Neutral Citation Number: [2024] EWHC 119 (KB)

Appeal No: 52 OF 2023

Claim No: H75YX259

IN THE HIGH COURT

KING'S BENCH DIVISION

MANCHESTER DISTRICT REGISTRY

BEFORE :

MR JUSTICE CONSTABLE

- -

B E T W E E N:

MATTHEW WALKER

Applicant

- and -

MERSEY CARE NHS FOUNDATION

Respondent

- -

- -

Daniel Bennett (instructed by Harris Fowler Solicitors) for the Applicant

Alexander Williams (instructed by Weightmans LLP) for the Respondent

Hearing date: [22] January 2024

- -

MR JUSTICE CONSTABLE:

Introduction

1. On 1 August 2018, the appellant, Mr Matthew Walker, was working as a nursing assistant at the Scott Clinic in Rainhill, at St Helens. This is a medium secure mental health unit. Mr. Walker was asked to participate in a game which he referred to as 'soft touch' football. There were 11 patients plus three members of staff. One member of staff was the referee, and the two others played. Mr. Walker, who was playing in goal, sustained a serious fractured radius when, he said, he protected his face from the ball kicked hard by a colleague Mr Dennis Callaghan. The medical experts agreed that Mr Walker suffers, as a result, from a restricted range of movement, loss of function and difficulty in power work and heavy bimanual work, which will interfere with manual physical activities such as restraining patients at work.

2. Mr. Walker brought an action against the Mersey Care NHS Trust ('Mersey'), on the basis that Mr Callaghan, for whose actions it was common ground Mersey were vicariously liable, had kicked the ball hard and high, and had failed to follow the rules of the soft touch football game. It was common ground that if this had been an ordinary game of football, what happened to Mr Walker would properly be seen as an unfortunate accident which would not have given rise to a cause of action. Mr Walker's case was that this was different: this was soft touch football with its own rules. It was materially different from five-a-side football and the key pleaded rule of soft touch football was that the football was not to be kicked hard or above chest height.

3. On the morning of trial, taking place on 17 August 2023 before Recorder Kennedy KC in the Liverpool County and Family Court, Mersey sought to amend its Defence. The key amendment was set out at paragraph 3. It stated:

> *"In the light of the matters raised within the skeleton argument of the claimant, dated 14th August 2023, the defendant amends this defence in order to provide clarity on its case at trial and more particularly to bring the pleaded defence into line with the witness evidence. The claimant is not prejudiced. The defendant's witnesses do not recognise the term 'soft touch football', nor are they aware of any set rule or guidance for that game as contended for by the claimant. The football played and being played at the time was akin to normal five-a-side football, the game was played at a normal pace. It was not specified that the ball should be kicked hard, albeit it was expected that excessive force would not be used. The kicker of the ball in question, Dennis Callaghan, does not recall any restriction on the ball not being kicked above chest height. If there was a member of staff refereeing a game, they would sometimes remind the players that it was a friendly game and there should be no aggressive tackles, but tackling was allowed within reason and the ball was allowed to be kicked with normal force. If players became overly competitive or carried away the referee would step in to calm the situation down."*

4. The amendment was resisted on the basis that, as Mr Bennett, counsel for Mr Walker contended, although the substance of the amendment had indeed been within the witness statement of Mr Callaghan served nearly a year previously, the case was not a pleaded one. It was accepted in front of the Recorder by Counsel for Mersey, Mr Sandiford, that the amendment was late. There was a debate about the proper interpretation of the pleadings, and whether or to what extent the new plea should be seen as bringing the pleadings in line with the witness evidence. The Recorder allowed the amendment, and refused the following application for an adjournment in a reasoned judgment ('the Application Judgment'). It is this case management decision that lies at the heart of the first part of the appeal before me.

5. Recorder Kennedy then proceeded to hear the trial. He gave judgment on 18 August 2023 ('the Main Judgment'). This found, centrally:

> *'did not find Mr Walker's description of soft touch football, something materially different to a friendly game of five-a-side as convincing. ....*
> *...*
> *There was no coherent case put forward on behalf of the claimant as to what was and what was not allowed in terms of the power of shots – when does a soft shot cease to be a soft shot? I shared Mr Callaghan's confusion as to how this distinction could be realistic or could be realistically refereed....It makes no sense for there to be no document setting out how it was different and what the key differences were.*
> *…*
> *The claimant got on with the game and said nothing to anyone at the time....His failure to do so is far more consistent with his injury being the unfortunate consequence of an ordinary shot, not the breach of any rule. It also sits uneasily with his evidence that the referees are astute to enforce the rules, not just at the beginning of the game but consistently throughout it.*
> *...*
> *Shin pads were available and worn. I agree that is...an indicator of the more normal game of five-a-side.*
> *...*
> *I found Mr Callaghan to be an objective careful witness who was doing his best to assist the Court....*
> *...*
> *...I find the balance of the evidence clearly favours the defendant's case for the reasons I have set out, and the claim is dismissed.*'

6. Mr Walker also appeals against the Main Judgment.

7. Permission to appeal was granted by Order of Mr Justice Ritchie dated 16 October 2023. Mr Justice Ritchie considered that the Grounds did not comply with CPR r52 PD 52B paragraph 4.2(d), in that there are no clear and simply expressed numbered Grounds. Instead, the Grounds were intermingled with the Skeleton Argument. Nevertheless, Ritchie J gave permission on 4 Grounds as extracted from the material. The first three relate to the Amendment Judgment and the fourth to the Main Judgment.

(1) (Para 23 of the Skeleton Argument) Mismanagement of the amendment application (errors of law, absence of formal amendment application, wrong decision on the application);

(2) (Para 24 of the Skeleton Argument) Misunderstanding the pleading;

(3) (Para 25 of the Skeleton Argument) Finding of non-compliance of the Defence with the CPR and Inappropriate exercise of management powers (the amendment was a complete 'about turn');

(4) (Para 30 of the Skeleton Argument) Factual findings as to the nature of the game.

The Pleadings

8. Given the application central to the first part of the appeal, it is necessary to set out the pleadings in more detail.

9. The Particulars of Claim included the following averments:

> *'3. One of the activities which the Claimant was frequently instructed to carry out for the Defendant was a "soft touch" football game for the residents. This would be carried out approximately twice per week, depending on availability of staff and residents to participate.*
>
> *4. The rules set out for each game was that the football was to involve no tackling, be carried out at a slow pace, with the football not to be kicked hard or above chest height. A staff member would act as a referee to enforce these rules.*
>
> *5. Whilst it was fairly common for some residents to get carried away and become over competitive, it was expected and important that staff members participating in the game abided by the rules.*
>
> *6. On 1st August 2018, the Claimant was asked by his supervisor to take part in a soft touch football game in the gym as the Defendant was short of staff participants. The game involved 1 1 patients split into two teams, with a member of staff on each team. A third member of staff acted as referee.*
>
> *7. Prior to the game commencing, the Defendant's supervisor, who was acting as referee, reminded all participants, including the staff members, of the rules of the "soft touch" football game.*
>
> *8. The Claimant was asked to play in goal for his team. As the game progressed, the Defendant staff member on the opposing team advanced*

with the ball towards the Claimant's goal. He then kicked the ball very hard, directly at the Claimant's face. The Claimant used his right hand to protect his face. The Claimant blocked the ball with his right hand but sustained injury to his right wrist as a result.'

10. These paragraphs were responded to at paragraph 3 of the Defence:

> '*3. The claimant is put to strict proof in respect of paragraphs 3 – 8 inclusive. The defendant accepts that residents did participate in "soft touch" football and that on 1 August 2018 the claimant was participating in a game, however the claimant is put to strict proof that he was specifically instructed to participate in the game. The defendant contends that the claimant was only required to escort patients to the football activity. The claimant was not required to actively participate. To clarify, the defendant will say that the claimant's role was to escort and observe the patients, participation in the soft touch football match was not mandatory.*'

11. Just as this paragraph uses the phrase 'soft touch football', the phrase was used a number of other times (eight in total), in particular in paragraph 6 of Defence which purported to set out Mersey's positive case:

> "*6. The defendant pleads a positive case as follows:*
>
> *a) The claimant was only asked by the nurse in charge if he would escort patients to the soft touch football activity. As a member of ward staff escorting the patients, the claimant was not required to actively participate. The claimant's role was simply to escort and observe the patients. Participation was not mandatory.*
>
> *b) The defendant has no record of any complaints made by staff about participation in soft touch football, either prior to or post the claimant's incident.*
>
> *c) The defendant has received no previous reports that the colleague who kicked the ball towards the claimant was overzealous whilst participating in soft touch football. Had there been any previous reports of the said member of staff being overzealous it would have been worthy of investigation for learning purposes and the member of staff would have been spoken to.*
>
> *d) All service users/residents involved in playing soft touch football have been risk assessed and are deemed settled enough to be involved in the game. There are no risks identified, nor any concerns regarding participation in soft touch football.*
>
> *e) The simple fact the claimant sustained injury blocking the football, does not mean his colleague failed to follow the rules of soft football. It is entirely foreseeable that injury could be sustained in entirely innocuous circumstances,*

for example because of the angle at which his hand/wrist were held when blocking the ball. The claimant is put to proof that the injury was sustained because his colleague kicked the ball too hard.

f) The defendant pleads "volenti non fit injuria" (the willing assumption of risk).

g) The defendant avers that the claimant was provided with a safe system of work.

h) The defendant avers they took all reasonable steps to ensure the reasonable safety of the claimant at all times.

i) The defendant denies that they exposed the claimant to a foreseeable risk of injury, as alleged or at all.'

12. I have set out the key paragraph of the amendment sought, above. There was also amendment sought to paragraph 6(e) of the Defence in the following terms:

'The simple fact the claimant sustained injury blocking the football, does not mean his colleague <u>*was negligent*</u> ~~*failed to follow the rules of soft football. It is entirely foreseeable that injury could be sustained in entirely innocuous circumstances, for example because of the angle at which his hand/wrist were held when blocking the ball*~~ . <u>*The Defendant acknowledges the opinion of the orthopaedic experts on velocity in the JS*</u>*. The claimant is put to proof that the injury was sustained because his colleague kicked the ball too hard.* <u>*It is denied that the ball was kicked with excessive force. This remains an issue of fact to be determined*</u>*.'*

13. The reference to the Joint Statement refers to the medical evidence before the Court that '*The description of a football being kicked at the wrist would imply a relatively high velocity impact to the right wrist*'.

<u>Witness Statements</u>

14. The witness statements were served in September 2022, almost a year before the trial.

15. Mr Walker stated, in relation to soft touch football and its rules:

'*9. One of the activities that we would do was a soft touch football game which we would try and organise twice a week, however this depended on interest from residents and whether certain residents would be able to take part, as some of them are not allowed to mix with other residents for either their own or others safety.*

10. The rules of the soft touch football game has [sic] *always been the same no matter who is organising it. The rules are that it is supposed to be a relatively slow paced game and not competitive. It is meant to be enjoyable for everybody. In addition, there are rules such as no tackling and also the football is not supposed to be kicked higher than chest height.*'

16. No other witnesses for the Claimant gave evidence that related to the existence of soft touch football or its rules. However, Mr Walker said:

'*25. I am still in contact with some of the other employees on the ward but they are not willing to provide statements in support of my claim as they are concerned about their jobs. They have however told me that since the ward has moved to a new building, there is now a rule in place, that as far as I know has only been communicated verbally, that staff are not to participate in the football games.*'

17. Mr Callaghan's evidence in his witness statement relevant to soft touch football and its rules was as follows:

'*7. I note that the particulars of claim refers to "soft touch" football. Paragraph 4 of the particulars of claim states that the football was "to involve no tackling, be carried out at a slow pace, with the football not to be kicked hard or above chest height. A staff member would act as a referee to enforce these rules". I am not entirely sure where the claimant has got the term "soft touch" football from. I have not heard it referred to as "soft touch" football. The football games which were played at the time, are still played and indeed the type that was being played by the claimant on the day of his accident was akin to normal five a side football. The players would play with a normal leather case football on an outside pitch/compound with small/five a side goals, approximately four foot in height.*

...

9. Coing back to claimant's assertion that it was soft touch football as stated above I have not heard it referred to as this. If there was a member of staff acting as referee, they would sometimes remind the residents that it was a friendly game and there should be no aggressive tackles etc however staff/residents were able to tackle and the ball was allowed to be kicked with normal force. When it is said a member of staff would referee this was more a supervisory role, to make sure that everyone was playing nicely, if any residents did become over competitive or started to become carried away with the game then the "referee" would step in to calm the situation down.'

18. Of the other witnesses for Mersey, Ms Weston used both the phrase '*soft touch football*' and '*football*', somewhat interchangeably in paragraph 6 of her statement. Ms O'Shea stated:

> "5. *I note that within the particulars of claim the claimant refers to him playing "soft touch" football and that the rules stated that there was to be no tackling, it was to be carried out at a slow pace and the football was not to be kicked hard above chest height. I am not aware of there being any set rules/guidance for "soft touch" football. Indeed I have not heard it referred to as being "soft touch" football. My interpretation of the type of football which the residents played and which the staff sometimes participated in is similar to five a side football. My understanding is this is the type of football which the claimant was playing on the day of the incident and which I have witnessed patients and sometimes staff playing on a regular basis.*"

Applicable Principles on Appeal

19. The first part of the appeal relates to the case management decision of the learned Recorder. As made clear when Ritchie J gave permission, appeals from case management decisions have a high threshold test, see Royal & Sun Alliance PLC v T & N [2002] EWCA Civ 1964, Chadwick LJ ruled as follows:

> "*... these are appeals from case management decisions made in the exercise of his discretion by a judge who, because of his involvement in the case over time, had an accumulated knowledge of the background and the issues which this Court would be unable to match. The judge was in the best position to reach conclusions as to the future course of the proceedings. An appellate court should respect the judge's decisions. It should not yield to the temptation to "second guess" the judge in a matter peculiarly within his province. I accept, without reservation, that this Court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."*

20. In Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537, at [52] the Master of the Rolls said:

> "*We start by reiterating a point that has been made before, namely that this court will not lightly interfere with a case management decision. In Mannion v Ginty [2012] EWCA Civ. 1667 at [18] Lewison LJ said: "it has been said more than once in this court, it is vital for the Court of Appeal to uphold robust fair case management decisions made by first instance judges."*

21. In Clearway Drainage Systems Ltd v Miles Smith Ltd [2016] EWCA Civ 1258, the test. in considering an appeal against a decision of this nature was neatly encapsulated by Sir Terence Etherton MR at paragraph 68:

> " *... The fact that different judges might have given different weight to the various factors does not make the decision one which can be overturned. There must be something in the nature of an error of principle or something wholly omitted or wrongly taken into account or a balancing of factors which is obviously untenable."*

22. The second element of the appeal relates to factual findings by the learned Recorder. The law and relevant key cases were recently summarised in Deutsche Bank AG v Sebastian Holdings [2023] EWCA Civ 191:

> *'48. The appeal here is against the judge's findings of fact. Many cases of the highest authority have emphasised the limited circumstances in which such an appeal can succeed. It is enough to refer to only a few of them.*
>
> *49. For example, in Henderson v Foxworth Investments Ltd [2014] UKSC 41, [2014] 1 WLR 2600 Lord Reed said that:*
>
> > *"67. ... in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."*
>
> *50. We were also referred to two more recent summaries in this court explaining the hurdles faced by an appellant seeking to challenge a judge's findings of fact. Thus in Walter Lilly & Co Ltd v Clin [2021] EWCA Civ 136, [2021] 1 WLR 2753 Lady Justice Carr said (citations omitted):*
>
> > *"83. Appellate courts have been warned repeatedly, including by recent statements at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The reasons for this approach are many. They include:*
> >
> > *(i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed;*
> >
> > *(ii) The trial is not a dress rehearsal. It is the first and last night of the show;*

(iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case;

(iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping;

(v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence);

(vi) Thus, even if it were possible to duplicate the role of the trial judge, it cannot in practice be done. …

…

85. In essence the finding of fact must be plainly wrong if it is to be overturned. A simple distillation of the circumstances in which appellate interference may be justified, so far as material for present purposes, can be set out uncontroversially as follows:

(i) Where the trial judge fundamentally misunderstood the issue or the evidence, plainly failed to take evidence in account, or arrived at a conclusion which the evidence could not on any view support;

(ii) Where the finding is infected by some identifiable error, such as a material error of law;

(iii) Where the finding lies outside the bounds within which reasonable disagreement is possible.

86. An evaluation of the facts is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and appellate courts should approach them in a similar way. The appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the trial judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion.

87. The degree to which appellate restraint should be exercised in an individual case may be influenced by the nature of the conclusion and the extent to which it depended upon an advantage possessed by the trial judge, whether from a thorough immersion in all angles of the case, or from first-hand experience of the testing of the evidence, or because of particular relevant specialist expertise."

51. *Another recent summary was given by Lord Justice Lewison in Volpi v Volpi [2022] EWCA Civ 464, [2022] 4 WLR 48:*

"2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden

path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

(ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

The Law relating to failures to follow the rules of a game

23. The leading authority is Caldwell v Maguire and Fitzgerald [2001] EWCA Civ 1054; [2022] PIQR P6. In this case the jockey was seriously injured in the course of a race. A steward's enquiry into the incident found that Maguire and Fitzgerald had been guilty of careless riding. The injured jockey sued them. The trial judge dismissed his claim, finding that the threshold for liability to be inevitably high. It was not enough to show an error of judgment or momentary lapse in skill when subject to the stresses of a race. This meant it might be difficult to prove a breach of duty in the absence of reckless disregard for the safety of a fellow contestant.

24. The Court of Appel upheld the judgment. Judge LJ emphasised at [37] that in the context of sporting contests, a distinction needs to be drawn between "*conduct which is properly to be characterised as negligent, and thus sounding in damages, and errors of judgment, oversights or lapses of attention of which any reasonable jockey may be guilty in the hurly burly of a race*". Overall, Judge LJ found that the "*threshold of liability is a high one. It will not easily be crossed''*.

25. This principle has been applied in a number of cases, including Fulham FC v Jones [2022] EWHC 1108 KB, in which Lane J upheld an appeal against the Recorder's decision that the defendant had been negligent in a tackle. The Judge found that "*The error lies in the recorder treating certain breaches of the Rules of the Game as being 'very likely' to amount to negligence.*"

Appeal against Permission to Amend

26. At paragraphs 23-25 of the Appellant's skeleton argument a number of points are advanced procedurally and substantively against the learned Recorder's decision to permit Mersey to amend its Defence on the morning of trial.

27. Paragraph 23 contains matters of procedure (in slightly different order to that set out): the absence of a formal application, the absence of a signed version of the amended defence until the end of trial, the absence of a reason for the delay and the absence of any explanation as to how the original defence came to accept and use the term 'soft-touch' which was disavowed in the amended pleading.

28. Paragraph 24 contends that the learned Recorder was wrong to hold that 'soft touch' was an ambiguous term, which (it is said), it was defined by paragraph 4 and admitted by paragraph 6(e) of the Defence.

29. Paragraph 25 contends that the learned Recorder was wrong in law to conclude that the original Defence did not comply with the CPR, and that there was no prejudice to the Claimant. Prejudice is dealt with, further, in paragraphs 26 and 27 of the Skeleton Argument, in which Mr Bennett argues that significant prejudice existed because of the resiling from 'significant admissions of fact', and without explanation from those responsible for signing the statements of truth.

30. The legal directions the learned Recorder reminded himself of and sought to apply on the application to amend were, first, upon the approach of Carr J (as she then was) in Quah Su-Ling v Goldman Sachs International [20156] EWHC 759 (Comm) at paragraph 38, where she set out as follows:

> '*Drawing these authorities together, the relevant principles can be stated simply as follows :*
>
> *a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;*
>
> *b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and*

why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.

31. Both counsel also referred to the judgment of Henshaw J in Toucan Energy Holdings Ltd & Or v Wirsol Energy Ltd & Ors [2021] EWHC 896. Mr Bennett, through the judgment, drew my attention to the reference to CIP Properties (APT) v Galliford Try Infrastructure Limited [2015] EWHC 1345. In particular, Mr Bennett relied upon the distinction by Coulson J (as he then was) between amendments which can be regarded as 'late' if it could have been advanced earlier, or duplication of effort or the revisiting of steps. It would be regarded as 'very late'' if permission to amend threatens the trial date, even if the application is made some months before trial (as was the case in *CIP*). At (c), Coulson J considered:

> '*(c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise (Brown; Wani). In essence, there must be a good reason for the delay (Brown)*'

32. Mr Williams, who represented Mersey before me (but who did not do so at trial), noted that at (c) from Carr J's summary in Quah Su-Ling, the Judge described a '*very late amendment*' as one made when the trial date has been fixed and where permitting the amendments '*would cause the trial date to be lost*'. From a linguistic perspective, this might be said to be different from the language of Couslon J who uses the phrase '*threatens the trial date*'. However, in substance it is clear that Coulson J meant that

the ('threatened') amendment would, if granted, mean that the trial date would have to be adjourned so that the amendment could be fairly to be dealt with, or that it would, by reason of its proximity to trial, cause an unfair imbalance between the parties in their preparation (as was the case in Bourke and another v Favre and another [2015] EWHC 277 (Ch) in which Nugee J refused the amendments some months before trial because of the "significant pressure" that having to deal with the new claim would put on the defendants). Despite the slight difference in language, I do not therefore identify a material difference in principle between the concepts involved in (relative) lateness considered by Coulson J and Carr J.

33. On the basis of CIP, Mr Bennett submitted that the absence of good reason for the delay, in circumstances where the amendment was '*very late*', was necessarily fatal to the application. The reference in the passage quoted above from Coulson J to '*Brown*' is a reference to Andrew Brown & Ors v Innovatorone [2011] EWHC 3221 (Comm) in which Hamblen J, as he then was, identified that '*parties to litigation have a legitimate expectation that trials will be conducted on the dates fixed for trial by the court and that the trial will not be put back or delayed without good reason'* i.e. explicitly in the context of the trial date being put back. In the context of an amendment which would have the effect of the trial date being lost, there may be (as Coulson J said at [19(e)] in CIP) *'an overwhelming reason to refuse the amendments'* even if there is a good reason for the amending parties' delay. Absent a good reason, the circumstances in which a party would successfully amend where there is no good reason for the delay and the trial date would be lost will be, if not non-existent, vanishingly rare. However, I reject the contention advanced by Mr Bennett that even in circumstances where the trial can proceed, notwithstanding the amendment, the absence of a good reason for the delay will itself be fatal to the application. This puts the point too high. Indeed, in *CIP*, the absence of a good reason (as found by Coulson J: see para [58]) was not stated as being determinative in that case. Instead, the '*single most important factor militating against allowing this amendment*' was the loss of the trial date if the amendment was allowed [see para 62].

34. Mr Williams also drew the following passage from Toucan to the Court's attention as being of relevance in the present case:

> '9. *It is relevant to have regard to the degree to which the case sought to be advanced by the amendment is one that the parties have in fact already been addressing. In Hawksworth v Chief Constable of Staffordshire [2012] EWCA Civ 293 (CA), the Court of Appeal stated, obiter, that it might be appropriate to permit an amendment at trial in respect of a matter which, although not raised in the pleadings, had nevertheless been raised in some of the witness statements and experts' reports served before trial. In Ahmed v Ahmed [2016] EWCA Civ 686, the claimants applied to have letters of administration revoked on the basis that the will annexed to them had not been duly executed or witnessed. At the start of the trial the claimants obtained permission to amend their particulars of claim so as to allege that the will had been forged. The Court of Appeal dismissed an appeal against that grant of permission: the amendment was no more than a formality bringing the claimants'*

case into line with what had been argued for at least six months; the appellants had not been taken by surprise by the amendment and, indeed, had themselves sought at the pre-trial review permission to call a handwriting expert.

10. On the other hand, the mere fact that an issue has received some attention in the preparation of the case and the experts' reports is not necessarily sufficient to make permission to amend appropriate.'

35. Before turning to the Grounds of Appeal, I start, as did the Recorder, with an analysis of the pleadings and the issues as they stood as at the first day of trial, absent the amendment. The learned Recorder's analysis, which is the subject of criticism, was as follows:

'*3, ... What the Amended Defence does is distance itself from the phrase that is used both in the Particulars of Claim and in the original Defence, namely "soft touch football" and it advances a positive case as to what the rules of the game actually being played were. It is not resiling from any admission, in fact, set out in the particulars of claim, because that was itself ambiguous.*

4. I say that because there is no definition of the words "soft touch" in either pleading, and it is the case that the game was supervised to ensure that it was friendly. The rule pleaded in paragraph 4 of the particulars of claim, that the parties to the game should not kick the ball hard, is not admitted; nor is the phrase "soft touch", although, confusingly, the Defence then goes on to use that phrase.

5. The original defence is not the clear case that we now have in the Amended Defence. That latter pleading disavows the phrase "soft touch", and says that there was no rule tempering the level of force with which the ball was to be kicked, over and above that it was a friendly game in general terms.

6. Mr. Bennett, on behalf of the Claimant, reminds me of the obligations on a party when pleading a defence, which are to be found at 16.5 in the CPR at page 487. They are that a defendant must deal with every allegation in the particulars of claim stating which are denied, which are unable to be admitted or denied, and which are admitted. Where a defendant denies an allegation they must state their reasons for so doing. If they intend to put forward a different version of events from that given by the claimant, they must state their own version. I find that the defence as originally drafted did not do that.'

36. Paragraph 3 of the Defence clearly put the Claimant to strict proof as to the substance of paragraphs 3 to 8 of the Particulars of Claim. This included paragraph 4 in which the rules for '*soft touch football*' were set out. When the Recorder stated that there was no definition of 'soft touch' in the Particulars of Claim, he was plainly referring to the absence of any particular definition of 'soft touch' (i.e. what might constitute a 'soft' touch). The Recorder was entirely cognizant of the fact that the Claimant had set out

the rules for 'soft touch football', which is made clear from the following sentence in which he explicitly referred to paragraph 4, in which the rules were set out, and explicitly recited the rule (as pleaded) that the parties should not kick the ball 'hard'. He did not overlook the existence of the pleaded rules. The Recorder correctly identified that paragraph 4 was not admitted: it plainly was not.

37. Mr Bennett argued, as he did before the Recorder, that the rules of 'soft touch' pleaded at paragraph 4 of the Particulars of Claim had been admitted in paragraph 6(e) of the Defence. This sub-paragraph states: '*The simple fact the claimant sustained injury blocking the football, does not mean his colleague failed to follow the rules of soft football*.' This sub-paragraph has to be read as part of the pleading as a whole in which the Claimant is put to proof as to what the rules of soft-touch football were. However, on any view the pleading does appear to accept in terms that (a) there was such a game as '*soft* [touch] *football*' and (b) it was a game which had rules. From these two aspects, the only sensible inference is that it was a game that had some rules somehow different to that from ordinary football, but nowhere does the pleading set out positively what those rules were. However, unsatisfactory though it was (as the Recorder pointed out – the pleading was ambiguous and confusing), I do not consider that the Recorder was wrong when, in light of the clear first sentence of original paragraph 3, he concluded that there was no clear admission of what the rules of soft touch football actually were.

38. On the face of the pleading, Mersey was entitled to, and had, therefore put Mr Walker to proof as to what the rules of softtouch football were, and how it was said that Mr Callaghan was in breach of them. This analysis is supported by Mr Bennett's own Skeleton Argument in the trial below, in which he identified that '*some judicial determination will be required on matters upon which the Defence puts the Claimant to proof, but where the Defendant's witness evidence now seeks to put forward alternate and positive case'*. The first of these related to the rules of 'soft touch' football. In argument, Mr Bennett contended that implicit within the name 'soft touch' itself was the requirement not to hit the ball hard. However, I agree with Mr Williams this is not necessarily the case. It is not a recognised term of art, the same way that the game of 'touch rugby' would generally be understood as a recognisably modified version of full contact rugby. Indeed, the latter illustrates the ambiguity: 'touch' in 'touch rugby' does not refer in any way to the kicking or passing of the ball, but to the level of contact between the players. Without further definition by reference to rules (which were pleaded at paragraph 4 but not admitted), 'touch' could by itself refer to the type of tackle and contact, the type of kicking, or both. It does not, for example, suggest the necessity for slow play, as alleged, which also demonstrates that relying upon the phrase 'soft touch' by itself to glean the rules would be insufficient.

39. In addition to the non-admission as to what the rules were, the original Defence also denied negligence (at paragraph 5) and also put the Claimant to strict proof in respect of the assertions at paragraph 10(a)(i) and (ii): these assertions were that Mr Callaghan '*(i) kicked the ball hard and high, at the Claimant's face*' as well as '*(ii) failed to follow the rules of 'soft touch football game*'. It can be noted that, in light of the authorities, a breach of the rules of 'soft touch football' (i.e. 10(ii)) alone would be insufficient to

establish negligence. It was necessary to establish, beyond mere breach of such rules as may be established, that Mr Callaghan's actions were not an error of judgment or a miscalculation but negligent.

40. In light of the somewhat unsatisfactory and confusing Defence, it is clear that insofar as Mersey intended to advance its own case as to what the rules were (as it ultimately did), and align the pleading with the evidence of their central witness Mr Callaghan, it was necessary to amend the non-admission into a denial and averment. This is what the amendment sought to do. The Recorder was therefore correct to identify that contrary to the original Defence, a clear positive case was articulated in the draft Amended Defence. This asserted the positive case (for the first time in a pleading) that there was no rule tempering the level of force with which the ball was to be kicked, and that over and above that it was a friendly game in general terms and there should be no aggressive tackles.

41. The consequence of refusing the amendment would have been that Mr Callaghan's evidence, where he engaged in a description of the rules and/or his lack of awareness of the term 'soft touch football', would not have been relevant to any pleaded case and, strictly, inadmissible. However, it would still in these circumstances have been necessary for the Claimant to prove to establish in particular 10(a)(ii)) that the rules of 'soft touch football' included a rule about the strength or velocity of shots and that Mr Callaghan breached that rule; and, as set out above, particular 10(a)(i) such that from all the surrounding circumstances it was possible to characterise Mr Callaghan's action not as an error of judgment or a miscalculation but of negligence.

42. Against the background of this pleaded position, the Recorder considered, one by one, the factors set out in Quah Su-Ling.

43. In relation to factor (b), the Recorder identified that it was not 'fully' right to describe what was being put forward as a new case as it encapsulates what has been dealt with in the evidence already. This was entirely fair. Mr Walker himself described the rules in his evidence (and notably, perhaps, did not in fact allege (inconsistent with his pleading) that one of the rules related to the strength with which the ball was, or was not, to be struck). Mr Callaghan's evidence also dealt with 'rules', and the new pleading essentially reflected his evidence. Prior to the amendment, Mr Walker had to establish the rules applicable to the game that was being played, that Mr Callaghan went beyond the rules which the court may find were in place; and then, whether there was sufficient evidence from all the surrounding circumstances to characterise that not as an error of judgment or a miscalculation but of negligence. This remained fundamentally the case.

44. The Recorder, critically, formed the view that there was no reason why the trial could not proceed if the amendment was granted. This determination was plainly central to the Recorder's decision (as it was, having determined the opposite, for Coulson J in CIP).

45. On the facts before the Recorder, this conclusion was within the bounds of his discretion and cannot properly be described as irrational. Key to this decision were the facts, which it was open to the Recorder to conclude, that (a) the question of what the rules were was in issue on the original pleadings (ambiguous as they were); and (b) the witnesses had already given evidence directly as to this issue, and it was clear from the service of witness evidence that Mr Callaghan did not accept that any rule included a restriction on the strength of kicking the ball. The Claimant had already effectively engaged in the point, as Mr Walker's evidence advanced his positive case as to what the rules were.

46. In argument, Mr Bennett said that prejudice was caused to the Claimant because the issue of 'soft touch football' had not been the subject of disclosure, and ought properly have been. It is not clear why disclosure had not encompassed the question of what the rules were of 'soft touch football', as this was an issue in the case and the Claimant was entitled to press for disclosure in respect of this. By definition, any document responding to this issue would respond to the implicitly prior question of the existence of 'soft touch football' at all. In reality, this would pick up risk assessments relating to any form of football to be played and any rules which did or did not apply. No detail of how disclosure was in fact dealt with was provided, and it is also relevant to note that it was not argued before the Recorder that prejudice sprang from disclosure related issues.

47. Mr Bennett also placed significant emphasis on the absence of an explanation for how the original pleading came to accept, as I have set out above, the existence of the term 'soft touch football', which acceptance was then flatly withdrawn in the Amended Defence, both documents being signed by the same claims handler for the Defendant. At times, in argument, Mr Bennett elided the requirement for a good reason for the delay in seeking permission to amend with the requirement for a good reason for the amendment itself. Obviously, the amendment was sought to bring the pleaded case in line with the witness evidence of Mr Callaghan, which had been served 11 months previously. This 'reason' for the amendment was plain. That there was no good reason for waiting until trial to do so was a separate factor. As to the circumstances in which the original pleading set out a case inconsistent with Mr Callaghan's evidence, this was a matter which (as the Recorder pointed out) could be explored with the witnesses, and would be the subject of submission seeking to argue that inferences should be drawn, as would be normal. The precise circumstances of the pleading and instructions given at that time would be privileged, and it was not clear what particular avenues Mr Bennett could legitimately have sought to explore (and whilst the unsatisfactory nature of the change of position was clearly argued, none were identified in argument before the Recorder as a reason why an adjournment would be necessitated).

48. The final aspect of prejudice, which was relied upon in argument, was that Mr Walker had been deprived of the opportunity of seeking evidence from colleagues saying that they do recognise the term 'soft touch football' and that they do recognise the rules set out at paragraph 4 of the particulars of claim and which, as it was said, the Defence appeared to accept existed. It is right that the Amended Defence put the existence of a

game recognised as, '*soft touch football*' formerly in issue but, as the analysis demonstrates above, the Recorder was justified in concluding that what the rules were always had to be proved. The Claimant knew this and Mr Walker himself led evidence on it. Moreover, Mr Walker's own statement made clear that other members of staff who may have had relevant knowledge had already been contacted and had not wished to provide evidence because they were concerned about their jobs. It is correct that considerable latitude ought to be given to the potentially prejudiced party in applications to amend, and it is plainly not the case that such a party has a burden of establishing that particular enquiries they wish to pursue (on the basis of the new case) would necessarily be fruitful. However, the Recorder was within his powers to conclude on the material before him that the parties had already engaged to the extent they were ever going to be able to in the factual question of the existence of the game and what the rules were in their respective evidence.

49. Factors (c) and (d) relate to lateness. The Recorder explicitly based his balancing exercise on the basis that the amendment was 'very late', but again came back to his judgment that allowing the amendment would not stop the trial from proceeding as a key factor.

50. Factor (e) focuses on the insufficiency of the absence of prejudice 'save as to costs'. This is a reference to the impact upon the administration of justice as a whole, in circumstances where the payment of costs *inter partes* (e.g. on an adjournment to permit the amendment to be dealt with) is insufficient to deal with this. In circumstances where, as here, the Recorder was entitled to conclude that an adjournment was not required, the factor has more limited relevance.

51. Factor (f) relates to whether there was a 'good explanation' for the delay. The Recorder rightly identified that there was not a good explanation for why Mersey had not sought to 'regularise the pleading situation', a reference to the fact that the pleading sought to align itself with the evidence as served (which included a positive case as to the rules, as opposed to a non-admission). He stated that he factored this into his balancing exercise. Insofar as it was suggested that the absence of good reason by itself must be fatal to a late amendment, I have set out why this is not correct. It should be factored in to all the circumstances. It is an important factor, but it is only a factor.

52. Factor (g) is a broad factor requiring consideration of the purpose of compliance with the CPR. The Recorder noted the approach and made clear he adopted it.

53. In paragraphs 14 and 15 of his judgment, the Recorder then noted his criticism of the Defendant for the failure, as he identified it, in failing to regularise the pleading situation. However, he also criticised the claim for Claimant for '*doing nothing when it is clear that the case has changed*.' Mr Bennett is critical of this aspect of the decision.

54. First, it is important to note that the Recorder's primary position was that, for reasons that the Recorder was entitled to conclude, no prejudice existed and the trial could proceed notwithstanding the amendment. The Recorder's remarks about the Claimant's

position were an alternative if, contrary to his primary position, prejudice did exist. Even in this context, I do not read this passage of the Recorder's judgment as having placed a positive burden on the Claimant, in the first instance, to meet an unpleaded case or to seek further evidence without an amendment to the cost budget. It is plain, however, that by doing nothing, the Claimant was adding to the certainty of a procedural wrangle arising at trial. It is clear what Mr Callaghan's evidence was going to be for the best part of a year before the trial. Presumably, the Claimant was, once it saw the content of the statement in September 2022, intending to make a submission at trial that Mr Callaghan's evidence was inadmissible because it did not go to a pleaded issue. . This is something that could easily have been flagged up either in correspondence, to draw the issue out, or (at the very latest) canvassed at the PTR. This would be good trial management and is the sort of approach expected of the parties to litigation in the 21st century. I take pains to emphasise that it would plainly be wrong to suggest that the burden of applying to the Court promptly when the need to amend arises does not fall squarely on the shoulders of the amending party, and the absence of a good reason to do so will be an important, and sometimes determinative, reason for refusing an amendment. But it would also be wrong to exclude as a matter of principle from those factors which may properly be considered on such an application the extent to which the potential resisting party has sought to engage with trial management issues in a proactive manner if an prospective procedural difficulty looks inevitable. This may, for example, factor into the extent to which a 'new' issue can properly be regarded as having taken a party by surprise. Adopting a 'wait and see' approach may therefore be an entirely legitimate one, as the Recorder said, but it also may not be entirely irrelevant to the Court's consideration of the appropriate course of action in all the circumstances of the case.

55. Finally, the fact that the amendment application was not made formally or the timing of the provision of the signed amended defence do not add meaningfully to the substantive grounds of appeal.

56. For all these reasons, the Recorder's decision to permit the amendment and refuse any adjournment (the latter decision not the subject of a separate ground of appeal) fell within the wide discretion permitted to a judge in relation to issues of trial management.

Appeal against the Main Judgment

57. Paragraph 30 of Mr Bennett's Skeleton Argument asserts that the Judge found that the game was a normal game and gave judgment for the Respondent on this basis. He contends that that this was '*quite perverse*' but concedes that the Recorder's decision was '*arguably a finding of fact open to the Judge, once he had permitted the amended Defence.*'.

58. It is clear that the Recorder dealt carefully with the evidence of each witness. The Recorder weighed the evidence which came principally from Mr Walker and Mr Callaghan. He gave clear reasons for preferring the evidence of Mr Callaghan, whom he found to be an objective careful witness.

59. The Recorder's decision was obviously not irrational, and turned on findings of fact which it is not appropriate for this Court to interfere with.

60. Paragraphs 30(a), (b) (c) and (e) all relate, in essence, to the Claimant's forensic point arising from the acceptance of the phrase 'soft touch football' within the Defence and Ms Weston's original statement, and the absence of evidence as to how this came about (the inference being it must have been on instructions). These points were taken account of in the Judge's reasoning (see paragraph 27). It was a matter for the Recorder to determine what weight could be placed upon these matters, and form a view having heard the evidence about the credibility and reliability of the witnesses' recollections.

61. Paragraph 30(d) relates to the absence of significance of the non-attendance of Ms O'Shea. Placing no weight on the evidence of a witness who did not attend (and whose evidence was, on paper at lease, unhelpful to Mr Walker) was in no way perverse. Paragraph 30(f) asserts that weight was wrongly placed on the absence of documents, and paragraph (g) asserts that the Recorder should have considered it 'odd' that staff would play full force football with dangerous and violent psychiatric patients without any risk-assessment. I have dealt with the related question of disclosure above. The Recorder did not fall into error in this regard.

Conclusion

62. For the reasons set out above, the appeal is dismissed.