Neutral Citation Number: [2022] EWHC 2863 (KB)

Case No: QA-2022-000044

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Case No: QB-2019-002810

ON APPEAL FROM
THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MASTER MCCLOUD

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2022

Before :

MRS JUSTICE HILL DBE

- -

Between :

MUHAMMED SUHEL AHMED	**Claimant/ Appellant**
- and –	
ADAM CHOJNOWSKI	**Defendant/ Respondent**

- -
- -

Simon Browne KC (instructed by NC Law) for the **Claimant/Appellant**
Andrew Davis KC (instructed by Clyde & Co Claims LLP) for the **Defendant/Respondent**

Hearing date: 2 November 2022

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Approved Judgment

This judgment was handed down remotely at 10.00am on 11th November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Hill DBE:

Introduction

1. This is an appeal by the Claimant against an order made by Master McCloud after a hearing on 2 February 2022. The order allowed an application made by the Defendant to have the Claimant's claim struck out. It also made consequential directions in relation to the repayment of interim payments and costs. The Claimant was granted permission to appeal by order of Sir Stephen Stewart dated 19 May 2022.

The facts

2. The claim arises out of a road traffic accident on 26 April 2015. The Claimant was driving his minicab along Northfields Avenue, Ealing, London W13 when a collision occurred between his vehicle and an Audi A4 driven by the Defendant.

3. On 6 August 2019 the claim was issued. A number of "standstill" agreements were signed between the parties and the claim was eventually served on 3 December 2019. On 18 December 2019 a Defence was filed by which the Defendant admitted liability for the accident.

4. On 17 July 2020 a costs and case management conference took place before Master McCloud at which a series of directions were made. Paragraph 15 of the order from this hearing indicated that the parties could, by prior agreement in writing, extend the time for directions by up to 56 days without the need to apply to the court. If any extensions were required beyond 56 days, the parties had to submit the agreed extension to the court by email, including "a brief explanation of the reasons, confirmation that it will not prejudice any hearing date and with a draft Consent Order in word format". The court would thereafter consider whether a formal application was necessary.

5. The parties progressed the directions made on 17 July 2020 and were working towards the trial window set out in the directions of March to May 2021.

6. On 7 December 2020 the Defendant served surveillance evidence on the Claimant. It was agreed between the parties that this necessitated revision to the timetable set out in the 17 July 2020 order. The parties agreed timescales for the Claimant to respond to the surveillance evidence by way of further witness evidence; for addendum reports to be

secured from the orthopaedic experts; and for the provision of an up to date schedule of loss and counter schedule. These revised timescales meant that the original trial window could not be kept. The parties proposed moving the trial window to June to July 2021. The proposed new timetable was set out in a draft consent order which was signed on 16 February 2021.

7. The draft consent order had to be submitted to the court because the proposed timescales in it extended the original deadlines by more than 56 days. Pursuant to paragraph 15 of the 17 July 2020 order, the parties had to notify the court of these so that the court could review the proposals. It is also well recognised that the parties cannot of their own volition move a trial window and so the court's approval of this proposed change was required. In fact, the court had not, by this point, taken steps to list the trial during the initial trial window of March to May 2021.

8. Accordingly the draft consent order was submitted to the court by the Defendant under cover of an application dated 19 February 2021. For reasons that are not clear, it was never placed before a Master or Judge for approval. Neither party chased the court in this respect. However the correspondence suggests that both parties considered themselves to be working towards the dates in the draft consent order.

9. On 19 March 2021 the Claimant's solicitor served a witness statement from him responding to the surveillance footage. However on the same date the solicitor made clear that a second period of footage had been overlooked and that a further statement from the Claimant responding to this would be provided "early next week". This statement was not provided. Without it, the further directions in respect of orthopaedic evidence and schedules of loss could not be progressed.

10. On 6 April 2021 the Claimant's solicitor indicated to the Defendant's solicitor that the Claimant was proposing to instruct a new firm (Noor Law) and that a notice of change of solicitor would be provided "shortly". This was never forthcoming and the Claimant's current solicitors remained on record.

11. On 16 April 2021 the Defendant's solicitor chased the Claimant's solicitor for an update but no response was received. On 23 April 2021 the Defendant's solicitor chased again. The Claimant's solicitor indicated that a letter "dealing with all matters" had been dictated. This was never received. This pattern – of either no response, or indications of progress to come that did not materialise - continued for several months.

12. The Defendant's solicitor understandably became concerned at the lack of progress in the claim. On 25 June 2021 the application to strike out the claim was issued, supported by a witness statement from the Defendant's solicitor, Hannah Shaw. The statement explained that due to the conduct of the Claimant and/or his solicitors, the directions in respect of further witness evidence, further orthopaedic evidence and schedules of loss had not been complied with, and that the delays were so significant that the proposed June-July 2021 trial window was no longer achievable.

13. The strike out application was listed on 4 November 2021. Due to the Claimant's solicitor not receiving adequate notice of the hearing it was adjourned by consent.

14. On 7 December 2021, in the absence of any further progress from the Claimant's solicitor, the Defendant's solicitor threatened to make a complaint to the Managing Partner of the Claimant's solicitor's firm, but was told that the solicitor who had been conducting the claim was the Managing Partner.

15. The strike out application was re-listed for 2 February 2022. An application by the Claimant to change solicitor was eventually filed with the court and was listed to be heard by Master McCloud on 16 February 2022.

16. On 24 January 2022 the Claimant's solicitor wrote a detailed letter to the Defendant's solicitor. The Claimant's intention to change solicitor was mentioned again. It was said that due to confidentiality issues further details could not be provided, and that the issues around his representation would be resolved on 16 February 2022. The letter made the point that no warning had been given that a strike out application would be made. It was recognised that matters had "stalled" and gone "slightly askew" as a result of the Claimant wishing to change solicitors. The Claimant proposed that the parties seek to agree further directions rather than proceed with the hearing of the strike out application.

17. On 25 January 2022 the Defendant's solicitor replied to the Claimant's solicitor indicating that no explanation had been forthcoming for the lack of substantive progress since early 2021. The letter stated that it was not clear what the difficulties in respect of the proposed change of solicitor were, but that this was not a reason for not progressing the directions. Further, it was said that the Defendant was not willing to risk the litigation "drifting" on the basis of "scant information as to something which might happen after the Hearing, which may or may not resolve some of any of the issues at stake". On that basis, the Defendant's solicitor indicated an intention to proceed with the strike out application.

18. The same day, the Claimant's solicitor sent a further letter to the Defendant's solicitor. Having apparently taken advice from counsel, this letter took the point for the first time that the draft consent order dated 16 February 2021 had not been approved by the court. On that basis, it was said that the strike out application was "extremely premature as at best you should have enquired with the Court the status of the Order". The letter again invited the Defendant to agree revised directions (though no dates were given in the letter) and withdraw the application.

19. On 27 January 2022 an application was filed on behalf of the Claimant to convert the 2 February 2022 hearing to a directions hearing.

20. On the same date, the Claimant's solicitor, Nazmin Choudhury, signed a witness statement in response to the strike out application. Paragraph 12 of the statement stated that the claim was "in abeyance" until the draft consent order was sealed by the Master or a hearing listed for consideration of it. Further, it was said that "the failure to follow directions by both parties has stemmed from the fact that the Order of the 16th February remains unsealed". The statement included an apology for not chasing the draft consent order with the court, but indicated that the maker of the statement thought that as the Defendant's solicitors had made the application in respect of the draft consent order, it was their responsibility to do so.

21. The statement submitted that the strike out application was "opportunistic and contrary to the overriding objective" and an "attempt to gain costs". It made the following further points:

    (i) Liability had been admitted and the claim was valued in excess of £377,947;

    (ii) Strike out as a draconian remedy of last resort;

    (iii) There had been total compliance until the Defendant sought to change the directions after the provision of the surveillance evidence;

    (iv) Matters had been complicated by the change of solicitor issue;

    (v) Delay in itself does not constitute an abuse of process (insofar as the same was argued); and

    (vi) The Claimant's solicitor had sought to address the issues with sensible proposed directions and avoid a hearing but the Defendant's solicitor had refused this approach.

22. On 1 February 2022, the Claimant's solicitor signed a further statement. Paragraph 7 of the statement said that the maker "…genuinely thought that as the order lodged at court on 19th February 2021 had yet to be sealed, that the Master had not approved the order or had some queries and that therefore the matter was going to be listed for a hearing".

23. The statement suggested that there had been difficulties between the Claimant's solicitor and his potential new firm with regard to the transfer of the file and whether a lien was to be retained on the matter and if so on what basis. The statement also alluded to issues caused by the Claimant "being of the firm belief that he will be able to change solicitors without the lien being paid". This was said to be an "extraordinary situation" that the Claimant's solicitor had never encountered in over 30 years in practice.

24. Finally the statement made the point that there had been no unless orders in the case and that the maker would not have allowed things to remain in abeyance had an application for an unless order been made or a warning that a strike out application was to be made been given. The apology to the court was repeated.

25. At no stage prior to the hearing before the Master did the Claimant's solicitor provide the further witness statement from him in respect of the surveillance evidence and so the other directions all remained outstanding. As at the date of the appeal hearing before me, that remained the case.

The hearing before the Master

26. Mr Davis KC, counsel for the Defendant, took the Master through the contemporaneous correspondence from 6 April 2021. He suggested that the Claimant's solicitor's evidence ignored the fact that there had been agreement as to new timetable, but a failure to progress it, and unjustifiably adopted an "all guns blazing" approach in respect of the Defendant's solicitor's conduct. He submitted that in suggesting that that the entire matter was in abeyance pending the approval of the draft consent order, the

Claimant's solicitor's conduct was "if…not disingenuous,…not far short of it". The Master noted, correctly, that the first time the issue over the lack of court approval of the draft consent order was raised in correspondence was on 25 January 2022 (transcript, pages 6-15).

27. The Master observed that the Claimant had taken a number of months to change his solicitor and noted the difficulties that his current firm may be in (pages 17-18).

28. Mr Davis KC reminded the Master that liability was not in issue and that the value of the claim was around £300,000, although he suggested that "some scepticism" around that valuation was appropriate in light of the surveillance evidence which the Defendant considered "very damning" (page 18).

29. The Master asked what was happening "in terms of quality of evidence". Reference was made to the outstanding evidence from the Claimant in response to the surveillance evidence (page 18).

30. Mr Rudd, counsel for the Claimant, referred to certain difficulties in obtaining the Claimant's second statement on the surveillance and the issues with Noor Law, but fully accepted that there had not been a full explanation for the various points raised in the correspondence (pages 20-21).

31. He emphasised that no unless orders had been made, and that the strike out application had been made without notice (page 23).

32. He accepted that as well as the power under CPR 3.4 the court had an inherent jurisdiction to strike out a statement of case; submitted that delay alone would not normally be sufficient to constitute an abuse of process; and reiterated that strike out is a draconian sanction of last report and that other options should be considered first (pages 23-24).

33. He proposed a stay or further directions, pending clarification of the matter on 16 February 2022 (page 22).

34. At various points during the hearing the Master referred to the statements filed in response to the application and to the application to change solicitors, albeit that the latter was not formally listed until 16 February 2022.

The Master's judgment

35. The Master gave an *ex tempore* judgment at the end of the hearing. Transcribed, the judgment runs to 8 paragraphs.

36. The judgment noted at the outset that the events in this case related back to a period of time during the COVID-19 pandemic when extensions of time could be agreed between parties up to a period of 56 days, and that for some reason the draft consent order had not been approved or sealed by the court. However, the dates in it were "agreed consensually be the parties" (paragraph 1).

37. The Master emphasised that while the court might interfere with the dates in a draft consent order of the sort in this case, it was important to bear in mind that litigation is:

> "[a] collaborative process…parties are encouraged to agree a sensible timetable by this, and where solicitors do so, then they should follow them unless they say they cannot and then they should seek to make an application, or in this instance, chase the application to proceed with the order if that was appropriate" (paragraph 2).

38. The Master considered that the *inter partes* correspondence in this case was "pretty extraordinary" as the "outward impression" was a "really a mixture of non-responses to being chased for the matters that needed to be progressed and repeatedly chased, and then assurances those would be actioned. They were not actioned, and finally the defendant lost patience". The Master described the evidence provided in response to the application as:

> "…really…a mixture of 'sorry, I do not really have an explanation but I thought it was all going to turnout all right', and 'the client actually wants to instruct another firm and the client is insisting on not paying this firm's lien'…[and] served late for this hearing, a witness statement which last thing raises the point that the order which re-timetabled matters was never sealed and it gives the impression that there is some reliance upon that which had never emerged at any stage until now so I am sceptical about that" (paragraph 4).

39. In the context of the upcoming hearing of the application from Noor Law, the Master accepted that it was not possible to "go behind" client confidentiality. However the Master's view was that the Claimant:

> "…through his solicitors who have been on the record throughout, has conducted his case in a way which has not progressed a consensual timetable and which has wasted huge amounts of time actually chasing him, and which in those circumstances he has not furthered the overriding objective which here is important because we are in that consensual area where the parties during the pandemic are actually supposed to sort of get on with it as best they can and to forward the agreed timetable" (paragraph 5).

40. The judgment continued:

> "…what we have got here in my view is an obstruction of the just disposal of proceedings and that is a type of abuse. I think also there is merit in the point that because this timetable was agreed and involved extensions of time, in which we are looking at 56 days, then actually that has to be notified to the court and was notified and is as good as an order. My primary [view] here is simply that the way this has been conducted has become an abuse and that that lies at the claimant's foot because if the claimant wants to change solicitors, he needs to change solicitors and get on with it, and seems not to have done that…my secondary view is that actually these extensions do take the form of what amounts to an agreed

> order with the formality of sealing the remaining outstanding. And the trial window point has fallen away because in fact [the] trial window was effectively abandoned by the court itself because it was never actioned…probably because of the pandemic.
>
> …it is all a mess…counsel...is in a difficult position because what has gone wrong lies at the lay client's feet, but in many ways he is here also to try to follow his instructions from his solicitors who are doing their best to explain themselves in circumstances where I understand that instructions from the lay client have not been forthcoming for some time...I am going to strike this case out. This case must end. The history that has been lamentable in terms of everything grinding to a halt. No cooperation really coming back, not answering letters, not really being pro-active in trying to move matters forward, not actually chasing the consent order and that really is certainly part of the claim its responsibility to his claim.
>
> I am going to strike this out. I think that the way in which it has been conducted is obstructing just disposal. It is an abuse of process effectively but it is also, effectively, a breach of [a] consent order which was only subject to the formality of sealing and which in fact in the case of extensions of time only had to be notified to the court in any event. It is above all else a breach of the overriding objective and where that comes in. That justifies abuse and the background to this is the failure to cooperate, the failure to move matters forward, and the failure by the client to get a move on and be upfront with his payments. So it is therefore a breach of the overriding objective but one does not simply pin it solely on that. So struck out it is." (paragraphs 6-8).

The legal framework

41. As is well-known CPR 1.1 sets out the overriding objective as follows:

> "**1.1 The overriding objective**
>
> (1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
>
> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
>
> (a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate –
>
> (i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders".

42. CPR 1.3 places a "duty on the parties" to the effect that the parties are "required to help the court to further the overriding objective".

43. CPR 3.4 provides in material part as follows:

"**3.4 Power to strike out a statement of case**

(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.

(2) The court may strike out a statement of case if it appears to the court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order.

(3) When the court strikes out a statement of case it may make any consequential order it considers appropriate…

(5) Paragraph (2) does not limit any other power of the court to strike out a statement of case…"

44. CPR 52.21(2) provides that every appeal is limited to a review of the decision of the lower court unless (a) a practice direction makes different provision for a particular category of appeal; or (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

45. Under CPR 52.21(3), the appeal court will allow an appeal where the decision of the lower court was "(a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court". The White Book 2022 at paragraph

52.21.5 explains that "wrong" in CPR 52.21(3)(a) means that the court below (i) erred in law or (ii) erred in fact or (iii) erred (to the appropriate extent) in the exercise of its discretion.

The grounds of appeal

46. The grounds were as follows:

Ground 1: The Master erred in concluding that a failure to comply with an agreed timetable set out in consent order which had not been approved or sealed by the court could constitute a breach of a court order for the purposes of CPR 3.4(2)(c). The use of the word "effectively" does not elevate a draft order to an approved and sealed order to justify a strike out for abuse (**"the consent order issue"**);

Ground 2: The Master held, wrongly, that a failure to further the overriding objective during the pandemic amounted to either an abuse of process or a breach of a rule, practice direction or court order under CPR 3.4(2)(c), to justify a strike out of the case (**"the overriding objective issue"**); and

Ground 3: Further, and in any event, even if the Master was entitled to find an abuse of process (which is denied), the Master wholly failed to exercise any discretion, as the Court of Appeal's guidance in *Cable v Liverpool Victoria Insurance Co. Ltd* [2020] 4 WLR 110 makes clear was required (**"the discretion issue**").

Discussion

Ground 1: The consent order issue

Submissions

47. The short point taken by Mr Browne KC under Ground 1 was that until the court approved the consent order and sealed it, there was no order that could be breached, let alone could any such alleged breach amount to an abuse of process. Reliance was placed on CPR 29PD 6 and 7 and the Queen's Bench Guide at 1B-134, which deal with the process for the approval of court orders in these circumstances. Accordingly the Master was wrong to find that the order had "effectively" been breached.

48. Mr Davis KC on behalf of the Defendant argued that the Master was right to consider that if the court had not overlooked the order, the reality is that the extensions of time in it would have been approved. The contemporaneous correspondence made clear that both parties had regarded themselves as bound by the agreement between them as to the revised timetable. The Master was therefore right to be "sceptical" about the Claimant's solicitor's late change of position in respect of the validity of the consent order and the extent to which the absence of approval of it was operating on her mind throughout the relevant period. It would be entirely contrary to the overriding objective to permit the Claimant to rely on his solicitor's failure to chase the court in respect of the consent order in this way. Ultimately, there were still no valid reasons before the Master for the Claimant's failure to comply with the agreed timetable.

Analysis and conclusion

49. The relevant parts of the Master's judgment are set out verbatim at [36]-[40] above.

50. From that summary, it can be seen that the Master did not specify in terms which, if any, of the three limbs of CPR 3.4(2) were being relied on for the purposes of the decision to strike out, or indeed whether reliance was being placed on the court's inherent jurisdiction to strike out any claim it considers amounts to an abuse of process. This inherent jurisdiction is in addition to the power set out in CPR 3.4 and is specifically preserved by CPR 3.1(1) and 3.4(5). It duplicates but is not limited to the express powers conferred by CPR 3.4(2), as the White Book at paragraph 3.4.20 makes clear.

51. This feature of the Master's judgment generates an immediate difficulty for Ground 1, because the Master did not expressly find that the failure to comply with the consent order fell within the CPR 3.4(2)(c). Had the Master done so, there might have been more force in Mr Browne KC's argument that there was no "court order" in place for the purposes of that rule, pending the court's approval of the order submitted by the parties.

52. Rather, the Master found that (i) the consent order was "as good as" an order; (ii) the agreed extensions took the form of "what amounts to an agreed order with the formality of sealing the remaining outstanding"; and (iii) the Claimant's conduct amounted to "effectively, a breach of [a] consent order which was only subject to the formality of sealing".

53. These were all entirely accurate observations. The extensions of time were being notified to the court in accordance with the terms of paragraph 15 of the previous order, and the Master's extensive experience indicated that they would in all likelihood have been approved without difficulty. The Master correctly observed that there were already issues with the trial window due to the court's own failure to action the listing.

54. The Master was entitled to take into account the Claimant's failure to comply with the consent order, in its unapproved and unsealed form, for two reasons.

55. First, it was capable of constituting or at least contributing to an abuse of process for the purposes of the power in CPR 3.4(2)(b) and/or the Master's inherent jurisdiction.

56. Second, it was capable of amounting to a breach of the duty on the parties to assist the court in furthering the overriding objective set out in CPR 1.3, and thus a failure to comply with a "rule" for the purposes of the power in CPR 3.4(2)(c), as explained further under Ground 2.

57. For these reasons I do not consider that the Master erred in taking into account the failure of the Claimant to comply with the terms of the draft consent order, albeit that it had not been approved or sealed by the court.

58. To the extent that it was argued under Ground 1 that the Claimant's failure in this respect did not justify a strike out, those matters are properly to be considered under Ground 3.

Ground 2: The overriding objective issue

59. The first limb of the argument under Ground 2 was that a failure to comply with the overriding objective cannot, in principle, constitute an abuse of process or a breach of a "rule, practice direction or court order" for the purposes of CPR 3.4(2)(c).

60. The classic summary of the concept of abuse of process given by Lord Diplock in *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 536C was quoted by Coulson LJ (with whom Nicola Davies and Lewison LJJ agreed) in *Cable v Liverpool Victoria Insurance Co. Ltd* [2020] 4 WLR 110 thus:

> "42…the inherent power which any Court of Justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, it would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute amongst right-thinking people. The circumstances in which abuse of process can arise are very varied… it would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limited to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power".

61. The concept of abuse of process is therefore broad, flexible and fact-specific. The situations that can constitute an abuse are varied and not capable of fixed definition.

62. Further, the overriding objective is set out in court rules in the form of the CPR. Mr Browne KC referred to the White Book at paragraph 1.3.2 which notes that Part 1 of the CPR "places a duty on the court to secure the overriding objective's achievement" but that "No such duty is directly imposed on the parties".

63. Both of these propositions are correct. However that is not the end of the matter: as the White Book continues to note, there is a different duty placed on the parties, namely that of helping the court to further the overriding objective under CPR 1.3. That is a duty set out in a court rule which can be breached.

64. Accordingly a breach of the duty in CPR 1.3 can, in principle, amount to a breach of a "rule, practice direction or court order" for the purposes of CPR 3.4(2)(c) and an abuse of process.

65. Support for this approach is found in *Wearn v HNH International Holdings Ltd* [2014] EWHC 3542 (Ch) at [111], where a breach of the duty in CPR 1.3 was part of the reason Barling J struck out a claim as an abuse of process.

66. This principle was also emphasised in *Cable*:

> "44…a failure to comply with the CPR or its Practice Directions can constitute an abuse of process: see for example *Lewis v Ward Hadaway (a firm)* [2015] EWHC 3503 (Ch), and *Liddle v Atha & Co Solicitors* [2018] EWHC 1751 (QB), [2018] 1 WLR 4953. These cases involved the deliberate understating of the value of the claim on the claim form in order to avoid paying higher court fees. In both cases, it was found that this amounted to an abuse of process".

67. In many situations the duty on a party to help the court to further the overriding objective will involve an element of co-operation with another party. As the Master highlighted, this was especially so during the pandemic. On that basis, the Claimant's failure to comply with the timetable that the parties had agreed as set out in the draft consent order was capable of constituting a breach of the duty in CPR 1.3.

68. The second limb of Ground 2 was that the Master wrongly held that a breach of the overriding objective justified a strike out.

69. In support of this proposition Mr Browne KC again cited the White Book at paragraph 1.3.2 where a series of cases are listed as supporting the proposition that "party-failure to help the court may be visited in costs on the defaulting party or party". Again, that is a correct statement of principle, but cannot mean that a failure to help the court under CPR 1.3 can never, on the right facts, constitute an abuse of process that merits the more robust sanction of a strike out: again, see *Wearn* and *Cable* at [65] and [66] above.

70. The remaining arguments under Ground 2 were to the extent that the facts of the breach of the overriding objective in this case did not justify a strike out. Again these are more properly to be considered under Ground 3.

Ground 3: The discretion issue

The Claimant's submissions

71. Ground 3 was the primary ground of appeal advanced by Mr Browne KC.

72. His overarching submission under Ground 3 was that, even if the Master was justified in finding an abuse of process, there was a clear failure to exercise any discretion contrary to well-established authority. He cited the cases set out in the White Book, at pages 127 and 144-145, principally *Biguzzi v Rank Leisure Plc* [1999] 1 WLR 1926 and *Cable*, together with *Summers v Fairclough Homes Limited* [2012] 1 WLR 2004, all of which emphasise the principle that strike out is the ultimate sanction and that other sanctions must be explored first.

73. Particular reliance was placed on the most recent guidance from the Court of Appeal in *Cable* thus:

> "63. In the recent case of *Asturion Foundation v Alibrahim* [2020] EWCA Civ 32, [2020] 1 WLR 1627, this court was considering a unilateral decision by the claimant not to pursue its claim for a period of time whilst maintaining an intention to do so at a later date. The court found that this may well constitute an abuse of process, but did not necessarily do so (see paragraph 61 of the judgment of Arnold LJ). More importantly for present purposes, the court set out the correct approach to an application to strike out for an abuse of process. It said that it was a two-stage test. First the court has to determine whether the claimant's conduct was an abuse of process. Secondly, if it was, the court has to exercise its discretion as to whether or not to strike out the claim (see paragraph 64). It is at that second

> stage that the usual balancing exercise, and in particular considerations of proportionality, becomes relevant.
>
> 64. Furthermore, it seems to me that applying this two-stage test in circumstances like this not only provides clarity and simplicity, but it also avoids the sort of confusion that was identified by Turner J in *Liddle v Atha*. In that case the judge noted at paragraph 20 of his judgment that, in the lower court, the parties had agreed that, if there was an abuse of process, the application to strike out would automatically succeed. The judge was not satisfied with that, saying that he remained to be persuaded that the finding of abuse automatically gave rise to the striking out of the claim. As *Asturion* has subsequently demonstrated, Turner J was right to be doubtful: they are different questions and the finding of abuse of process does not lead inexorably to the striking out of the claim" [my emphasis].

74. He noted that in *Cable*, the Court of Appeal held that the District Judge had failed to apply the two-stage test, but had "…dealt with all aspects together, as part of an overall exercise of her discretion, which ran the risk of downplaying the proportionality of bringing the claim to an end": [65]-[67] and [75]. The District Judge had also failed to consider key matters pertinent to the second stage of the test or explain why lesser sanctions were being rejected, which explanation should have been given: [91] and [93]. Mr Browne KC argued that the Master made similar errors of law here.

75. He referred to the fact that in conducting the two-stage exercise afresh in *Cable*, the Court found that:

    (i) There had been an abuse of process because of three serious failures by the Claimant's solicitors: [69]-[72];

    (ii) The principal consequence of the abuse of process was a one year delay in progress of the action, and "[u]sually, such delays are capable of being compensated for in costs or by way of other financial sanctions": [76]-[77];

    (iii) There was no evidence of any further prejudice to the Respondent: [78]-[88]; and

    (iv) In terms of prejudice to the Appellant, he had been the victim of an accident for which liability had been admitted: [90]; and

    (v) If the claim was struck out he would have to commence a professional negligence claim against his solicitors, with all the risk, uncertainty and cost that that involved. This would also involve a "loss of a chance" claim which was "inevitably an inferior type of satellite claim, particularly when compared to the present proceedings, which involves a claim against a primary Defendant who has already admitted liability": [90].

76. For these reasons the Court considered that the District Judge had erred in striking out the claim as that was a disproportionate sanction in all the circumstances. The Court reinstated the claim but held that the Appellant should pay the Respondent's costs on an indemnity basis up to and including the day of the hearing before the District Judge

and that the Appellant should recover no interest on his special damages for the relevant period: [92]-[95].

77. Mr Browne KC submitted that the Master had failed to take into account the following relevant factors in this case:

    (i) The admission of liability some time ago;

    (ii) The Claimant's entitlement as of right to a fair trial of his claim;

    (iii) The lack of prejudice to the Defendant other than delay which could be compensated in costs and interest sanctions;

    (iv) The relatively short timescale of the delay, namely one year, and the lack of other breaches;

    (v) The secondary or inferior remedy for the Claimant of a claim against his solicitor; and

    (vi) The absence of an unless order or other sanction to which the Claimant could have been subject.

78. He argued that the Master had also failed to consider alternative remedies short of a strike out.

79. Overall his case was that had the Master applied the two-stage approach properly, and considered the above relevant factors at the second stage, the inevitable conclusion would have been that strike out was disproportionate, and lesser sanction(s), similar to those imposed by the Court of Appeal in *Cable*, would have been applied. This case was "on all fours" with *Cable* on the facts and the approach that should have been taken.

The Defendant's submissions

80. Mr Davis KC argued that it was unfair to assert that this experienced Master, who is very familiar with the CPR, failed to apply the discretion. Although counsel had not taken the Master to *Cable* specifically, reference had been made to the commentary in the White Book. The Master could not have done anything other than had the rules in mind. The fact the two-stage test and alternative remedies were not expressly referred to does not mean they were not considered. The Master did apply the two-stage approach, albeit taking a holistic approach.

81. An *ex tempore* judgment was given which considered the chronology and the reasons put forward by the Claimant. The conduct of the Claimant and his solicitor was found by the Master to have been "lamentable". This was not a case solely about delay but also about one party not being entirely straightforward with the court. The Master effectively found that no proper reason had been given for that conduct. Reference was made to the overriding objective. The Master had been reminded that strike out is a draconian response. However the Master was fully entitled to conclude that on the facts of this case, strike out was the proportionate outcome and in line with the standards to which parties are held under the overriding objective.

82. Further, as a matter of general principle, this court should be slow to interfere with the exercise of the Master's discretion. The Claimant had failed to identify any real error of law in the Master's approach. Rather, the nub of the argument was that the discretion should have been exercised in a different way. However an appeal is a review not a re-hearing; the Master had a wide discretion; and it was exercised in a rational way.

83. Further, the specific factors now relied upon by the Claimant (as summarised at [77] above) were not enumerated in this way to the Master. They are, in any event, "double-edged" in that:

    (i) Despite the admission of liability some time ago, the claim continues, with no proper prosecution of it by the Claimant for an extended period;

    (ii) The right to a fair trial is constrained by the overriding objective;

    (iii) Prejudice is not the operative test but in any event the delay, the claim remaining open and the Defendant's inability to value the claim are all prejudicial;

    (iv) The Claimant delayed for around a year without any good reason being provided and despite the Defendant repeatedly trying to progress matters;

    (v) The Claimant may well have a claim against his solicitor albeit that this could be problematic if he was at fault in not giving instructions to his solicitor, but the court should not speculate on this issue.

84. He also noted that the Master was not invited to consider alternative remedies in any detail.

85. Overall, Mr Davis KC contended that the Master quite properly exercised the discretion to strike out the claim and this court should not interfere with the decision.

Analysis

86. The transcript of the hearing before the Master makes clear that it moved relatively rapidly, as the Master was already appraised of the detail of the witness statements that had been submitted and the central issues. Both parties were represented by experienced counsel who at various points responded to questions posed by the Master. An *ex tempore* judgment was then promptly provided. In those circumstances the fact that the judgment does not refer explicitly to the relevant parts of the CPR or the inherent jurisdiction is more understandable than if judgment had been reserved. The findings of the Master nevertheless adopt the language of the pertinent parts of the CPR and the reasons for the strike out decision are clearly set out.

87. It is clear from the judgment that the Master had formed a very dim view of the conduct of the Claimant and his solicitor. The Master had no difficulty in finding that there had been an abuse of process. In light of my conclusions on Grounds 1 and 2 and the nature of the evidence, the Master was fully entitled to find an abuse. Further, I accept the submissions from Mr Davis KC that the nature of the abuse found went beyond mere delay: rather the Master was concerned both that the Claimant's solicitor was not being

fully transparent about the reasons for the delay and that the conduct of the Claimant himself justified criticism.

88. Accordingly, there is no doubt that the Master engaged fully with the first stage of the *Cable* test and made robust and appropriate findings about the abuse of process issue.

89. The Master clearly also exercised the discretion to strike out the claim. I am therefore very mindful of the appropriate role of the appellate court in such circumstances, namely that the court:

> "…will only interfere if it considers that the first instance judge has erred in principle, or if she has left out of account a feature which should have been considered or taken into account a feature which should not have been considered, or failed to balance the various factors fairly in the scale: see *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647 and *AEI Rediffusion Music Limited v Phonographic Performance Limited* [1999] 1 WLR 1507" (*Cable* at [74]).

90. However, I am persuaded that the Master did err in principle in the manner alleged by Mr Browne QC. There is no mention in the judgment of the second stage of the *Cable* test, the proportionality concept or the weighing of factors for and against the proposition that strike out was a proportionate response to the abuse. In those circumstances, and with great respect to the Master, it is not possible to be confident that the Master applied the second stage of the *Cable* test, perhaps because neither counsel referred specifically to it.

91. I am unable to accept the submission made by Mr Davis KC that the Master did indeed apply the necessary two-stage test, albeit in a holistic way: rather, by dealing with all aspects together, as part of an overall exercise of judicial discretion, there is a risk that the two different questions were not considered separately and that the proportionality of bringing the claim to an end was downplayed. These were two of the specific difficulties of a one-stage or holistic approach identified by Coulson LJ in *Cable* (see [73] and [74] above).

92. Further, the Master had been addressed on the Claimant's behalf, albeit briefly, to the effect that other options short of a strike out should be considered (see [33] above). In those circumstances, per Coulson LJ in *Cable* (see [74] above), an explanation should have been given as to why they were rejected.

93. I therefore conclude that there was a similar error in the Master's judgment to that identified in the District Judge's approach in *Cable* and that it is necessary to conduct the two-stage assessment afresh.

94. For the reasons already given I reach the same view as the learned Master as to the finding of the abuse of process and the nature of it.

95. However, I do not consider that a strike out was, in all the circumstances, a proportionate response to the abuse.

96. This is a claim in which liability was admitted and thus one in which the Claimant had a right to have his entitlement to damages determined. It is similar to *Cable* in a further way in that the principal impact of the abuse on the Defendant was a period of around one year delay in progressing the claim, and such issues can "[u]sually" be capable of being compensated for in costs or by way of other financial sanctions (*Cable* at [77]). The additional factors present here, of the Claimant's solicitor being less than forthcoming about the reasons for the delay and the Claimant's own contribution to the abuse, do not, in my view, justify a strike out. They too can be addressed in costs and by other financial sanctions.

97. Taking into account all the circumstances I consider that the proportionate approach is to reinstate the claim but to impose the following further sanctions and make the following further directions:

    (i) The Claimant should pay the Defendant's costs on an indemnity basis from 26 March 2021 to 2 February 2022. I have selected the first date as this is a realistic date on which the second statement from the Claimant addressing the surveillance evidence should have been provided. The second date is that of the hearing before the Master at which, based on my judgment, the claim should not have been struck out;

    (ii) The Claimant should recover no interest on his special damages for the same period;

    (iii) The Claimant must provide his second statement in response to the surveillance evidence within 21 days, and unless he does so, the claim will be struck out. The parties should agree consequential directions for further orthopaedic evidence, schedules of loss and a potential trial window with this in mind and liaise with the court for approval or variation of the same; and

    (iv) The Claimant must, within 21 days, request the court to re-list the application in respect of Noor Law as soon as possible or indicate that it is no longer pursued.

Conclusion

98. Accordingly for the reasons set out herein the appeal is dismissed in respect of Grounds 1 and 2, but allowed under Ground 3. The claim will therefore be reinstated but subject to the further sanctions and directions set out at [97] above.