package of rules which show how firm the commitment is to costs neutrality.

82. It logically follows that to give substance to this fact in a Small Claims Track case the "unreasonable behaviour" provision must not be construed widely.

The authorities

83. That is a point which is endorsed in the authorities cited above. See for example:

   a. *Willow Court* [34]: "*for the clearest cases and that in every case it will be for the party claiming costs to satisfy the burden of demonstrating that the other party's conduct has been unreasonable*."

   b. *Dammermann* [32]: *"it would be unfortunate if litigants were too easily deterred from using the Small Claims Track by the risk of being held to have behaved unreasonably and thus rendering themselves liable for costs"*.

   c. *Lea* [16]: *"To the extent that a party seeking its costs under [a rule disapplying a costs neutral starting point] might argue that the test in Ridehalgh and Willow Court for unreasonable conduct ... is unduly restrictive, the answer is that, not only is it the* *test set out in the authorities, it is also consistent with a generally "costs neutral" regime."*

84. We do of course have in mind that this Court in *Dammermann* said that there was no special rule applicable in the context of that Small Claims Track case, but that dictum actually focusses on the difference between represented and unrepresented parties and not on the distinction between how to calibrate the concept of "unreasonable" against the background of a definitely strongly costs neutral starting point versus "unreasonable" in other contexts.

85. This question of other contexts leads to the point that the authorities must, in our judgment, be treated with a degree of caution when invoked as setting down principles; not just because they are all very fact sensitive, but also because few of them relate to this precise regime, with its significant background of default costs neutrality.

86. Thus the first significant case, *Ridehalgh,* was not an "unreasonable behaviour" case at all nor a small claim, but a wasted costs case where unreasonableness was invoked as part of a wider formula in that jurisdiction: *"improper, unreasonable or negligent act or omission on the part of any legal or other representative …"* (s. 51(1) Senior Courts Act 1981). There was therefore in that case a necessary nexus with impropriety/vexatiousness (and a context where unreasonable and vexatious elide) which cannot be assumed to be applicable in the Small Claims costs jurisdiction. Nor does it necessarily follow that everything seen as "unreasonable" in the context of the wasted costs jurisdiction would also be "unreasonable" in the context of a default costs neutral Small Claims jurisdiction where disapplication of costs neutrality hangs almost entirely on "unreasonableness".

87. That takes us to Lord Bingham's "acid test" formulation: "*whether the conduct permits of a reasonable explanation"*. On one level no objection can possibly be taken to it. Indeed, that test is essentially reflected in the CPR definition within the Fixed Costs regime at CPR 45.13 *"unreasonable behaviour is conduct for which there is no reasonable explanation"*. At the same time however, there is a danger that via restatement in this way (focussing on an explanation to be given) the test easily becomes divorced from the context which informs its meaning. That danger must be avoided.

88. There is also a related issue which has emerged since the era of *Ridehalgh*; the *Denton* approach. The focus in the *Ridehalgh* acid test on "explanation" brings with it a tendency to elide into the *Denton* approach, where much emphasis is placed on the importance of the explanation. This instinctive elision is illustrated by the Circuit Judge's post-script obiter "guidance" which is the subject of Ground 2. Features of the *Denton* approach are also inherent in some of the reasoning of the District Judge and the main reasoning in the Circuit Judge's judgment.

89. Use of or elision into the *Denton* test in this context is, in our judgment, erroneous. Again the starting point is important. *Denton* starts from the perspective of an established default in compliance with the rules. It is all about assessing that default, its explanation and its consequences. There is a burden on the defaulting party to try to provide a good explanation. The Small Claims costs jurisdiction starts from the very different perspective of an entitlement not to pay costs. It cannot be the case that in this context (given the size and type of the cases) the intent is to produce the kind of detailed, evidence based interrogation of the merits of an explanation which is often found in the *Denton* context and may be justified by the starting point of default. Nor is there any need for concepts of "*seriousness*" or "*significance"*.

90. We conclude that the safe guidance which can be taken from the authorities therefore should be limited to the following:

a. The process of evaluating whether a "*party has behaved unreasonably*" must be informed by all the facts. That includes the context of the Small Claims Track and the breadth of the costs neutrality regime which generally applies;

b. The burden of proof is on the party alleging unreasonableness to establish it.

c. The kinds of circumstances which will qualify are as set out in the "acid test" in *Ridehalgh,* namely circumstances which do not permit of a reasonable explanation.

d. Reference to previous cases is unlikely to be helpful, however:

   i) Vexatious behaviour, such as issuing proceedings with no prospect of the claim being successful, will usually be unreasonable;

   ii) The withdrawal of a claim or unsuccessful pursuit of a claim should not itself be considered as unreasonable;

e. Judges exercising the discretion should also bear in mind the undesirability of deterring parties from using the Small Claims Track.

The factual background

91. The third point does relate to the facts of the case, and has two aspects. The first is the nature of an offer. The backdrop to the decision to discontinue by the Appellant can be seen, from the passages quoted above, to have been offers to settle by him; countered by what was described to us - accurately - as "*forceful, somewhat bellicose correspondence*" from the Respondent.

92. We pause here to note that the tone of that correspondence is unpleasantly surprising to see in the context of a costs neutral regime dealing with small claims where many litigants will not be legally represented. We appreciate however that in this case the Appellant was legally represented by solicitors experienced in this type of litigation, and that the correspondence was therefore between experienced professionals. We therefore make no further observations about this correspondence - other than to note that we hope that those involved will ensure that the plainly incorrect assertions in the earliest correspondence are not replicated in any future letters in other similar cases.

93. The significant point about those letters however was that they offered nothing. The nature of an offer to settle is that the party making it indicates a willingness to take less than they would get at trial. The Appellant made repeated offers to settle. He offered to accept less than he claimed. The Respondent, by way of contrast, came not one step towards him. The letters were not offers. They were "invitations to discontinue": essentially rejections and ultimata. Before us it was acknowledged that on closer analysis it was wrong to describe them as offers. That concession was not in place before the District Judge: it can be seen that the letters were said to be "drop hands offer[s]" (see [9, 11, 13, 14, 15]). It does not appear that before the District Judge the point was picked up by the Appellant. Accordingly, the judge was wrongly proceeding to approach this analysis on the basis of a premise that both parties had made offers, and that CPR 27.14(3) was engaged.

94. The second aspect is there was before us a clear and explicit agreement that we should approach the matter on the basis that the Appellant's claim was arguable. There was no such concession before the District Judge, and the clear tone of the correspondence read by the District Judge suggested that the Respondent felt strongly that the claim was

hopeless. This is not a factor which was ever explicitly part of the reasoning, but it appears to have to some degree informed the District Judge's scepticism as to the "commercial decision".

Analysis

95. As noted by the Respondent (both in writing and in oral argument), this might be seen as an appeal against a finding of "objective fact" and, to that extent, as put by Coulson LJ in *Lea*, the experienced judge ought to be granted significant latitude by the Court of Appeal in reviewing her decision, and to that extent the Circuit Judge's decision.

96. However, this approach is unfair to the District Judge. We have concluded that this is not simply an appeal against a finding of objective fact. It is, as Mr Weir submitted, one which goes to both the approach as a matter of law to the exercise of the power, and then to the analysis of the facts based firmly in those principles.

97. In our judgment the District Judge erred in the application of the legal principles, but she did so in part, as explained above, because of reliance on authorities which require some caution, rather than focussing on the test set firmly in the context of the specific costs regime.

98. Accordingly, while correctly invoking the costs neutral regime at the start of the judgment, the Judge erred by not using it later in the judgment as a starting point for the relevant analysis of the facts. She should rather have approached this as a situation where the disapplication of the costs neutral regime had to be justified by something which was unambiguously unreasonable (with the burden of proof falling on the person alleging unreasonableness). That error was then compounded by (i) the focus on interrogating the Appellant's explanation and (ii) an assumption that the Respondent's correspondence encapsulates a series of offers.

99. As to the former, what appears in the judgment is an approach where, once an allegation of unreasonableness was made, the burden somehow fell on the Appellant to disprove unreasonableness. That led to the Judge interrogating the reasonableness of the decision and (courtesy of the lack of agreement as to the merits of the claim) importing into the decision some element of scepticism as to the original merits or good faith of the claim. That can be seen:

   a. In the implicit criticism of the lack of evidence as to the reasons behind the decision and the implicit scepticism which follows ("*I cannot immediately follow ... why a party with a very strong case would decide to discontinue*") [24];

   b. In the doubt also inherent in [25] "*the difficulty I have with that argument*" where the idea of a late commercial decision is seen as illogical and assumptions are made as to whether that commercial analysis would have been the same earlier;

   c. Implicitly in the conclusion as to "*far too long*" [29] to take the commercial decision and the statement that the costs "*could and should have been saved by discontinuing at an earlier stage*". Saying that the claim should have been discontinued earlier skates close to saying it lacked merit or should not have been brought.

100. We note in passing that we cannot accept the implicit conclusion that the Appellant's "commercial" reason for discontinuance at this point made no sense. It appears to proceed in part from a (now disavowed) case that the claim was hopeless. But also this approach rests on assumptions that the Appellant would have (a) known from the outset the exact cost of instructing counsel and (b) known from the outset that it would be

necessary to instruct counsel. Yet it seems on the evidence (from paragraph [21] of the Hussain witness statement) that the "commercial" reason for discontinuing hinged on the fact that it was only having reviewed the Respondent's materials, that the Appellant took the view that he would have to instruct counsel to deal with the claim. It was not a certainty until the Respondent's materials had been filed that the issues would not narrow and hence would require more than the Appellant or his solicitor to engage. The issues had narrowed once in the course of proceedings (as to limitation); it was not inconceivable that they would narrow further.

101. We also consider that the judge's approach as to the timing issue was erroneous. That approach effectively said (as the Respondent did before us) that, even if earlier rejections of the Respondent's "offers" were not unreasonable, a tipping point was reached in late May where the Appellant had all the information and was aware a crunch was coming on costs - such that not making up his mind in a mere nine days was unreasonable. That is an analysis which is plainly informed by characterising the "invitations to discontinue" as genuine offers to settle.

102. The combination of these two errors can be seen clearly in paragraph [28-9] of the Judge's judgment. At that point the entire decision appears to boil down to the Appellant's refusal to accept the final "drop hands offer". At this point the Judge does not invoke the starting point of costs neutrality and how the particular facts move the situation from costs neutrality to the criteria for CPR 27.14. Rather it is predicated on (i) the erroneous characterisation of the 22 May email as a further/final offer and (ii) the earlier analysis that the Appellant's "commercial" reason for discontinuance was not one on which he could rely.

103. The combination of errors in approach is what leads to the obvious tension which emerges from both judgments: on the one hand it is plain on the authorities that it is not unreasonable (in itself) to discontinue a claim or to refuse an opposing party's offer, but on the other hand it was found in this case to be unreasonable (apparently in itself) for this Appellant to fail (in very short order) to accept the Respondent's "offer" and to discontinue the claim.

104. We have set out above the reasons why we conclude the Judge erred in her approach and where the reasoning departs from principle or was diverted by submissions now accepted to be erroneous.

105. However, to some extent the answer in this case can be reached by looking at the implications if it is correct.

106. In this case the Appellant in an arguable case chose to discontinue because ultimately the Respondent has not wanted to settle and the cost/benefit analysis was so marginal. That was said to be unreasonable. That conclusion leads to an unacceptable range of knock-on conclusions.

107. If the decision is correct, a party in a costs neutral regime can be worse off by deciding to settle or discontinue the case for commercial reasons than if they turned up and fought the case. If the Appellant had fought the case at trial (whether represented or not), the default position would be that there would be no costs. While Mr Mallalieu tried to persuade us that the Judge might have ordered costs against the Appellant at trial, we fail to see how that could conceivably be the outcome of a disputed arguable case on the Small Claims Track. Certainly a litigant should not be worse off if they decide to discontinue because of the absence of representation than they would be if they turned up in person and lost.

108. If the decision is correct, a party to a small claim can be subjected to a costs penalty for failing to settle in a very short time window although (i) a costs penalty would not have been available under Part 36 (where a 21 day period for reflection is given), and (ii) Part 36 is explicitly disapplied under Part 27.

109. If the decision is correct, such a party becomes tacitly subject to an obligation to respond promptly and make an assessment of the case promptly (i.e. to litigate in an optimal fashion) when no such rule forms part of the CPR Small Claims Track regime and they are within a regime which is designed for under resourced and vulnerable litigants.

110. Finally, if this decision is correct, it opens the doors to well-resourced parties corresponding their way out of the costs neutral regime. As Bean LJ noted in argument, this is an important case because if the Judge's decision is upheld PPI sellers (and other defendants to small claims) will be able to say in correspondence that cases are commercially unviable because of the costs to fight them to trial, and will contend that anything short of early discontinuance is unreasonable, and sounds in costs. That approach (which is redolent of the tone of the correspondence in this case) would blow the scheme of the Small Claims Track to bits. Similarly – and equally unacceptably – a claimant could pressure a defendant by repeated offers to settle backed by deadlines and intimations of costs applications if those offers are not accepted promptly.

111. Accordingly, the appeal on Ground 1 succeeds.

112. Ground 2 is more straightforward than Ground 1. The appeal ought to be allowed.

113. This can be taken briefly. We conclude that the Circuit Judge erred in setting out the guidance he did. There is no need for it. As this Court has previously made clear, there is nothing to be gained from adding any gloss on the rules beyond the limited guidance given by this Court.

114. Further the Circuit Judge’s guidance, though we are sure it was given with the best of intentions, is not helpful, and actually prone to lead to an approach to this provision which is both too generous to those invoking it and too likely to lead to escalation of costs.

Conclusion

115. For the reasons given I would allow the appeal on both Grounds. The Order of the District Judge dated 9 August 2024 should be set aside. It was agreed between the parties in argument that by virtue of CPR 27.14(2) there should be no order as to the costs of this appeal.

Lady Justice Andrews

116. I agree.

Lord Justice Bean (Vice-President, Court of Appeal, Civil Division)

117. I also agree.