Case No: HQ12X04892

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

The Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 18 December 2013

BEFORE:

MASTER COOK

BETWEEN:

PAUL CHAMBERS

Claimant/Applicant

- and -

BUCKINGHAMSHIRE HEALTHCARE NHS TRUST

Defendant/Respondent

MR A SMITH (instructed by Judkins) appeared on behalf of the Claimant

MR M BARNES (instructed by Capsticks) appeared on behalf of the Defendant

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Approved Judgment

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(Official Shorthand Writers to the Court)

1. THE MASTER: These are cross applications. Firstly, there is there is the claimants' application, dated 26 November 2013, seeking an order debarring the defendant from relying upon an expert's report served late on 25 November 2013, any further expert evidence and a counter-schedule of loss pursuant to rule 3.1 and 3.8. Secondly, there is the defendant's application, dated 6 December 2013. By this notice of application the defendant seeks variation of an order made by me on 31 May 2013. Three variations are sought:
    (i) that the Defendant's experts reports in the fields of care, prosthetics and psychiatry be served by 20 December 2013,
    (ii) that the counter-schedule be served by 20 December 2013, and,
    (iii) that the time for discussions between the experts of like discipline be extended to 17 January with respect to liability and 31 January 2014 in relation to quantum.

2. The claimant's application is supported by the witness statement of Mr Judkins dated 26 November 2013, who is the solicitor with conduct of the claim on the part of the claimant. The defendant's notice of application is supported by the witness statement of Ms Bennett dated 6 December 2013, who is the solicitor with conduct of the claim on behalf of the defendant.

3. It is necessary to say a little bit about the nature of this action. It is a clinical negligence action. The details of the claim are summarised in paragraph 2 of Mr Judkins' witness statement. It appears that on 6 April 2008 the claimant developed flue like symptoms and a severe pain in his left calf following a long cycle ride. On 10 April he developed severe pain in his left calf and on 11 April attended hospital were he was given shin splints and diagnosed with flue before being discharged. Later that day the claimant returned to hospital and was taken to the intensive care unit and put on IV fluids, where his condition deteriorated. On 12 April he was taken to theatre where his leg was explored and decompressed. Later that day he was returned to theatre for an above-knee amputation of the leg following a diagnosis of necrotising fasciitis.

4. In brief, it is the claimant's case that the defendant was negligent in failing to note that his symptoms were indicative of compartment syndrome, and failing to take the appropriate steps to diagnose that condition or refer the claimant for a specialist opinion prior to midday on 11 April, in which case the claimant alleged that his leg would have been saved. A further allegation of negligence was made that the claimant was given repeated doses of gentamicin contrary to guidelines and contrary to clear indications that previous doses had been adequately excreted, thus giving rise to bilateral deafness and tinnitus.

5. The claim was first notified to the defendant by way of a protocol letter which was served with a claim form and Particulars of Claim. In the circumstances the pre-action protocol was complied with.

6. The claim was originally commenced in the county court. On 28 May 2012 District Judge Eynon, sitting in the Hertford County Court made directions for the allocation of the claim to the multi-track, for disclosure, for the service of witness statements of fact and for the service of expert evidence. The District Judge gave permission to rely upon the written evidence attached to the Particulars of Claim and further reports in the

fields of psychiatry, prosthetics and for the service of a report by a Dr Mogg in respect of the claimant's injuries.

7. That order was superseded, on transfer of the claim into the High Court, by my order on 23 November 2012. I directed that the parties were to agree directions in the form contemplated by the district judge but so as to comply with the model directions applicable to clinical negligence claims proceeding in the central office. I directed that there should be a case management conference on 9 May 2013.

8. The case management conference appears to have been postponed, but, having heard counsel for both parties on 31 May 2013 I made a comprehensive order for directions, which followed the standard form of order for clinical negligence disputes. As far as expert evidence was concerned , in relation to breach of duty and causation I gave permission to the parties to rely on evidence in the field of accident and emergency medicine, microbiology, orthopaedic surgery and audiology. Those reports were to be simultaneously exchanged by 9 August 2013. In relation to issues of quantum, condition and prognosis, I gave each party permission to rely on the evidence of an expert in the fields of audiology, care, prosthetics and psychiatry.

9. My order provided that the reports were to served as follows; the claimant's reports were to be served by 19 July 2013 and the defendant's reports were to be served by 25 October 2013. Paragraph 18 of my order required the defendant to serve a counter-schedule by 25 October 2013. I directed a trial window of 3 March to 30 May 2014.

10. My order, as usual, provided for experts' discussions to take place. The order provided that experts discussions were to take place on a without-prejudice basis, in the case of liability experts by 27 September 2013, and in relation to condition and prognosis experts by 6 December 2013. In common with all clinical negligence cases proceeding in this division, it was directed that a copy of the order for directions was to be served on the individual experts. Paragraph 22 of my order required the parties to consider by 31 December 2013 whether the claim was capable of resolution by ADR and to conclude any form of ADR not less than 35 days prior to trial ie by 27 January 2014 assuming a trial date 3 March 2014.

11. On 28 August 2013, on the application of the defendant and without a hearing, I made an order varying my order of 31 May 2013 to permit the exchange of liability expert evidence to take place by 4.00pm on 20 September 2013 and I extended the time for service of the defendant's condition and prognosis otolaryngology report to be extended to 20 September 2013. The claimant was given permission to apply to set aside or vary that order within seven days. As this provision was included I deduce that that order was not made by consent, but equally it would not appear to have been opposed, as no application to apply to set aside or vary was made.

12. On 20 September 2013 I made a further order, again upon the defendant's application and again without a hearing. On this occasion I extended the time for exchange of liability expert evidence to 4.00pm on 21 October 2013 and I extended the time for the service of the defendant's condition and prognosis otolaryngology report to 21 October 2013. The order was silent in relation to the time for experts' discussions and in relation to the service of the defendant's counter-schedule. That may well have been due to oversight on the part of the defendant's solicitor in drafting the order.

13. In short, the defendant failed to comply with the provisions of the order of 20 September 2013 and it did not serve its evidence as required on 21 October 2013. The failure of the defendant to serve its evidence in accordance with the order gives rise, of course, to the claimant's application. The claimant's application, as I have noted, seems to have spurred the defendant's solicitor into making its application on 6 December 2013. The defendant's application was therefore made over a month after the deadline for the service of expert evidence should have taken place pursuant to my earlier order.

14. I am told that a trial date has now been fixed for 14 May 2014. It also is relevant for me to note that the value of the claimant's claim is put in the region of £1.2 million and the defendant's valuation of the claim in its counter-schedule, yet to be served or for which permission for late service is sought, is said to be in the region of £500,000. It is right also that I should record there has been recent service of a draft Amended Defence, for which no permission has yet been sought or given, in this document some admissions are made in relation to issues going to breach of duty, but I am told that causation remains firmly denied.

15. In her witness statement, Ms Bennett sets out the procedural history. At paragraph 23 she records that she came to review the claimant's GP records and on 31 July 2012, having reviewed those records, formed the view that she had an incomplete set. She therefore requested a full set of records from the claimant's solicitors. She indicates the correspondence in relation to the missing GP records continued in August and September 2012. I am invited to infer that that this correspondence and the difficulties in relation to obtaining a complete set of the claimant's GP records is partly responsible for the inability of the defendant to comply with my initial order for directions and resulted in the applications to extend the deadline for exchange contained in my orders of 28 August and 20 September 2013.

16. In relation to the failure to serve the reports in accordance with the orders of the court, in paragraph 48 of her witness statement Ms Bennett says:

> "I appreciate that I should have made a further application for an extension of time for service of my client's liability evidence on 21 October 2013. I fully recognise that the deadlines made by the court are of the utmost importance and are not aspirational but there to be met. I apologise sincerely to the court and to the Claimant for not making this further application. I wholly appreciate the seriousness of the court's deadlines as evidenced by my two previous applications in this case and accept that this further application should have been made and that this situation should never have arisen."

17. At paragraph 49 of her witness statement she states that following her client's instructions she went straight back to counsel, who was able to draft an Amended Defence for her at short notice:

> "49. … The drafting of this however necessitated further amendments to be made to Roger Evans' report prior to service.

> Roger Evans was asked to make these amendments as soon as he could and I received a copy of his report by post on 27 November 2013. Mr Evans' report and the Amended Defence were served on 27 November 2013.
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> 50. The rationale for drafting the amended Defence was borne out of the efforts put into the investigation to try and locate the missing A&E records. These missing records were crucial to the Claimant's pleaded case as many of their allegations on liability relate to the A&E management the Claimant received. Had I not pushed the Trust to try and locate these records, they would never have materialised and the Defendant's case, as now set out in the amended Defence, is much more favourable to the Claimant as a result. The discovery of these A & E records has meant that the Defendant has had to make further substantial admissions on breach of duty that would otherwise have not been made had it not been for the efforts put in to the disclosure process. Service of the Trust's Amended Defence has therefore been beneficial to the Claimant.
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> 51. The Counter Schedule was due to be served on 1 November 2013. Counsel has been instructed to settle the Counter Schedule and I anticipate being in a position to serve the Counter Schedule and all the Trust's quantum expert evidence by 20 December 2013. I am respectfully asking the court to make an Order in this regard."

18. That is the explanation given for the defendant's default. It is also relevant that I should record that at paragraph 46 of her witness statement Ms Bennett indicates that she had obtained instructions from the National Health Service Litigation Authority not to serve the Trust's expert evidence in the field of accident and emergency medicine without it being accompanied by an Amended Defence. It may well be that this decision is at the heart of the failure of the defendant to comply with the court's order. I am not assisted by the fact that the date and time when she received her instructions is not given, but it does seem to me to be the fact that the decision to hold back the service of the experts' reports was one that was taken in conjunction with the NHS Litigation Authority and/or was clearly a situation that could have been anticipated well before the deadline imposed by order of 20 September 2013. It is in any event no excuse for a failure to comply with an order of the court to say that my client gave me instructions to ignore the court order.

19. In the circumstances, it is submitted by Mr Smith on behalf of the claimant that this is a paradigm case for the court to apply the stricter approach that the Jackson rule changes to the Civil Procedure Rules have brought about. He referred me to the recent case of Mitchell MP v News Group Newspapers Limited [2013] EWCA Civ 1537 and to the endorsement given by the Court of Appeal to such a robust approach. In particular he drew my attention to paragraph 46 of the judgment, in which the Master of the Rolls said:

> "46. The new more robust approach that we have outlined above will mean that from now on relief from sanctions should be granted

> more sparingly than previously. There will be some lawyers who have conducted litigation in the belief that what Sir Rupert Jackson described as 'the culture of delay and non-compliance' will continue despite the introduction of the Jackson reforms. But the Implementation Lectures given well before 1 April 2013 were widely publicised. No lawyer should have been in any doubt as to what was coming. We accept that changes in litigation culture will not occur overnight. But we believe that the wide publicity that is likely to be given to this judgment should ensure that the necessary changes will take place before long."

20. The Court of Appeal in the case of Mitchell gave guidance as to how the new approach should be applied in practice. I bear in mind that the Court of Appeal's observations in the case of Mitchell were made in relation to an automatic sanction and an application that had been made for relief from sanctions. However, it is clear to me and from the case law that the considerations applicable under CPR 3.9 are equally applicable to circumstances where, an application is being made to extend time for compliance with a deadline contained in a court order. There is ample authority to underline the fact that that is in effect and by any other name an application for relief from sanction and the court should consider the matter in accordance with criteria set out in CPR 3.9.

21. The practical guidance given by the Court of Appeal requires the court to consider firstly whether or not the failure to comply with the relevant rule or practice direction or court order can be properly regarded as trivial. In this case it is conceded by Mr Barnes that the failure to comply cannot be regarded as trivial.

> "41. If the non-compliance cannot be characterised as trivial, the burden then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal. But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial

> pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event."

22. In this regard the Court of Appeal made reference to a series of cases, beginning with the case of Hashtroodi v Hancock [2004] EWCA Civ 652, which were decided in relation to the period of validity of a claim form under CPR 7.6. I remind myself that in this case we are concerned with an application for relief from sanction which was made one month after the relevant deadline had expired.

23. In the circumstances, it is submitted on behalf of the claimant that there is no good reason given by the defendant for failing to comply with the order, or alternatively no good reason for making the application over a month after the deadline for service of the evidence expired.

24. On behalf of the defendant, Mr Barnes makes essentially five points. Firstly he points to the fulsome apology made by Ms Bennett at paragraph 48 of her witness statement. He submits that it is not every case where the solicitor owns up to the mistake and apologises. It seems to me the fact an apology may have been made is not a matter to which I can attribute great weight. To do otherwise would be to excuse that which the Civil Procedure Rule changes were brought into change.

25. Secondly he submitted that it was the difficulty with regard to the accident and emergency records which resulted in the deadline for the exchange of expert evidence in this case being put back and was the reason for the late service of the evidence and that there is consequently a good explanation for the delay, in the sense that this is not a case of a solicitor simply doing nothing or overlooking a deadline but it is an example of a later development in the course of litigation which could not necessarily have been foreseen at the time the original deadline was set.

26. It seems to me that this submission has to be seen in context. I accept that the difficulties with an expert may in some circumstances result in unforeseen issues occurring and may result in procedural timetables being delayed. This may be due to either late engagement between the expert and solicitors or busy experts not being able to meet the deadlines that have been imposed upon them. However, it seems to me that the context here includes the fact that in clinical negligence cases the experts are provided at the outset with a copy of the procedural directions. The purpose of this is to enable the experts to understand the time table for the progress of the case, to appreciate their own position within the procedural timetable and, above all, to make sure that those matters which are outside the control of solicitors, for example the delivery of the reports and the conduct of the joint meetings, take place on time and in accordance with the court's orders. Secondly, it seems to me that I have to have regard to the fact that there were a series of orders here. The defendant's solicitors, if there was a problem, were alerted to the nature and extent of the problem at the outset when

they realised that they might be unable to comply with the initial directions order made by me. This resulted in two further applications being made for extensions of time, so the issues relating to the time for compliance with the directions, on any view, must or should have been at the forefront of the defendant's solicitor's mind. More so once instructions had been obtained from the NHS Litigation Authority not to serve the expert evidence without it being accompanied by an amended defence.

27. Thirdly it is submitted by Mr Barnes that there is no prejudice or jeopardy to the claimant in the late service of the defendant's evidence or in permitting late service of the defendant's evidence. He points to the fact that the procedural timetable still has enough room to enable the consequences of the late service to be addressed. In particular for the defendant to deal with the matters set out in the expert evidence and for the experts to have their joint meetings in time to enable the trial to take place. The enforcement of a sanction, of course, is something that may not necessarily prejudice the claimant and indeed may amount to a windfall for the claimant, but it is nonetheless a matter which seems to me to form part of my overall considerations. It seems to me that the procedural time table was as set out in my original order and it must be bourn in mind that the time for exchange of experts has been pushed back without a corresponding shift in the proposed trial date or time for conducting ADR. The procedural time table following exchange of expert evidence is designed to enable settlement meetings or ADR to take place and the possibility of effective part 36 offers to be made before trial. In the circumstances there may well be prejudice to a claimant if this period is unnecessarily foreshortened.

28. Fourthly it is submitted by Mr Barnes that if the defendant were to be deprived of the opportunity to rely upon the expert evidence in support of its case on causation, the result would be disproportionate. He submits it is a reasonably short-term failure, the expert evidence has now been served, but failure to admit it will have dramatic consequences. Again this seems to me to be a fact of life in the post-Jackson world. Failure to comply with rules, practice directions and orders can attract draconian consequences. That is the raison d'être for the get-tough approach. Lord Justice Jackson's view endorsed by the Court Appeal is that the legal profession, when faced with such consequences, will mend its ways, with the result that delay and non-compliance with orders rules and practice directions will become a thing of the past.

29. As part of the last submission Mr Barnes went on to suggest that a distinction could be drawn on the facts of this case between a situation where a claimant felt it necessary, because of the conduct of the claim on the other side, to come to court and obtain an unless order with a clearly specified sanction. He submitted that that was not the case here and that the defendant had not been in breach of an "unless order" or a "final order". I have to say I was not impressed with that submission, where a deadline for doing a particular act has already been extended three times that fact alone is an important and relevant consideration for the court, although I recognise the impact of an unless order may well be more readily appreciable by a party having to comply with it, and a party who does not comply with an unless order may have less room for complaint in the event that there is a failure to comply.

30. Lastly Mr Barnes submits that it is relevant to have regard to the conduct of the litigation generally. He points to the difficulties at the outset which were created by the claimant's late notification of the claim, the manner in which the pre-action protocol

was complied with, the fact that there was no schedule of loss at an early stage and that it was only in July 2012 that the majority of the claimant's evidence in support of the claim was served. He also underlines the ongoing difficulties referred to by Ms Bennett in her witness statement relating to the GP records. In the circumstances, he asks me to stand back and to remind myself that although the climate has changed, the overriding objective still requires the court to deal with cases justly. It would be unjust, submits Mr Barnes, given the underlying reason for the defendant's failure to comply, to make an order which would effectively deprive it of the wherewithal to defend the valuable claim that the claimant puts forward. In essence he submits that proportionality remains at the heart of the court's consideration.

31. Over all I consider this application to be finely balanced. It seems to me that the delay which has occurred here is something that should and could have been foreseen by the defendant's solicitor. The fact that there was a deadline for service of the expert evidence was clearly overlooked or ignored. On the other hand, it seems to me that the difficulty relating to the late development and obtaining of the full set of GP records is something that was also foreseen and was ongoing from a relatively early stage and was the prime reason for the previous requests for extensions of time. Were that the only factor and had the application been made in time, it seems to me that the defendant may have provided the sort of good reason for the court to exercise its discretion in the defendant's favour. However, when I add to that that this application was made more than a month after the expiry of the deadline, and in absence of any good explanation for the added delay, it seems to me that the consequence must be that the defendant fails to clear the burden placed upon it to show good reason for its failure.

32. The two issues combine. Firstly, this was an ongoing and foreseeable problem. Secondly, it should have been the case that an application was been made in advance of the expiry of the deadline. That is so because of the nature of the problem. Thereafter the failure to take any step to rectify the problem for over one month seems to me to be wholly without explanation and to be contrary to the requirement that any application for relief should be made promptly. That remains part of the amended CPR 3.9.

33. I realise that the effect of my decision may well be to tie the defendant's hands or prevent it from deploying its expert evidence to challenge the claimant's claim, and I realise that in a valuable claim such a result may appear to an observer to be unjust. But unless the court is robust in relation to its process, the culture of delay and non-compliance with orders that was identified by Rupert Jackson and which the Court of Appeal have sought to address in the case of Mitchell will continue.

34. This is not a case where the defendant can say that the case of Mitchell has come as a surprise. The changes to the Civil Procedure Rules came into effect on 1 April 2013. They were widely heralded in the legal press and in the work carried out by Sir Rupert in the preparation of both his interim and final report. They were the subject of numerous implementation lectures. In the circumstances it seems to me that the legal profession should by now, and certainly by the stage that this application should have been made , have been fully aware of the need to act promptly and to supply full reasons for any failure to comply with an order in circumstances where an application for relief was afoot.

35. In case it has not been made clearly apparent, it seems to me that the explanation given by Ms Bennett for the delay in her witness statement is far from convincing or comprehensive, particularly in relation to the timing of the instruction of the experts and in relation to her appreciation of the time at which a difficulty was beginning to arise. I stress that difficulties in relation to expert evidence can come about for a variety of reasons. It can come about because the solicitor has taken their eye off the ball or it can come about because the solicitor has been diligent and the expert has taken his eye off the ball. It can come about because both have been diligent but unforeseen events have caused delay. The permutations are almost endless, but unless a full and proper account is given of the difficulties the court is hampered in its understanding of what may or may not be said to amount to a reasonable explanation for the failure to both achieve the deadline and to make any application in time.

36. For these reasons the claimant's application succeeds and the defendant's application is dismissed.