IN THE COUNTY COURT AT BIRMINGHAM **Claim No. 3YS11406**

Priory Courts
33 Bull Street
Birmingham
B4 6DS

Monday, 13th July 2015

Before:

DISTRICT JUDGE TRUMAN

Between:

ABID ANWAR & ORS

Claimants

-v-

SEVERN TRENT WATER LTD

Defendant

Counsel for the Claimants: MR MIDDLETON

Counsel for the Defendant: MR MCKEON

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JUDGMENT

DISTRICT JUDGE TRUMAN:

1. This matter concerns an application by the defendant that I should re-visit an order of the court made on 9th February 2015. On 19th February 2015, I heard the trial of this action. I heard evidence from all the parties and I made various findings of fact. As a result of those findings, it was held that the first claimant had been present at the accident but was not the driver as he had stated, the second claimant had been present at the accident and was a passenger in the vehicle, the third claimant, however, had not been present at the accident and his claim was fraudulently made. I considered liability as between the parties with regard to the circumstances of the accident and I found that the unknown driver had been 75 percent responsible for the accident which had occurred and the defendant's driver had been 25 percent responsible for the accident and the reasons for those findings are set out in the judgment that I gave.

2. There were many discussions as to whether or not the claimants should have any award of damages in view of the fact that they had supported a fraudulent claim and had told lies themselves with regard to who was present. I considered the notes in the White Book and the cases referred to in relation to that aspect and held that it was still appropriate to make an award to the first and second claimant in respect of the injuries they received, although that award was substantially reduced from what it might have been if I had been able to believe the claimants with regard to the level of injuries they had received. I considered, after consideration of the notes in the White Book, that the appropriate sanction was in relation to costs and I duly made various orders in that regard. Again, the reasons for those decisions are set out in my previous judgment.

3. One of the arguments against the claimants receiving any award which was not canvassed at the trial was the issue of the order made by Deputy District Judge Long on 9th February. I can understand why that perhaps was not discussed. We had been dealing with papers in the trial bundle and there had been no formal consideration of the order of Deputy District Judge Long and its impact in light of the findings that I had made. We had spent a very long time dealing with the case. We did not finish, as it was, until 7.30 in the evening.

4. Very promptly after I had given my decision, I received a lengthy letter from the defendant's solicitors asking, in essence, that my order should not be perfected and that I should re-visit my decision in light of consideration of the order of Deputy District Judge Long. That letter has been exhibited to the application. I decided that, in fairness, any such matter should be made on notice by way of formal application so that the claimants had a proper opportunity to consider it and deal with it. Today is the hearing of that application.

5. Back on 24th October 2014 Deputy District Judge Fowler made a peremptory order against the claimants. He specifically required that each claimant should file and serve full and accurate CPR compliant replies to the defendant's Part 18 request for further information which was served on 14th August 2014. The order was made at a hearing and under the terms of the order made, those responses should actually have been received by 7th November 2014. The order actually drawn was not drawn until 14th November, ie after the date that had passed and the court staff mistakenly thought that because of the fact that the date for compliance had passed before they typed the order

that they should allow a further 14 days. The order as drawn therefore actually said that the replies to all the Part 18 requests should be served by 1st December. As I say, as it had been made at a hearing at which the claimants could have been present, that should not have occurred but nothing turns on that because, in essence, we are all dealing with the order that the parties had which said that it should have been done by 1st December.

6. More detailed answers signed with a statement of truth and dated 24th November were then served. The defendant did not consider that the replies given had been in compliance with Deputy District Judge Fowler's order, and the claimants made an application equally that they had complied, that they had not been struck out and in the alternative that they should be granted relief from sanctions. That hearing took place on 9th February and Deputy District Judge Long ordered that the claimants having complied by 1st December 2014 with the requirement to file and serve full and accurate CPR compliant replies to the defendant's request for further information in accordance with the order dated 24th October 2014, the claimants' claims were not struck out.

7. The defendant says today that if the court had known at that particular time that the answers given were not full and complete and were certainly not accurate, that it would not have made the order that it did and the court should re-visit the order made in consequence. It does not appear to be disputed between the parties that CPR 3.1(7) does give the court power to go back and re-visit orders that it has made. The fundamental question is whether or not the court should re-visit such an order.

8. The leading case appears to be that of *Tibbles v SIG Plc (t/a Asphaltic Roofing Supplies) [2012] EWCA Civ 518* heard by the Court of Appeal in 2012 before Lord Justice Rix, Lord Justice Etherton and Lord Justice Lewison. There was a review of previous case law and then consideration as to what conclusions should be drawn. These are set out at paragraph 39 of that judgment. Subparagraph (i) says that whilst the rule is apparently broad and unfettered, due to considerations of finality, the undesirability of allowing litigants to have two bites at the cherry and the need to avoid undermining the concept of appeal, those factors all push towards a principled curtailment of an otherwise apparently open discretion. The Court of Appeal said specifically, "Whether that curtailment goes even further in the case of a final order does not arise in this appeal". The second element read:

> "The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary considerations in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated."

(iv) says:

> "There is room for debate in any particular case as to whether and to what extent, in the context of principle (b) in (ii) above, misstatement may include omission as well as positive misstatement, or concern argument as distinct from facts. In my judgment, this debate is likely

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> ultimately to be a matter for the exercise of discretion in the circumstances of each case."

(v) says:

> "Similarly, questions may arise as to whether the misstatement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or unknown, knowable or unknowable. These, as it seems to me, are also factors going to discretion: but where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate."

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(vi) does not really apply in this circumstance. (vii) says:

> "The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation."

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9. In the case of *Tibbles* the Court of Appeal declined to permit an appeal or to permit a decision to stand whereby the district judge had re-visited his own decision. The reason for that primarily was one of promptness. In that particular instance there had been no application to the court for many, many months after the order was made. Paragraph 41 says:

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> "Thus it may well be that there is room within CPR 3.1(7) for a prompt recourse back to a court to deal with a matter which ought to have been dealt with in an order but which in genuine error was overlooked (by parties and the court) and which the purposes behind the overriding objective, above all the interests of justice and the efficient management of litigation, would favour giving proper consideration to on the materials already before the court."

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The court was concerned to avoid people merely having a second bite of the cherry or trying to avoid the need for an appeal but it was permissible to deal with something which, once the question was raised, was more or less obvious on the materials already before the court. The court did emphasise the word "prompt":

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> "The court would be unlikely to be prepared to assist an applicant once much time had gone by. With the passing of time is likely to come prejudice for a respondent who is entitled to go forward in reliance on the order that the court has made."

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10. In that particular case the court did consider that if the parties had gone back to the court promptly after the hearing, that it might well have been appropriate for the district judge to reconsider his order and come to a different conclusion. This is a case where the order of Deputy District Judge Long was made on 9th February, drawn on

17th February and sent out to the parties and where the actual hearing of the trial was on 19th February with representations being made by 20th February. I do therefore consider that there has been promptness in asking the court to deal with it and I understand at the end of a long day why it was not raised at the actual trial.

11. Mr Middleton in his submissions has been very thorough, as he always is when he appears before me, and he has emphasised that this is something that should only occur rarely, it needs in practical terms to have something out of the ordinary within it, he says, it is not a discretion to be exercised at the drop of a hat. He submits that I should consider the overriding objective, court resources have already been spent on this matter by having a trial and this is spending yet further time. This is perhaps a discretion, he says, which should be exercised more freely in interlocutory matters and more narrowly where there has actually been a final trial.

12. He has also emphasised to me that I need to consider all the circumstances of the case when I decide whether or not I should exercise my discretion and some highly relevant circumstances, he says, are the fact that I had heard full argument and I still held that the claimants were entitled to some award for their personal injury claims and I imposed sanctions by way of the costs orders that I made. He says that I should not punish the claimants twice because I have already imposed punishment on them by reducing the personal injury damages that they might otherwise have received if I had believed them in full about everything and by reason of the costs orders made.

13. He reminds me that I made those awards knowing that I had found that there had been some fraudulent responses given to the court at the trial as well as in the Part 18 requests. He also asked, rhetorically, what prejudice had there actually been to the defendant because they had still been in a position to deal with the trial despite the false answers given within the Part 18 answers. He submitted that in practical terms the defendant was asking the court to erase its previous findings when it had made those findings and decisions conscious of the fact that the claimants had supported a fraudulent case. He stressed again that the sanction had already been imposed and they should not be punished again.

14. He did not feel it would be appropriate for me to put myself in Deputy District Judge Long's shoes and try and decide what the judge might have done. The claimants told the same lies at trial as they had told in their Part 18 responses and they had been punished, they should not be punished again. He also considered that if the defendant had disagreed with my decision, they should have appealed it and not asked for a re-visit in respect of an earlier order.

15. As part of my consideration and looking at the notes in the White Book, I did come across the case of *JSC BTA Bank v Granton Trade Ltd & Ors [2012] EWCA Civ 564* which was referred to the parties during our discussions and which makes it plain that it is permissible to go back and re-visit a sanctions order in certain circumstances. In that case, the high court judge had given relief from sanctions but he later discovered that the information that he had been given was, on the balance of probabilities, false and he revoked his order granting relief from sanctions so the matter never actually went to trial and the parties in that instance were struck out.

16. I have come to the conclusion that in this case it would be appropriate for me to re-visit the order of Deputy District Judge Long. I bear in mind all the factors that

Mr Middleton has asked me to bear in mind, particularly the fact that I did make an award of damages and I did impose sanctions with regard to costs and I did so knowing that the claimants had supported a fraudulent case. I considered that on the basis of the notes in the White Book, that that was where case law directed me and I should make those orders accordingly. However, this is a different set of circumstances. This is a case where an unless order had been made which specifically required full and complete CPR compliant responses. It was not a case of answers to be given, it specifically said full and complete. In no shape or form could the answers given be considered to be full and complete.

17. If when the matter came before Deputy District Judge Long he had been told that the Part 18 answers which said that the third claimant was present and the steps taken by the first and second claimants in respect of the third claimant were actually wholly untrue and the third claimant had not been present at all, I do not consider that Deputy District Judge Long would have considered that the claimants had complied and ought to be permitted to continue. He would undoubtedly have said that to have told lies within the Part 18 answers to the extent that they were, which was significant, was a serious breach. He would have looked at the question of whether there was a good reason for that and plainly there cannot be a good reason for telling basically wholly fraudulent lies within a Part 18 response.

18. He would then have looked at all the circumstances of the case, which included the fact that final unless orders had been made with which the claimants had to comply and would undoubtedly have considered that all those factors pointed against any relief from sanctions being granted. He would not have considered that the claimants had complied with the order of Deputy District Judge Fowler and there would plainly have been no good reason for them not to have complied and the case would have been struck out.

19. I do not think that this is a case of punishing the claimants twice. I think it is a case that if I do not vary the order, that the claimants actually get a better position through telling lies than they would have done if the court had known the truth at the time. If the court had known the truth at the time of the order of 9th February, this case would never have reached trial, the claimants would have been struck out, there would have been a decision at that point in favour of the defendant. Court resources in having a final trial would not have been given. I think it would be wrong if the court said that by allowing the claimants to tell lies after there had been an order for a full and complete response, that it should be in a better position than if no such order had been made and had gone on to a full trial.

20. If there had been no such order, then obviously matters would be entirely different and the notes in the White Book with regard to whether or not I should award damages and what costs sanctions should be imposed would be a proper and proportionate response but there had been that previous order, the claimants had told lies to get round that previous order, I do not consider they should be in a better position for doing so. In the circumstances I set aside the order made by Deputy District Judge Long and I hold that the claimants were struck out by 9th February 2015 and the sanctions set out within the order of Deputy District Judge Fowler of 24th October will therefore apply.

MR MCKEON: Madam, might I suggest the following order? I will undertake if it can be agreed or madam approves it to send in the minutes of the order to the court by email.

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What I, as it were, sketched out is first of all that it be ordered that the order of Deputy District Judge Long dated 9th February 2015 and District Judge Truman, madam, dated 19th February 2015 be set aside.

THE DISTRICT JUDGE: I think you had better say my non-perfected order, had you not?

MR MCKEON: Non-perfected order, yes, madam, be set aside and; (2) that the order of
B Deputy District Judge Long be varied so that—

THE DISTRICT JUDGE: If I have just set it aside, how can I vary it?

MR MIDDLETON: Madam, can I make a suggestion?

C MR MCKEON: You could make it a different order in its stead. You can set it aside—

THE DISTRICT JUDGE: If I have set it aside, it no longer exists. I am not varying if it is not there. Sorry, Mr Middleton, what were you going to say?

MR MIDDLETON: I was simply going to say, madam, as you suggest, if you set aside that order then the unless order holds and I think all other consequences are dealt with.
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MR MCKEON: Very well.

MR MIDDLETON: Just for the avoidance of doubt, simply you need to set aside your own order of 19th February.

E MR MCKEON: To make it clear, if madam sets it aside then madam effectively says "and the claim shall be struck out pursuant to the order of Deputy District Judge Fowler", dated I think it was—

MR MIDDLETON: 24th October.

F MR MCKEON: 24th October.

MR MIDDLETON: Effectively, madam, you now find that they were struck out as of 1st December last year.

MR MCKEON: And that the claimants, pursuant to that order the claimants jointly and severally pay the defendant's costs of the claim subject to a detailed assessment if not
G agreed and, madam, as you are now re-visiting the order I would ask that those be assessed on an indemnity basis and that they also include the defendant's costs of the Part 20 claim and; (3) that the claimants be jointly and severally liable for the defendant's costs of and occasioned by this application and you can, madam, either summarily assess them or they can be included within the detailed assessment of the
H trial's costs.

MR MIDDLETON: If, madam, we are stepped back to 24th October, as my learned friend asks us to do, it is appropriate simply to reinstate the order that Deputy District Judge Fowler made.

THE DISTRICT JUDGE: Mr Middleton, what I have written down so far is the order of Deputy District Judge Long dated 9th February 2015 and the non-perfected order of District Judge Truman made on 19th February be set aside.

MR MIDDLETON: Yes.

THE DISTRICT JUDGE: (2) the order of Deputy District Judge Fowler of 24th October do stand and in consequence the claimants' claims do stand struck out from 1st December 2014

MR MIDDLETON: Yes and I think, madam, that deals with issues of costs as well.

MR MCKEON: And with the same costs consequences as per the order of Deputy District Judge Fowler because he was quite specific that the claimants be jointly and severally liable for the costs of the claim.

MR MIDDLETON: I think that would be the case in any event, madam, but I contend—

THE DISTRICT JUDGE: If I say specifically with the costs consequences set out in the order of 24th October.

MR MCKEON: Yes, that would be helpful and then I also ask that those include the Part 20 costs but that effectively would be within those costs very probably, because it is the defendant's costs of the claim and part of defending that cost was the Part 20 claim.

MR MIDDLETON: The fact has to remain—

THE DISTRICT JUDGE: I have just gone back to Deputy District Judge Fowler's order, whatever Deputy District Judge Fowler's order says is *[inaudible]*—

MR MCKEON: It does not say anything about the Part 20 claim, so we can deal with that on detailed assessment if necessary.

MR MIDDLETON: Insofar as it makes any difference, madam, I contend that in principle the defendant should not have the costs of the counterclaim. It was not raised before Deputy District Judge Fowler when it should have been and there is still the jurisprudential basis for finding in the counterclaim against any of the claimants in this case. Practically speaking, madam, it probably does not matter very much for costs, they will be subject to detailed assessment anyway but as a matter of principle it should only be the costs of the claim.

MR MCKEON: Actually the—

THE DISTRICT JUDGE: I think the defendant is going to be in difficulty on the counterclaim because their case always was that *[inaudible]* the first claimant who was driving. They have always known that from their point of view there is an unknown person.

MR MCKEON: I will leave that to one side, madam.

THE DISTRICT JUDGE: Yes.

MR MCKEON: With the cost consequences of—

THE DISTRICT JUDGE: If I said specifically that the order of Deputy District Judge Fowler of 24th October do stand and in consequence the claimants' claims do stand struck out from 1st December with the cost consequences set out in the order of 24th October.

MR MIDDLETON: Yes.

THE DISTRICT JUDGE: So we have gone back to what you would have had at that particular time.

MR MCKEON: The costs of the action, yes. Of course since, well, the action would include obviously the whole action which included the hearing before madam as well.

THE DISTRICT JUDGE: I do not think Mr Middleton is disputing that, are you, Mr Middleton?

MR MCKEON: No, he cannot.

MR MIDDLETON: It is a matter for detailed assessment, madam, the exact quantum of costs.

MR MCKEON: The exact quantum but in principle the whole action includes the hearing before madam, I do not think there is any dispute about that but that would satisfy it anyway because it says "the action" within the order.

THE DISTRICT JUDGE: Costs of today, are we—

MR MCKEON: We have got a bill, madam.

MR MIDDLETON: That, madam, I would suggest should most appropriately be dealt with at detailed assessment *[inaudible]* case.

MR MCKEON: I do not mind that, madam.

THE DISTRICT JUDGE: So if I say—

MR MCKEON: The claimants jointly and severally do pay the defendant's costs of the application, such costs to be subject to a detailed assessment on the indemnity basis.

MR MIDDLETON: I do have an issue in relation to that in principle, madam, in the sense that although you have said that you understand why the point was not taken, the point was not taken at trial, it could have been taken at trial. You may well have made a different decision, madam, on the basis of what you said probably would have made a different decision at trial had it been raised then and whilst we can all be excused for

the length of the day with drooping energy levels towards the end of it, had the point been raised the costs of this further application *[would not have been?]* necessary.

MR MCKEON: I thought my learned friend said they should be dealt with within the detailed assessment.

MR MIDDLETON: That is why I said, madam, there would be an issue in relation to the quantum of costs at detailed assessment.

MR MCKEON: Right, well that can be dealt with then. I would ask for the order to read: the claimants jointly and severally do pay the defendant's costs of the application, such costs to be subject to a detailed assessment if not agreed. I will leave it to madam's discretion as to whether they be on an indemnity or standard basis.

MR MIDDLETON: For the reasons that I have given, madam, I oppose an order in relation to the costs of the application. You can either provide specifically in relation to that, madam, or simply provide that the claimants shall pay the defendant's costs and leave any issues arising out of that to detailed assessment.

MR MCKEON: They have lost the application. We are entitled to our costs.

THE DISTRICT JUDGE: In answer to the principle of the costs, I am not going to leave to detailed assessment. I am going to order that the claimants pay the defendant's costs of today's application. I entirely understand what you say to me, Mr Middleton, that the application would have been better made at the trial. There were obviously a number of other points made as to why I should not award the claimants damages but I think it is also appropriate that I do bear in mind the fact that we had been dealing with the matter for some considerable time, it was half past seven at night when we concluded the arguments that we had got in front of us and I do not expect even counsel to be superhuman.

MR MIDDLETON: So be it.

MR MCKEON: Most obliged and if that could also as per the order, madam, of Deputy District Judge Fowler be on a joint and several basis please.

THE DISTRICT JUDGE: No, you have got the order that you got from Deputy District Judge Fowler. I am not amending that.

MR MCKEON: Not that one, madam. That is jointly and severally. It is just madam's order today that that be on a jointly and several basis.

THE DISTRICT JUDGE: Yes, in which case stop referring to other people's orders, Mr McKeon. That is where the confusion—

MR MCKEON: No, I said as per Deputy District Judge Fowler's order because he *[inaudible]* joint and several liability. *[Pause]*

THE DISTRICT JUDGE: Right, so just so that we are all clear then, what we have got is the order of Deputy District Judge Long dated 9th February and the non-perfected order

of District Judge Truman made on 19th February be set aside; (2) the order of Deputy District Judge Fowler of 24th October 2014 do stand and in consequence the claimants' claims do stand struck out from 1st December 2014 with the cost consequences set out in the order of 24th October 2014; the claimants do jointly and severally pay the costs of the application to be subject to detailed assessment if not agreed. Is there anything else?

MR MCKEON: No, I think that is it, madam.

MR MIDDLETON: No, thank you, madam.

MR MCKEON: Thank you very much.

THE DISTRICT JUDGE: May I thank you—

MR MCKEON: Sorry, madam, my instructing solicitor wants… *[Pause]* I thought this had been discussed, madam, but my solicitor is concerned. I think that the costs of madam's hearing are effectively the action which is included within the order of Deputy District Judge Fowler because he says they are liable for the costs of the action.

MR MIDDLETON: I do not think I can sensibly dispute that, madam.

MR MCKEON: That reassures my solicitor, madam.

THE DISTRICT JUDGE: All right, anything else?

MR MIDDLETON: No, thank you, madam.

THE DISTRICT JUDGE: Thank you all for your time. Good afternoon.

[Hearing ends]