Neutral Citation Number: [2020] EWHC 1378 (QB)

Case No: M20Q213

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY (sitting at Liverpool)

Date: 29 May 2020

Before :

MRS JUSTICE YIP

- -

Between :

SIMONE MAGEE	**Appellant / Claimant**
- and –	
JOY ANGELA WILLMOTT	**Respondent / 2nd Defendant**

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- -

Mr Michael Smith (instructed by **Browne Jacobson LLP**) for the **Appellant**
Ms Helen Rutherford (instructed by **Linder Myers Solicitors**) for the **Respondent**

Hearing dates: 1 May 2020

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Approved Judgment

Covid-19 Protocol:
This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunal Judiciary website (press.enquiries@judiciary.uk). The date and time for hand-down is deemed to be 14:00 on Friday, 29 May 2020.

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MRS JUSTICE YIP

Mrs Justice Yip :

1. This is an appeal from a decision of Mr Recorder Riza QC handed down in the County Court at Reading on 29 November 2019. The Recorder granted the Respondent (the claimant in the action) relief from sanctions, permitting her to rely on expert evidence obtained after the date for exchange of such evidence, in circumstances where this had caused the trial date to be lost. The Recorder also refused a cross-application by the Appellant (the second defendant in the action) to strike the claim out. The Appellant contends that the Recorder erred in his approach to the application under CPR 3.9 and that relief should not have been granted. The Appellant further contends that the Recorder was wrong not to strike the claim out.

2. I am grateful to both Counsel for their extremely well focused and sensible submissions, both in writing and orally. I also commend the very efficient way in which they both conducted the remote hearing.

Venue for the appeal

3. The appeal was issued in Manchester for the convenience of Counsel. The court accepted jurisdiction and permission was granted by Turner J. I note that CPR PD52B sets out the appeal centre in which an appeal from the County Court must be brought. This appeal should have been brought in Oxford. As it happens, the appeal proceeded remotely given the current circumstances and it perhaps made little practical difference. However, the rules allocate work to appeal centres in a way that provides a sensible distribution of the workload and assists the administration of appeals. For the future, it should be noted that is not open to parties to elect to issue in a different appeal centre. Doing so, runs the risk that the appeal will not be accepted.

Background to the applications and the evidence before the court

4. The claim out of which this appeal arises is a claim for clinical negligence, relating to an alleged delay in diagnosing bowel cancer, originally pursued against two general practitioners and a hospital trust. The Appellant, one of the two GPs, was the second defendant. The claim against her partner, the first defendant, had been discontinued. The claim against the Appellant related to two consultations in August 2012 and one in April 2013. Proceedings were issued in April 2016. Liability was, and remains, firmly denied. In November 2018, directions had been given leading to a trial of liability and causation in a window between July and September 2019. Those directions provided for the exchange of expert evidence and for joint meetings between the parties' respective experts.

5. On 18 June 2019, the Respondent, discontinued her claim against the third defendant by serving a notice of discontinuance. This was subject to an application to set aside and to have the claim struck out instead, which was dealt with at the same time as the applications with which this appeal is concerned. The application was refused but with a wasted costs order against the claimant's solicitors. That forms no part of this appeal and I need say no more about it. The proceedings having been discontinued against both the first and third defendants, the claim was then proceeding against the Appellant alone.

6. After more than one extension to the court timetable, expert evidence was exchanged on 15 July 2019. Joint statements were due by 2 August 2019 and meetings had been diarised before the reports were exchanged. The trial was listed to begin on 16 September 2019.

7. Upon reviewing the Respondent's expert evidence, the Appellant's solicitor, Ms Jackson, noted that it did not appear to support many of the pleaded allegations of breach of duty and that no oncology causation evidence had been served. The Respondent concedes that her claim against the Appellant would fail if she is only able to rely on the expert evidence served on 15 July 2019.

8. Ms Jackson communicated her view that the evidence served did not support the pleaded case to the Respondent's solicitor, Mr Anwar, by telephone on 25 July 2019. She followed this with a letter dated 29 July 2019, in which she set out a detailed analysis of the gaps in the evidence, cross-referring to the pleadings. She concluded that it was evident that the claim could not succeed and suggested that it was inappropriate that it had been maintained for over three years without supportive expert evidence. Ms Jackson invited the Respondent to discontinue the claim, intimating that otherwise an application to strike out and for wasted costs would be made.

9. On 30 July 2019, Ms Jackson contacted Mr Anwar by telephone enquiring about Respondent's response to the letter emailed the previous day. She was concerned about the urgent need for the expert meetings to take place if the claim was to go to trial. Mr Anwar told her that he had made an error with the expert reports and that not all the evidence in the Respondent's possession had been served. He said that the additional evidence was not in a form that was suitable for service. The intention was to finalise the evidence for service, for it to be reviewed in conference with Counsel later in the week and for agendas for the expert meetings to be considered thereafter. The solicitors agreed that the booked experts' meetings could not go ahead given the Respondent's position.

10. The matter was listed for a pre-trial review on 8 August 2019. On 6 August 2019, the Respondent issued an application seeking permission to rely on further expert evidence and for an extension of time for the experts' joint meetings to take place. The Respondent sought to introduce three new reports from 1) Dr Hard, General Practitioner, dated 3 August 2019 2) Dr Smallwood, consultant surgeon dated 2 August 2019 and 3) from Professor Stebbing, Professor of Cancer & Oncologist dated 1 August 2019.

11. The application was expressed as an application for permission to rely on updated medical evidence. It was supported by a statement from Mr Anwar dated 6 August 2019. He said that he took over conduct of the matter in March 2019 and noted that the experts had been asked to finalise and "amalgamate" their evidence ready for disclosure towards the end of 2018, following a conference with Counsel. He said that he believed that had been done and asked all the experts for their finalised medical evidence. He believed that Dr Hard and Professor Stebbing had sent final reports which amalgamated their original reports and later supplementary evidence. Mr Anwar said he did not check them properly before service. He said that after discussing the expert evidence with Ms Jackson, he realised that "the reports served were clearly not intended to have been disclosed in the format they were in." He

asked the experts to rectify the matter, that is "to urgently update their final reports amalgamating and incorporating their previous supplementary reports and letters into one final version, which should have been done previously as per our instructions."

12. Mr Anwar continued his statement by confirming that the finalised reports were "based only on material which was available to them previously plus the Second Defendant's letter of 29.07.19 which pointed out the outstanding evidence" and said that he asked the experts to amalgamate all their previous evidence into one final report ready for disclosure.

13. He blamed the error on the number of alterations that had been made to the court timetable coupled with the file having been handled by several different fee earners. He asserted that the expert evidence and opinion had not materially changed, rather it had only been "completed and made ready for trial".

14. The Appellant had limited time to consider and respond to the application. On the day of the pre-trial review, the Appellant made a formal application to strike out the claim under CPR 3.4, supported by a detailed statement from Ms Jackson. Ms Jackson provided an accurate chronology and a careful analysis of Mr Anwar's statement. She noted that he had not disclosed the supplementary reports which were said to have been amalgamated into the reports served two days earlier. In an appropriate and responsible way, she raised concerns about the explanation provided by Mr Anwar, pointing out that it was hard to see how he could have mistakenly believed that the reports he served were 'amalgamated' reports. Ms Jackson noted that there was no explanation as to how and when the experts had changed their opinions, as they appeared to have done.

15. It was unrealistic to think that a contested application to admit further expert evidence could be dealt with within the 30 minutes allowed for the pre-trial review. The Appellant invited the court to list both applications together before the end of August. Alternatively, if that was not possible, the Appellant suggested that the applications could be determined on the first day of trial, still leaving sufficient time to conclude the trial within its estimate, given the narrowing of the issues and the discontinuance of the claim against two of the three defendants since it had been listed. The Respondent opposed that approach and the District Judge was persuaded that it was necessary to vacate the trial listed to commence on 16 September 2019. The applications with which I am concerned, together with the third defendant's application, were listed for hearing on 23 September 2019 with an estimate of one day. It was on that basis that all three applications came before Mr Recorder Riza QC.

16. The order made on 8 August 2019 recorded that the Appellant requested disclosure of the Respondents' other expert reports, letters of instruction and correspondence between her solicitors and experts. This required some chasing by Ms Jackson. On 16 August 2019, Mr Anwar provided a report from Dr Hard, dated 12 February 2018 and a letter from Professor Stebbing dated 28 November 2018. He confirmed there had been no earlier supplementary report from Mr Smallwood.

17. It is apparent from the correspondence that has been disclosed that the Respondent's experts had the Appellant's expert reports when they provided their updated reports in August 2019. Although Mr Anwar said in his statement that they had been told not to

review them, in fact the instruction was that they should not "refer to" the Appellant's expert evidence. As Ms Jackson pointed out, that was rather different. Dr Hard had been instructed to amalgamate both his earlier reports into one, to review the note of a conference in April 2018 and incorporate any comments arising from that and finally to "review the Defendant's letter in which they point out any "missing" evidence in relation to Breach of Duty and ensure these have all been addressed / ticked off in your report." Professor Stebbing had been asked "is there anything you can include whatsoever just to add a little weight to your views?"

18. A review of all the reports which have been disclosed demonstrates that the August 2019 reports cannot be described as containing only evidence amalgamated from previous reports. Ms Rutherford accepted that the new reports undoubtedly contain new evidence.

19. Somewhat worryingly, Mr Anwar served a further statement dated 17 September 2019, admitting that there was an error in his first statement. Although he had said that the experts had been asked to finalise and amalgamate their evidence towards the end of 2018, in fact it was only Dr Hard who had been asked to amalgamate his reports in November 2018. Mr Anwar had then written to him and to Professor Stebbing on 2 July 2019 asking them to provide their final medical reports. It is difficult to draw any conclusion other than that Mr Anwar had appreciated that the disclosure he had been obliged to give did not support what he said in his original statement. It appears that he had not been entirely frank with the court when making his initial statement. Certainly, he had not given the court the full picture as to how the Respondent's expert evidence had developed over time.

20. Ms Jackson again responded with a detailed statement dated 18 September 2019, providing the court with a full and accurate picture. I commend the professional way in which she dealt with the matter throughout. She conducted a careful analysis of the evidence and then promptly raised her concerns with Mr Anwar. Throughout, she took a fair and balanced approach, trying to get to the bottom of what evidence the Respondent had, rather than seeking any tactical advantage. She did not make any unfounded allegations but did raise points of genuine concern about the way in which Mr Anwar had presented the position to the court. No possible criticism could be made of anything done on the Appellant's side.

The Recorder's decision

21. The agreed starting point was that the Respondent's claim could not succeed unless she was permitted to rely upon the additional expert evidence. It was common ground that in order to do that, she required relief from sanctions under CPR 3.9. This brought into play the well-known three stage test set out by the Court of Appeal in *Denton v TH White Ltd* [2014] EWCA Civ 906. Ms Rutherford accepted, as she was bound to, that the breach was serious and that there was no good reason for it. The focus therefore was on the third stage of *Denton*, requiring the court to consider all the circumstances of the case, so as to enable it to deal justly with the application.

22. The Appellant's application to strike out the claim was put on the basis that there were no reasonable grounds for bringing the claim, alternatively it was an abuse of process. The thrust of the claim against the Appellant was that she should have referred the Respondent to a gastroenterologist following the consultations on 20 and

28 August 2012 and 12 April 2013. The Respondent's cancer was in fact diagnosed following an emergency attendance at hospital on 14 April 2013. The Defence identified that the Particulars of Claim did not plead a case on causation so far as the April 2013 consultation was concerned. Even if a breach of duty was established in relation to that date, it was difficult to see how a delay of two days could have materially altered the outcome. I understand that Ms Rutherford did not seek to maintain that part of the claim before the Recorder, but she resisted striking out the whole claim. The Appellant argued that it was an abuse of process to have pleaded and maintained the claim without proper supportive evidence, following *Pantelli Associates Ltd v Corporate City Developments Number Two Ltd* [2010] EWHC 3189 (TCC).

23. Having heard submissions, the Recorder reserved judgment. He circulated his judgment in draft and dealt with costs and permission to appeal on paper, handing down both his substantive judgment and a supplementary one dealing with the consequential orders on 27 November 2019.

24. In the main judgment, the Recorder correctly identified that, pursuant to CPR 35.13, the Respondent could not rely on the new expert evidence without permission and that the court was required to apply the provisions of CPR 3.9, which he set out. He then summarised the approach in *Denton*, which he said that he adopted. He noted that the loss of the trial date was a matter of grave concern and would often be fatal to an application for relief but was not necessarily decisive.

25. The Recorder noted the Appellant's criticism that Mr Anwar did not merely fail to file and serve the evidence on time, he sought to rely on reports which did not exist at the date fixed for exchange. However, he rejected the suggestion that the Respondent had gained a forensic advantage by her experts seeing the Appellant's evidence first, relying on the duty of experts under CPR 35.3.

26. The Recorder then said:

> "Standing back and considering the court's obligation to try cases justly I start with the proposition that in bowel cancer cases early diagnosis is important."

I confess that I am not entirely sure what the Recorder meant by this. It may be that, before turning to other factors, he was simply reminding himself of the nature of the case. He continued:

> "Now all the expert evidence is to hand and the case is trial ready my task is to ask whether it is necessary and proportionate to the legitimate aim of the overriding objective to deprive C a trial of her claim owing to the serious and inexcusable breaches of the rules and/or orders."

He reiterated that the loss of the trial date was a very important, but not conclusive, factor.

27. The Recorder continued:

> "Ultimately, I have to balance the interests of D2 against the interest of C in the context of the overall justice of the case having regard to the Denton criteria. The delay caused by the loss of hearing date will cause further anguish to D2. She has had these proceedings hanging over her head like the sword of Damocles and a further delay is something I have to weigh in the scales against C as well as the inefficiency of C's team. On the other hand she has not lost the possibility of being cleared by the court after a full trial
>
> In my judgment D2's loss of having C's case struck out without a trial now would not be as unjust to D2 as the loss of an opportunity to prove that her cancer should have been diagnosed earlier would be to C.
>
> Furthermore, I have to strike a fair balance between the legitimate aims of CPR 3.9 and the right of C to continue with the trial of her claim. In my judgment although the case is finely balanced the overriding objective of doing justice between the parties impels me [to] allow use of the new expert evidence."

28. The Recorder therefore granted relief from sanctions and gave leave to the Respondent to rely on the new expert evidence. He then said:

> "It follows that D2's application for abuse and/or no reasonable grounds for bringing the claim fall to be dismissed. It will be for the trial judge to decide what if any purpose there is in persisting with the part of the claim that is concerned with the consultation of 12 April 2013."

29. Mr Smith also invites attention to the reasons given by the Recorder when refusing permission to appeal. While Ms Rutherford is right to point out that those reasons are not part of his judgment, they do illuminate his thinking and were plainly intended to clarify the reasoning behind his decision. The Recorder said:

> "In my judgment, there is no error of law in the way I performed the balancing exercise. I placed rational weight on factors for and against C in the exercise of discretion the law accords to judges in the context of doing justice between the parties *inter se* as well as other court users, which I noticed judicially.
>
> Bearing in mind that C has a right of access to justice under Article 6 of ECHR, so far as possible she ought not to be deprived of her right in the exercise of the court's discretion given she was not blameworthy."

The Recorder also indicated that, in his judgment, striking out the claim "would have been disproportionate and in violation of her right to access to justice."

Grounds of appeal and the parties' submissions

30. I do not propose to set out the grounds of appeal in detail. In essence, the Appellant contends that, despite referring to *Denton*, the Recorder did not in fact apply the correct test. Instead, he framed his exercise of discretion by asking whether it was necessary and proportionate to deprive the Respondent of a trial of her claim and ultimately treated the decision as being based simply on the balance of prejudice to the Respondent if relief were refused and that to the Appellant if it were granted. It is said he further erred in his approach based on Article 6 of the ECHR. In short, the Appellant contends that rather than applying the proper approach under CPR 3.9 and following *Denton*, the Recorder treated the test as a simple balance of prejudice, weighted in the Respondent's favour because of Article 6.

31. The Appellant contends that the Recorder did not give any proper weight to the two factors specifically referred to in CPR 3.9 (the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders). Although he referred to the importance of the loss of the trial date, he did not explain why that had not proved decisive in the circumstances of the case. He did not weigh the interests of other litigants or the administration of justice. Further, he did not make any proper findings as to the conduct of the Respondent's solicitor, not only in causing the original breach but also in his approach to the application, or consider how that impacted on the exercise of his discretion. The Appellant also complains that the Recorder also left other relevant factors out of account, including whether the application was made promptly and the merits of the matters raised in the cross-application, in particular whether the claim had been improperly maintained without the benefit of supportive expert evidence.

32. In relation to the cross-application, the Appellant complains that the Recorder did not properly consider that as a separate application but treated its dismissal as following automatically from the granting of the Respondent's application. He did not consider the argument that the claim was an abuse of process, in the *Pantelli* sense nor did he properly consider the position in relation to the consultation in April 2013, even though causation was not pleaded in relation to that and Ms Rutherford had conceded that this part of the claim could not succeed.

33. Mr Smith argues that while the Recorder identified that CPR 3.9 applied to the Respondent's application and initially set out the correct principles, he went astray in the application of the third stage of *Denton* and that, properly analysed, he did not in fact follow the approach laid down there. Further, he did not properly engage with all the circumstances of the case. Some factors were simply left out of account, others received no more than lip service. In summary, Mr Smith contends that the Recorder misdirected himself by "balancing the interests of the parties to the litigation with a finger on the scale to the Claimant because of her right of access to justice" and that his exercise of discretion cannot be upheld in all the circumstances. Further, he argues that the Recorder simply did not address the cross-application properly. He treated it as a mirror of the application for relief from sanctions whereas it required separate consideration.

34. Ms Rutherford invites me to say that the Recorder did have the correct test in mind, having recited CPR 3.9 in his judgment. This was a discretionary and fact sensitive case management decision. The Respondent argues that ultimately the Recorder did

what was required of him; he balanced the relevant factors and reached a decision. In the circumstances, this court should not interfere. If, however, I am persuaded to re-exercise the discretion, she reminds me that the Respondent is living with a huge worry about her prognosis and that the claim is not just about money for her. She seeks justice from the Appellant, whom she believes to have been responsible for her delayed diagnosis. Bringing a professional negligence claim against her solicitors could never offer the same remedy.

35. Although Ms Rutherford now concedes that the part of the claim relating to the consultation in April 2013 should be struck out, she disputes that the claim was an abuse of process. She says that the Recorder cannot be criticised for dealing with the strike out application briefly. It had not been addressed in detail by the Appellant and the Recorder was entitled to take the view that this application fell away if relief was granted.

Analysis and conclusions

36. I remind myself that an appellate court will not lightly interfere with case management decisions or the exercise of judicial discretion. The test in considering an appeal against a decision pursuant to CPR 3.9 was neatly encapsulated in *Clearway Drainage Systems Ltd v Miles Smith Ltd* [2016] EWCA Civ 1258 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."

The same approach applies to decisions by first instance judges to strike out, or not to strike out, claims under CPR 3.4(2), see *The Commissioner of Police of the Metropolis v Abdulle & others* [2015] EWCA Civ 1260 at paragraph 28.

37. I have concluded though that the Appellant's grounds of appeal are well-founded and that the Recorder did err in his approach to the application for relief from sanctions. Although he purported to apply the test in CPR 3.9, as explained in *Denton*, his analysis in fact demonstrates a different approach, focusing on the Respondent's Article 6 right, asking whether it was "necessary" to deprive her of her right to a trial of her claim and "seeking so far as possible" not to deprive her of that right. The simple balancing of prejudice to the Respondent if she were unable to pursue her claim to trial against that to the Appellant in not having the claim struck out also failed to properly engage with all the relevant circumstances, including the two factors specifically mentioned in CPR 3.9.

38. It is impossible to be anything other than sympathetic to the Respondent's position. She is not to blame for the late service of the evidence, for the way in which Mr Anwar dealt with the expert evidence after Ms Jackson pointed out the difficulties or for any other failings. It is particularly unfortunate for someone who believes that they have been failed by the medical profession to then be badly let down by the legal profession. It is also to be remembered that she has been through a dreadful time. Had her cancer been diagnosed earlier, she would have faced less treatment and better

prospects of a successful outcome. While the condition and prognosis evidence is not yet clear, I do not doubt that the Respondent lives with the real fear of a recurrence and the worry that she may have lost the opportunity to be cured. I entirely understand her desire to have her claim tried. Further, I accept that a claim for professional negligence against her solicitors may not provide a real remedy for her for multiple reasons, including the way in which damages are calculated, the time involved in prosecuting a new claim and the denial of the opportunity to seek a positive finding against the Appellant.

39. Mr Smith referred to the observations of Turner J in *Gladwin v Bogescu* [2017] EWHC 1287 (QB) at paragraphs 30 to 31, as authority for the proposition that generally the courts will treat the actions of a party's legal representative as those of the party. However, as he fairly acknowledged during his submissions, the court could and should take into account the Respondent's circumstances and the fact that she was personally blameless when considering all the circumstances of the case.

40. However, sympathy for the Respondent and her personal blamelessness cannot be the sole, or even the main, consideration. It is not enough to weigh the prejudice to the Respondent in losing her claim against the prejudice to the Appellant in the loss of the trial date and the resultant delay and ongoing worry for her. The court must look at all the circumstances, including in particular the two factors set out in the rule, namely the need for litigation to be conducted efficiently and at a proportionate cost and to enforce compliance with rules, practice directions and orders.

41. The starting point is that the court had set a timetable providing for a trial no later than September 2019. The parties were required to obtain and exchange the expert evidence on which they were to rely in time for the experts' joint statements to be prepared by the beginning of August so that trial preparations could then be completed. The litigation was conducted efficiently on the Appellant's side and she complied with all directions. The Appellant's representatives were pro-active in addressing the issues. A clear Defence was served. Breach of duty was denied in relation to all three consultations. It was noted that no case had been pleaded in relation to causation in respect of the April 2013 appointment. Causation was denied in relation to the events of August 2012, it being contended that referral at that stage would not have materially altered the treatment course or outcome. The Appellant's expert evidence, served in time, was consistent with the pleaded Defence.

42. Ms Jackson clearly went to some effort to analyse the Respondent's served evidence before promptly raising her concerns with Mr Anwar. In my view, her conduct was exemplary and demonstrated a genuine desire to deal with the matter fairly, efficiently and within the timetable set by the court.

43. Unfortunately, the same cannot be said of Mr Anwar. I am afraid that the inescapable conclusion from the evidence before me is that he was not frank with Ms Jackson or with the court. He sought to give the impression that the problems with the Respondent's evidence arose through his oversight in serving the 'wrong' evidence but that he was in possession of evidence supporting the pleaded allegations of breach of duty and causation. His statement that the expert evidence had not materially changed but had just been completed and made ready for trial was just not true. The reality is that, after Ms Jackson had taken the trouble to identify the real weaknesses in the Respondent's case, Mr Anwar set about trying to put the case in order. By then,

he had disclosed the Appellant's evidence to his experts. He gave specific instructions to Dr Hard that he should address the gaps identified by Ms Jackson. Mr Anwar was slow to give disclosure and it was left to Ms Jackson to tease out what had really happened and to provide a full picture to the court.

44. If it was not already inevitable that an attempt to introduce new evidence at such a late stage would cause the trial date to be lost, that became wholly unavoidable by the way in which Mr Anwar dealt with the application. His attempt to conceal the true position, namely that he did not then have the necessary expert evidence to support the Respondent's case and his withholding of the supplementary reports until after the pre-trial review made it impossible for the Appellant to properly respond in time. Had this truly been a case of oversight where evidence was available but had not been served at the right time, it may well have been possible to rectify the situation without threatening the trial. The true position was very different. Mr Anwar was seeking the necessary expert evidence to plug the gaps in the Respondent's case after the time for service had passed. It is simply not good enough for a claim for professional negligence to be pleaded and maintained without proper expert support and for a late attempt to be made to furnish evidence to support the claim just before trial. Further, it is notable that Mr Anwar delayed making the application until he had the new evidence and further delayed proper consideration of the application by being slow to disclose obviously disclosable material.

45. In those circumstances, granting relief in this case undermines rather than promotes the need for litigation to be conducted efficiently and at proportionate cost and for parties to comply with rules and court orders. It rewards the inefficient and improper conduct of the Respondent's solicitor at the expense of a party who has done everything possible to conduct the litigation efficiently and without incurring unnecessary cost.

46. The Recorder was right that the loss of the trial date was not necessarily decisive, but it was a very important consideration. Not only did this impact on the Appellant in the way that the Recorder acknowledged, but it also disrupted the court's business. The need to relist the trial was likely to impact on the allocation of resources to other cases. Further, it could not be said that the case was "trial ready". The joint statements of the experts remained outstanding. The new evidence would first need to be considered by the Appellant's experts. It would clearly take some time to relist the trial taking account of the availability of all the witnesses. As the Recorder noted, the claim had already been hanging over the Appellant for a considerable period of time.

47. Factors (a) and (b) in CPR 3.9 both weighed heavily against granting relief from sanctions in the circumstances. The only factor that could really be set against that was the impact on the blameless Respondent, particularly taking account of her difficult circumstances. However, that was balanced at least to some extent by the impact of granting relief on the Appellant, who was also blameless, as were her solicitors.

48. The Recorder misdirected himself in his approach to Article 6. The court's refusal to grant relief will not offend Article 6 provided that doing so is proportionate. Securing compliance with court orders is a legitimate aim. Conducting the required balancing exercise pursuant to CPR 3.9 will generally ensure that the decision on whether to grant relief from sanctions is Convention compliant. Otherwise, litigants could act

with impunity, avoiding compliance with court orders and claiming relief on the basis of their right to a fair trial, see *Momson v Azeez* [2009] EWCA Civ 202. The Recorder was wrong to elevate the Respondent's Article 6 right to the decisive factor in the way that he did. A proper application of CPR 3.9, weighing all the circumstances so as to deal with the application justly satisfies Article 6.

49. Further, in my view, the Recorder overestimated the extent to which depriving the Respondent of opportunity to rely on the new evidence represented a real prejudice to her. The strength of a party's case is generally irrelevant when it comes to case management decisions, including on applications for relief from sanctions: *HRH Prince Abdulaziz Bin Mishal Bin Abdlaziz At Saud v Apex Global Management Ltd* [2014] UKSC 64. Here though, it is a relevant consideration that the effect of the breach, involving the piecemeal service of the Respondent's expert evidence, was bound to leave her in a difficult position, even if she was permitted to rely on the updated reports. This was particularly so in relation to breach of duty. The Appellant had served evidence from Dr Hampton supporting her approach at the relevant consultations. Applying the well-known principles that emerge from *Bolam v Friern Management Committee* [1957] 1 WLR 582 and *Bolitho v City and Hackney Health Authority* [1998] AC 232, the Respondent could succeed only if she could demonstrate that Dr Hampton's view did not withstand logical analysis and/or could not be viewed as representing a responsible body of medical opinion. It seems to me that it would be very difficult to overcome that hurdle in reliance upon expert evidence that had materially changed and developed so late in the course of the litigation. In truth, the breach had already left her claim in a very weakened position. Permitting reliance on the late evidence might have allowed the claim to limp on to trial. Realistically, it was unlikely to lead to a successful outcome given the circumstances in which it was obtained and the test to be addressed. I stress that I have avoided an impermissible examination of the substantive merits of the claim. However, given the way in which the Recorder framed his judgment, I think it is important that the Respondent is aware that refusing to grant relief does not necessarily equate to depriving her of an otherwise good claim.

50. Standing back, I consider that the application of the proper test under CPR 3.9 leads to the refusal to grant relief from sanctions so as to allow the Respondent to rely upon the additional expert evidence which came into existence only after the date for exchange of the evidence to be relied on at trial. The breach was serious and resulted in the loss of the trial date. Re-listing would have produced further, not insignificant, delay leaving the matter hanging over the parties. The conduct of the Respondent's solicitor was particularly egregious. He was not frank with the Appellant or the court and delayed in making the application and in giving full disclosure while he attempted to obtain the necessary evidence to support the claim which had been advanced. He did so in response to the Appellant's solicitor appropriately identifying the difficulties in maintaining the pleaded claim. To allow the application for relief would not only fail to do justice between the parties but would serve to discourage the sensible, pro-active and efficient approach to litigation exemplified by the Appellant's side. The factors specifically identified in CPR 3.9 pointed strongly towards refusing relief. The natural sympathy inevitably felt for the Respondent, who was not personally responsible for the breach, cannot properly tip the balance in her favour. Properly analysed, it is far from clear that she is significantly prejudiced by the refusal of relief given the weak position she would have found herself in anyway given the piecemeal

development of her expert evidence so late in the course of the litigation. It follows that I must allow this part of the appeal and refuse relief from sanctions.

51. Having reached that conclusion, I must consider the Appellant's strike-out application. Plainly, the Recorder's decision cannot stand since it was founded on the grant of the application for relief from sanctions, which has now fallen away.

52. It is now accepted on behalf of the Respondent that the part of the claim that relates to the consultation on 12 April 2013 should be struck out. That is plainly right. The Recorder erred in not addressing this separately. It was wrong for him to say that it would be for the trial judge to decide what, if any, purpose there was in maintaining that aspect of the case. There were two problems with the claim relating to April 2013. First, on the face of the pleadings, there was no basis for maintaining that the alleged breach of duty was causative of any loss. Second, it was apparent that the Respondent did not have any admissible expert evidence to support the allegations of negligence.

53. It was inappropriate to leave this wholly unsubstantiated part of the case for trial. Such a course risks distracting from the real issues. There was a further practical reason why the issue should have been addressed before trial. Ms Jackson had explained in her evidence that different insurance arrangements applied between August 2012 and April 2013. Dr Magee was indemnified by the Medical Protection Society (MPS) in relation to the consultations in August 2012 and by the Medical Defence Union (MDU) in relation to the April 2013 consultation. So long as the claim spanned both periods, it was necessary to seek instructions from both organisations. The MDU could cease to be involved if the claim relating to April 2013 was struck out.

54. In my judgment, that part of the claim fell to be struck out under both CPR 3.4(2)(a) on the ground that the Particulars of Claim disclosed no reasonable grounds for bringing the claim and under CPR 3.4(2)(b) as an abuse of process.

55. The Appellant had acted reasonably in highlighting the absence of any causation case in respect of the April 2013 consultation and providing an opportunity for the Respondent to rectify the position before seeking to strike out the relevant part of the claim. Once it was apparent that no causation case was to be advanced, this part of the claim should have been struck out.

56. Further, I agree that it was an abuse of process, in the sense described by Coulson J in *Pantelli* to put forward a claim for professional negligence that was not founded on appropriate expert evidence. This aspect of the claim should therefore have been struck out on both limbs. I shall make an order to that effect. There may be costs consequences pursuant to the QOCS regime.

57. The position is different in relation to the rest of the claim. Here, I consider the arguments to be more finely balanced. It has been accepted on the Respondent's behalf that she cannot realistically succeed on her claim without the new expert evidence. I have refused her permission to rely on that evidence. The logical conclusion is that she cannot now proceed to trial. However, the Appellant would resist discontinuance of the claim by the Respondent. I understand that to be because

of the impact this may have on the enforceability of any order for costs under the QOCS regime.

58. In my judgment, CPR 3.4(2)(a) does not apply in respect of the claim relating to the consultations in August 2012. The Particulars of Claim do disclose a claim, which if made out on the evidence, would succeed. The real complaint is that the claim was pleaded and maintained for over three years without proper expert evidence to support it. That falls for consideration under CPR 3.4(2)(b).

59. I have had regard to *Pantelli* and to the recent decision of Lambert J in *Quaatey v Guy's and St Thomas' NHS Foundation Trust* [2020] EWHC 1296(QB), in which she confirmed that a claim involving an allegation of professional negligence "must be supported by an appropriately qualified professional, absent which the claim is liable to be struck out as an abuse of the court's process."

60. However, I have concluded that it would not be appropriate in the circumstances of this case to strike out the entire claim as an abuse of process. That conclusion follows close examination of the pleadings and the expert evidence which has been disclosed. I accept that the written evidence which the Respondent had was not fully supportive of all her pleaded allegations of breach of duty. However, on balance, I consider that the expert evidence she had was just sufficient to mount a claim, the essence of which was that the Respondent should have been referred to a gastroenterologist in August 2012. I bear in mind that the court should be slow to strike a claim out as an abuse of process. In my judgment, this is not a case like *Pantelli* and *Quaatey* where it can be said that there was no expert support for the claimed breach of duty. I do not wish this to be taken as in any way encouraging a less than careful approach to allegations of professional negligence. It is of fundamental importance that such allegations are not made unless supported by an appropriate expert. All practitioners must take care to ensure that the pleadings properly reflect the expert opinion and do not contain unfounded allegations. Here though I am unable to conclude that the claim amounted to an abuse of process having regard to the expert evidence available when it was brought.

61. Taking account of matters raised in the Defence coupled with the absence of any admissible causation evidence in relation to the August 2012 consultations, this claim no longer has any realistic prospect of success. That is conceded by the Respondent. In those circumstances, an application for summary judgment pursuant to CPR 24 may well be appropriate. The Appellant did not make such an application in the alternative to her application under CPR 3.4. There may have been tactical reasons for that, particularly having regard to the QOCS provisions.

62. It may be open to the court to treat an application under CPR 3.4(2) as if it were an application for summary judgment (*Moroney v Anglo-European College of Chiropractice* [2009] EWCA Civ 1560). However, that was not a course which either party invited me to consider during the hearing of the appeal and I do not consider it appropriate to venture down that route on my own initiative. Both parties should have the opportunity to consider the impact of my ruling and may then take any such action as they consider appropriate in the court below. I would hope that they might agree what should happen in relation to the substantive claim, even if they are not able to resolve all issues about costs.

Disposal

63. I allow the appeal to the extent set out above. I note that a final order reflecting the Recorder's judgment was not drawn up. I shall order that the Claimant's claim for relief from sanctions is dismissed and she is refused permission to rely on any expert evidence served after 15 July 2019. That part of the claim that relates to the consultation in April 2013 shall be struck out pursuant to CPR 3.4(2)(a) and (b).

64. Unless the claim is now discontinued, and subject to any application for summary judgment, the matter will have to be remitted to the court below for further directions.

65. The parties should seek to agree an order reflecting this judgment and dealing with all consequential matters, failing which I will receive written submissions on any outstanding issues to be filed within 14 days of the judgment being handed down.