Neutral Citation Number: [2022] EWHC 2824 (KB)

Case No: QA-2022-000032

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/09/2022

Before:

MR JUSTICE GARNHAM

- -

Between:

Mr Jose Carlos Maques Correia	**Appellant**
- and -	
Ms Suleima Williams	**Respondent**

- -
- -

Grant Armstrong (instructed by **Harris da Silva**) for the **Appellant**
Jake Rowley (instructed by **Crawford and Co Legal Services**) for the **Respondent**

Hearing dates: 17 October 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 9 November 2022

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MR JUSTICE GARNHAM

Mr Justice Garnham:

Introduction

1. Mr Jose Correia, the Appellant, appeals against an order dated 24 January 2022 of HHJ Gerald ("the Judge") sitting in the Central London County Court. The Appellant was the Claimant in the proceedings before the Judge and the Respondent before me was the Defendant. I will call them "Appellant" and "Respondent" throughout this judgment. By that order the judge:

    i) Dismissed the Appellant's application dated 23 December 2021 to adduce the expert report of a road traffic collision expert, Mr George Mighall;

    ii) Dismissed his application dated 14 January 2022 for permission to obtain the expert report of an urologist and to adjourn the trial listed for hearing that day;

    iii) Ruled that the Appellant's witness statement was inadmissible;

    iv) Refused the Appellant's oral application to give oral evidence in chief, alternatively to adjourn the trial to allow amendment or regularization of his witness statement or to permit the Appellant to "start again";

    v) Dismissed the claim.

2. The Appellant originally sought leave to appeal on 5 grounds, namely that:

    i) The Judge erred in refusing to admit his witness statement on the grounds of non-compliance with CPR 32 paragraph 18.1, 19.1 and 20.1 and Practice Direction ("PD") 22 paragraph 2.4;

    ii) Refused to admit the witness statement of his solicitor, Ms Alexandra Bailey and the exhibits there too;

    iii) Refused to adjourn the trial to enable the Appellant to adduce the evidence of the urologist;

    iv) Refused to admit the Appellant to address the expert evidence of Mr Mighall; and

    v) The Judge's conduct at the trial was unjust because of serious procedural or other irregularities.

3. By order dated 17 May 2022 the Appellant was given leave to appeal on grounds 1-3 by Sir Stephen Stewart, sitting as a Deputy Judge of the High Court. He was refused permission to appeal on grounds 4 and 5. He renewed his application in respect to grounds 4 and 5 before me. I refused that renewed application. As to ground 4, I ruled that the decision of Sir Stephen was plainly correct; the Judge's reasons in the judgments in paragraph 8-9 were not in error. As to ground 5, like Sir Stephen, I concluded that even if the Judge's comments to counsel went further than they should, they did not give rise, even arguably, to a serious error affecting the outcome of the appeal.

4. The Respondent served a Respondent's Notice setting out alternative grounds for upholding the judgment. In particular, it is said that the judge was entitled to refuse to admit the Appellant's witness statement in the exercise of his case management powers; the judge was entitled to conclude that no, or no meaningful, weight could be placed on the statement of Ms Bailey and its exhibits and the judge was entitled to refuse to adjourn the trial and allow the Appellant to instruct and call a urologist because that was not reasonably required to resolve the proceedings.

5. As to the extant grounds, I had the benefit of detailed oral arguments from Mr Grant Armstrong on behalf of the Appellant and from Mr Jake Rowley for the Respondent. I am grateful to both counsel for their assistance.

The Background

6. The Appellant is a Portuguese national who has lived in the UK since 2002.

7. By an undated claim form enclosing Particulars of Claim dated 20 February 2020 the Appellant, as Claimant, sought damages for serious personal injury he sustained in a road traffic accident which occurred at about 5pm on 26 February 2017 at the junction of the A112, High Street Plaistow and Clegg Street, London E13.

8. The Appellant was riding a Honda motorcycle in a south easterly direction along the High Street and the Respondent, then the defendant, Suleima Williams, was driving a Ford Fiesta motorcar in the opposite direction intending to turn right across the Claimant's path into Clegg Street. The junction was controlled by traffic lights. The critical issue on liability was whether, as the Appellant alleged, the Respondent drove through a red light or crossed the juncture without the benefit of a green filter turning right; or alternatively, as the Respondent contended, the Appellant failed to stop at a red light.

9. On 27 July 2021 the case was listed for trial in the Central London County Court on Monday 24 January 2022 with a two day time estimate. The matter came on that day before HHJ Gerald. The Appellant was represented by Ms T Khan of counsel and the Respondent by Mr Rowley.

10. Ms Khan indicated that she intended calling her client on whose behalf a witness statement dated 15 December 2021 had been prepared. She also indicated an intention to rely on a witness statement from her instructing solicitor, Ms Alexandra Bailey. Ms Bailey's witness statement exhibited handwritten notes taken at a Magistrates Court hearing at the conclusion of which the Appellant had been acquitted of driving without due care and attention. I note in passing that when the Appellant had given evidence before the Magistrates Court he did so through an interpreter.

11. Ms Khan also indicated that she had outstanding applications for permission to rely on a report by Mr Mighall and for permission to instruct and then call an expert urologist. That latter application would, if granted, necessitate the adjournment of the trial and Ms Khan sought that adjournment.

12. The judge immediately raised concern about the statement of the Appellant. That witness statement was written in English. At paragraph 10 of that statement the following appears:

> "Whilst I can understand and speak English I am not wholly fluent and rely on the assistance of a translator during court proceedings. I am able to make this statement in English because the principal solicitor of Harris da Silva solicitors speaks fluent Portuguese."

13. The witness statement, which runs to some 126 paragraphs over 36 pages, ends with a statement of truth, in English, and a "Certificate of Translation" which reads:

> "I, Charles da Silva, hereby certify that I am proficient in Portuguese and English. I translated the foregoing statement and read it back to Jose Carlos Marquez Correia in its entirety in Portuguese (European) on 15 December 2021."

14. The statement of truth was signed by the Appellant himself and the certificate of translation by Mr da Silva.

Discussion before the Judge and the Judgment

15. Most of the first day of the trial was taken up with argument and the judge's rulings. I was provided with a transcript of the hearing and of three short extempore judgments, which are produced as a single, composite document. The first judgment (paragraphs 1-17 of the composite document) addressed the two applications to adduce expert evidence. There was then further argument before the judge gave his ruling and the reasons for that ruling on the admissibility of the Appellant's witness statement (paragraphs 18-36). There followed further submissions before the judge gave his ruling dismissing the claim.

16. I set out below the parts of the composite judgment and/or the discussion between judge and counsel relevant to each ground of appeal. But first I set out the relevant parts of the Civil Procedure Rules ("CPR") and the King's Bench Division ("KBD") and Chancery Division guidance.

Rules and Guidance

17. It was common ground before me that in accordance with CPR rule 52.21 (1) this appeal was not a rehearing of the matters before the Judge, but was a review.

18. CPR Part 22 and Practice Direction (PD) 22 deals with statements of truth

> R. 22.1(1): The following documents must be verified by a statement of truth… (c) a witness statement.
>
> R. 22.3: If the maker of a witness statement fails to verify the witness statement by a statement of truth the court may direct that it shall not be admissible as evidence.
>
> PD 22 2.4. The statement of truth verifying a witness statement must be in the witness's own language.

19. CPR Part 32 deals with witness statements

> R 32.4(1): A witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally.

> R32.8 A witness statement must comply with the requirements set out in Practice Direction 32.

20. The Practice Direction to part 32 ("PD32") sets out requirements for the preparation of witness statements:

> PD32:18.1. The witness statement must, if practicable, be in the intended witness's own words and must in any event be drafted in their own language.
>
> PD32:19.1. A witness statement should – (8) be drafted in the witness's own language
>
> PD32:20.1. A witness statement is the equivalent of the oral evidence which that witness would, if called, give in evidence it must include a statement by the intended witness in their own language that they believe the facts in it are true"
>
> PD32:23.2. Where a witness statement is in a foreign language –
>
> (a)The party wishing to rely on it must –
>
> (i) have it translated; and
>
> (ii) file the foreign language witness statement with the court; [...]
>
> PD32:25.1 Where:
>
> (1) an affidavit,
>
> (2) a witness statement, or
>
> (3) an exhibit to either an affidavit or a witness statement,
>
> does not comply with Part 32 or this practice direction in relation to its form, the court may refuse to admit it as evidence and may refuse to allow the costs arising from its preparation.
>
> PD32:25.2 Permission to file a defective affidavit or witness statement or to use a defective exhibit may be obtained from a judge in the court where the case is proceeding.

21. While not immediately applicable in these County Court proceedings it is of interest to note what the Kings Bench Division and the Chancery Division guides say on the topic of witness statements from witnesses who are not fluent in English.

22. The King's Bench Guide [2016] provides at paragraph 10.61:

> If a witness is not sufficiently fluent in English to give their evidence in English, the witness statement should be in the witness's own language and the translation provided.

23. The Chancery Guide says at 19.13:

> If a witness is not sufficiently fluent in English to give his or her evidence in English, the witness statement should be in the witness's own language and a translation provided. If the witness is not fluent in English but can make himself or herself understood in broken English and can understand written English, the statement need not be in his or her own words provided that these matters are indicated in the statement itself it must however be written so as to express as accurately as possible the substance of his or her evidence.

Ground 1: the Appellant's witness statement

The Judgment below

24. The judgment on the admissibility of the Appellant's witness statement is found at Paragraphs 18 – 33 of the composite judgment.

> 18. We finally get to the beginning of the trial and the first question is whether or not Claimant has adduced an admissible witness statement…
>
> 19. I am told by the claimant's counsel and (it) is quite plain from the content of the witness statement that the claimant is a Portuguese speaker and is not particularly proficient in English, notwithstanding how long he has been in this country. Therefore he gave instructions to his solicitor, presumably Mr de Silva, in Portuguese, who took notes in English which were then put together as a witness statement in English…
>
> 21. Be that as it may, the defendant objects to its admissibility into evidence on the grounds that it was not but should have been taken in Portuguese and then translated into English and, furthermore, the statement of truth itself should have been in the claimant's own language, Portuguese, and not in English.
>
> 22. This has now been the procedural law since 6 April 2020. Practice Direction 32 paragraph 18.1 makes it clear that the witness statement must be in the witness's own words and drafted in his or her own language. The point is reinforced by paragraph 19.1(8) and again, the requirement that the statement of truth be in English is specifically stated in paragraph 20.1 and that reflects practice direction 22, which states that a statement of truth must be in the witness's own language. It is therefore, in my judgment, quite plain that the witness statement is simply not a witness statement. It is not admissible as a witness statement.
>
> 23. There are very good reasons for this which it is sometimes worth repeating. The first is that it is only fair to the witness that they give their statement in their own language, because if they get it wrong, they may lose the case, whichever side they

are for, and they run the risk of being in contempt of court. So a witness statement is a very important document. Secondly, it is very important that all parties, not just the maker of the witness statement, but the other side can rely on a statement which the giver understands in his or her own language, because that forms the case against or the evidence against that individual (in this case the defendant)…

24…Thirdly, it is important not only for the trial judge to know that this is reliably a document which represents the factual evidence of the witness, but also it forms the basis upon which that witness is going to be cross-examined and it is a statement of the obvious, particularly here where, for obvious reasons, the claimant would be assisted if he was giving evidence, by a Portuguese interpreter. It is critical that that person be tied down to one version of events and then cross-examined on the basis of it…

26. Here, we just have the solicitor's translation. One thing which was suggested by the claimant's counsel was that the witness statement should just be translated back from English into Portuguese to the claimant and get him to confirm that that is all true. But the problem with that is that that would be a double translation from Portuguese to English and then back to Portuguese, and the claimant will be being asked to confirm something which is essentially leading questions, setting out what somebody else has interpreted (accurately or otherwise) his original instructions as…

30. The claimant's counsel suggested that it remained open to the court under Practice Direction 32 paragraph 25.2 to nonetheless permit a defective witness statement to be used. In that context, the defect is more, according to the rule 25.1, confined to the form rather than the substance, but even if I was wrong about that, I would not be prepared in this case to allow the waiver, as it were, of these defects because, in my judgment, it goes to the very heart of the issue of credibility and whether or not what the claimant says can be satisfactorily relied upon. In my judgment, it also would be quite wrong for the court to allow this witness statement into evidence because, what would have to be then undertaken would be an extensive job of trying to work out, even being as generous as one possibly could, actually represented what the claimant was saying as distinct from a running commentary or submissions of other people's evidence or possible evidence.

31. Finally, the claimant's counsel submitted that I should nonetheless allow the claimant to get into the witness box and give his evidence in Portuguese in old-fashioned examination-in-chief. I am not prepared to do that because, not only of the length of the material which the claimant covers in his witness

> statement, but it would be unfair and inappropriate in the circumstances of this case where the matter has been listed since July 2021 relating to an accident which goes right back to 2017 and, furthermore, in a trial which has already been somewhat tightly listed for two days where both counsel thought it should be three days…
>
> 33.The final point which was made was that it would be unfair and unjust and disproportionate for the court to take the approach I am intending to take, and furthermore that the court should grant an adjournment in order to allow the claimant (to adopt the claimant's counsel's phrase) "start again", in other words, for a proper witness statement to be taken in Portuguese and then translated into English.
>
> 34…It is not fair for (the Respondent) to be faced with a moveable feast, starting all over again in relation to something which happened back in 2017, some five years or so ago
>
> 37. The result of the Claimant not having any admissible evidence is that his claim has regrettably come to an end…"

The Argument

25. For the Appellant, Mr Armstrong's arguments were set out in his detailed grounds and skeleton argument and developed in oral submissions. He argued that the Judge was wrong to refuse to admit the written witness statement of the Appellant and there was no evidence that the Claimant did not understand its contents or not believe they were true. He criticised the judge for failing to make efforts to establish the Appellant's command of English. He says the substance of the Claimant's evidence was clear on both liability and the effect of the accident and its consequences.

26. He said the judge should have permitted the Applicant to adopt alternative methods of remedying the deficiencies by (i) allowing him to give oral evidence in chief, either in English to the best of his ability or in Portuguese, with evidence being translated into English; or (ii) permitting the independent interpreter to translate the statement into Portuguese and a fresh statement of truth to be signed by the Claimant at Court or (iii) granting a short adjournment so the statement could be drafted in Portuguese. He says the judge could have directed that a statement limited to the issue of liability be provided the same or the following day.

27. He argues that the judge misinterpreted PD32 §25 which gives the court a discretion to admit the defective witness statement. He contends that the judge failed to identify and have regard to the correct issue for non-compliance which was the weight to be attributed to the oral evidence and failed to apply the *Denton* criteria properly or at all. He says he erred in assessing the seriousness and significance of the failure to comply with the Practice Direction, wrongly held that the Defendant would not be able to understand the case that she was required to meet and failed to consider properly or at all why the default occurred and/or all the circumstances of the case.

28. Mr Armstrong placed much reliance on a series of five authorities which consider the consequences of a witness statement not being prepared in the witnesses' principal language. Those cases were *Force India Formula One team v Malaysia Racing Team* [2012] EWHC 616, *NN v ZZ* [2013] EWHC 2261; *Frankel v Lyampert* [2017] EWHC 2223, *Diamond v SSHD* [2020] EWHC 313 and *Bahia v Sidhu* [2022] EWHC 875. He says that in no case has non-compliance with the Rules led to the relevant evidence being held to be inadmissible.

29. Mr Rowley for the Respondent argued that the Judge was right to hold that the Appellant's witness statement had been prepared in breach of the Rules, that these were breaches of substance and that they could not be remedied in the way the Appellant proposed. He said that none of the authorities on which the Appellant relied established the witness statement prepared in breach of the rules relating to witnesses who were not fluent in English was nonetheless admissible, or that the only issue was as to the weight to be attached to that evidence.

30. He said the effects of Part 32 was to impose an implied sanction the effect of which was to render a non-compliant witness statement inadmissible. He argued that even if the breaches should be "*seen through the prism of Denton*" an application for relief would have failed.

31. Mr Rowley argued further that if he was wrong in that analysis and the witness statement was not inadmissible, the Judge would have been entitled, in exercise of his case management discretion, to exclude it given what he found to be the reasons for the rules and the effect of the deficiencies.

My Analysis

32. A good deal of the hearing before me was taken up by a close analysis of the five authorities to which Mr Armstrong referred. But in my judgment these cases are of marginal value here. In none of them was the point taken that the errors rendered the statement inadmissible. Accordingly, none of them are authority for the proposition that a witness statement which does not comply with the rules is admissible.

33. As Mr Rowley contends in *Force India*, there was no argument that the deficiencies in the preparation of the witness statement led to them being admissible and so the point now at issue did not arise for determination by Arnold J (as he then was).

34. In *NN v ZZ* the Judge, Peter Jackson J (as he then was) was sitting in the Family Division and applying the family procedure rules not the CPR. His observations about the preparation of foreign language witness statements (at 56-61) come in what is described as a "Postscript: preparation of statements close". His comments are plainly not part of the judgment and are, as the judge himself observed, simply a record "of basic principles" on how such statements should be prepared. There was, in any event, no argument in *NN* as to the admissibility of witness statements not prepared in compliance with such basic principles.

35. In *Frankel* there was no argument advanced that the language used rendered the witness statements inadmissible. As a result, Mrs Amanda Tipple QC (as she then was) (sitting as a deputy High Court Judge) was not required to determine the admissibility or otherwise of the statements.

36. In *Diamond* too there was no express challenge to the admissibility of the witness statements. Instead, counsel did not object to the court having regard to the evidence. Instead, she contended that little weight should be attached to their evidence. As a result, the issue of whether the failure to comply with the procedural requirements for foreign language statements rendered the statement inadmissible was not argued before the judge and not determined by him.

37. In *Bahia* it was argued that there were failures to comply with PD32 and that those failings affected the weight which could be attached to the evidence. There was no attack on the admissibility of the defective statements and accordingly the issue did not arise did not arise for determination.

38. Mr. Armstrong submitted that it would be surprising if it were the position that such defects rendered the witness statements inadmissible that the point was never taken. I see the force of that. Nonetheless it seems to me that in the absence of authority on the point now being argued it is necessary for me to go back to first principles and to the rules of court.

39. In my judgment, the starting point must be the CPR. CPR 32.8 requires that a witness statement is drafted so as to comply with the practice direction. PD32 requires that the witness statement must, if practicable, be in the witness's own words and must, in any event, be drafted in their own language. The words “if practical” qualify the need for the witness statement to be in the witness' own words. There is no such qualification for the next clause in that paragraph. On the contrary, the expression that applies to the requirement that the statement is in the witness’ own language is “in any event”.

40. Similarly, the requirement in PD32 20.1 mandates the inclusion of a statement in the witness’s own language to the effect that the contents are true.

41. The result is that the witness statements and statement of truth must be in the witness's own language. The reasons for that are obvious and are accurately summarized by the Judge. If the witness statement is not in his or her own language, there can be no confidence that it is their own evidence rather than the evidence of the drafter.

42. The necessity of compliance with the rules is demonstrated further by paragraph 23.2 which requires a foreign language witness statement to be accompanied by a translation filed with the statement. The purpose is obvious; it is so that others can check that there has been an accurate translation of what the witness, speaking in his or her own language, has said.

43. The consequences of defects in witness statements are addressed in PD 32 paragraph 25. The consequence of a deficiency *of form* is dealt with expressly in paragraph 25.1 which provides that the court *may refuse* to admit the statement as evidence (and may refuse to allow the costs of its preparation). Contrary to the judge’s view, in my judgment there is nothing in paragraph 25.2 to suggest that the deficiencies to which it refers are only deficiencies of form and not deficiencies of substance. However, such deficiencies, “*can only be used with permission of the Judge*.” It follows, in my view, that whether there is an error of form or of substance there is a route by which the court can exercise control over the admission of the evidence. The difference between the two categories of statement is that in the case of errors of form the default position is that the statement is admitted (unless the court rules otherwise); in the case of

defects of substance the default position is that the statement is not admitted, unless the court agrees.

44. In my view, that analysis is, at least, not inconsistent with the five authorities to which Mr Armstrong took me and it would explain why the point was never taken in those cases. There remains a power in the Court to admit defective witness statements even when the deficiencies are profound, but it is a power that will be exercised in the light of the nature, seriousness and consequences of the deficiencies.

45. At [22] in his judgment, the judge treated the Appellant's witness statement as so defective that it was "*simply not a witness statement*". In my view, in so holding the judge went too far. It was intended by the Appellant as the equivalent of the oral evidence that he would, if called, give in evidence and, if permission had been given for its use, it would have been so treated. However, it was manifestly defective in all the respects identified by the judge. These were defects of substance, not merely form, again for the reason the judge gave. As a result, the Appellant needed the judge's permission to adduce the statement.

46. The Appellant sought that permission in accordance with CPR25.2, as the judge made clear at [30]. Contrary to the judge's view, the statement was not inadmissible per se but it was inadmissible without the judge's permission. Had the judge simply refused to admit the statement without considering the circumstances and the merits of the application before him, his decision would have been open to criticism. But he did not. He made it clear at [30] that if he was wrong to regard the statement as inadmissible per se, he would not "*be prepared in this case to allow the waiver, as it were, of these defects*". The critical question therefore is whether the judge was entitled to exercise his discretion to refuse to admit the statement.

47. In my judgment, he was. In all the respects identified by the judge, this witness statement failed to meet the requirements of the rules. The rules about the provision of witness statements by those who are not fluent in English provides an important discipline for litigants and their advisers and are not lightly to be ignored. The judge correctly identified the reasons why to have allowed this witness statement to be admitted would have been grossly unfair. In particular, the Respondent had provided a witness statement which complied with the rules, and, as a result, the Appellant knew the evidence to which he has to respond. By contrast, the Respondent had only the account of events drafted by the Appellant's solicitor, in a language in which the Appellant was not fluent. The difficulties that would have faced the Respondent's counsel in cross examination on such a witness statement are obvious. As the judge observed, one of the purposes of requiring the service in advance of trial of witness statements are to tie the witness down to one account of events; to have allowed in this statement would have enabled the Appellant to escape that constraint.

48. Furthermore, this application was being made on the first day of a two day hearing; to have permitted it would have been to limit severely the Respondent's opportunity to respond and it would have put the hearing of the case on this date substantially at risk. Had an adjournment proven necessary, it would likely have put the parties to additional cost and it would have resulted in significant wastage of court time with consequent disadvantage to other litigants.

49. In addition, in my view, the judge was entitled to reject as unsatisfactory or unfair the various alternatives advanced by the Appellant. He gave good reasons for rejecting those alternatives. To have allowed the Appellant to give oral evidence in chief, either in English, to the best of his ability, or in Portuguese, with evidence being translated into English, would have been to create precisely the difficulties for the court and the respondent which the rules are intended to avoid. To have permitted the interpreter to translate the statement into Portuguese and a fresh statement of truth to be signed by the Claimant at Court would have created the difficulties and unfairness the judge identified. To have granted an adjournment so the statement could be drafted in Portuguese would have created the unfairness referred to in the preceding paragraph of this judgment.

50. In those circumstances this ground of appeal is dismissed.

Ground 2: The witness statement of Ms Bailey

The exchanges between the judge and counsel

51. There is no judgment on this issue for reasons which will become apparent. But Mr Armstrong took me to the relevant exchanges between the judge and counsel and advanced his arguments in response. It is necessary to summarise that material here.

52. After making submissions about the admission of her client's witness statement, Ms Khan turned to the witness statement of Ms Bailey and the notes annexed to it. Ms Bailey's witness statement describes how her firm represented the Appellant in respect of a charge of driving without due care and attention at Statford Magistrate's Court. She explained that that case came to a hearing on 1 March 2018. She attended the hearing and completed contemporaneous attendance notes of the trial, which notes she annexed to her statement. The notes are handwritten, but are largely legible. They are, however, only notes, and she uses shorthand. There is some reference to photographs, which were not produced to the judge nor to me, but to which it appears witnesses were referred. Ms Khan explained that that evidence was served on the Respondent who was asked if any point was taken as to its admissibility. There appears to have been no substantive response.

53. The Judge then asked Ms Khan whether she was asking him "*to determine liability in part based on a solicitor's note of some person giving evidence in a Magistrate's Court*"; she replied in the affirmative. She was asked whether Ms Bailey was going to give evidence. Counsel replied "*I do not think that is required*". She was then asked if, in those circumstances, the evidence was admissible. She said it was. She was asked whether she had any authority to support that proposition. She said she did not.

54. The Judge then pointed out that the evidence was hearsay. Ms Khan agreed. The judge then suggested that it was hearsay that could not be tested and that no weight could be given to it. Again, Ms Khan agreed. However, she went on to add that the Judge would hear submissions about "*the credibility of that evidence*". She said that the "*mere fact that there was a trial where two independent witnesses came and gave evidence as to the traffic lights and the mechanics of the accident…is helpful to this court in determining liability*."

55. Following further argument about the admissibility of the Appellant's statement the judge gave a ruling on that topic. On his return to court, the judge asked counsel for the Appellant whether she had "*other witnesses who can give evidence as to the accident*". Ms Khan replied that there were none. She went on "*there were two independent witnesses which I mentioned at the Magistrates' court but unfortunately one of them is on the heart transplant list and is unable to attend.*" The Judge again asked whether she had any other evidence on liability. Ms Khan replied "*Your Honour no.*" The Judge commented that that was "*the end of the claim*". In response counsel said she would be making an application to adjourn the trial. The Judge indicated that he had already ruled on an application to adjourn the trial but he gave Ms Khan a short period of time to "*take stock*" with her solicitor.

56. On the Judge's return, Ms Khan said "*the only evidence in relation to liability on behalf of the claimant was the witness statement of the Claimant and the evidence of the Claimant...I have no further evidence that I can adduce to the court in relation to liability*." The Judge responded "*so the claim has to be dismissed then*". Ms Khan replied "*It is a matter for Your Honour but I cannot adduce any further evidence, well not further evidence, any evidence that has not been dismissed or struck out by the court*." The claim itself was then dismissed by the Judge.

The argument

57. It was argued by Mr Armstrong that the Statement of Ms Bailey and the notes she annexed was admissible as hearsay under the Civil Evidence Act 1995. That evidence recorded the Appellant's account in the Magistrates Court, together with that of James Clark, Nadia Alia, Jason Blair and the Respondent. He says this evidence was of particular value in circumstances where the Magistrates proceedings are not recorded and the Court did not have any notes of the trial. The weight to be given to the contemporaneous notes of the Magistrates trial and the Defendant's Costs Order were matters to be assessed by the judge but did not prevent the statement or exhibit from being adduced.

My analysis

58. The following points of significance arise from the exchanges between the judge and counsel:

    i) the Claimant had produced a witness statement from a solicitor to which was annexed notes of a hearing in a Magistrate's Court;

    ii) the Claimant's counsel indicated that she did not intend calling the maker of that statement but wanted to rely on the notes without doing so;

    iii) The judge pointed out that the solicitor's record of what was said in the Magistrate's Court was hearsay;

    iv) The Judge pointed out that since the solicitor who had made the notes was not being called, that hearsay evidence could not be tested. Counsel agreed;

    v) Counsel told the judge there was no other evidence going to liability that she was able to adduce.

59. Mr Armstrong points out that the Judge did not deal in his judgment with Ms Bailey's statement. That is correct, but in my view that is unsurprising when counsel had made it clear that she was not going to call Ms Bailey as a witness.

60. The Judge described the handwritten notes of the Magistrates' court hearing as hearsay, which they plainly were. He did not, however, say that hearsay evidence was inadmissible. He did not admit the material as hearsay evidence because counsel did not invite him to admit it. Having rejected the witness statement of the Appellant, the Judge repeatedly asked Ms Khan whether she had any other evidence on liability and she repeatedly said that she did not.

61. On no occasion, in response to a question about whether she had any evidence which went to liability, apart from the Appellant's witness statement, did counsel suggest that the notes next to Ms Bailey's witness statement should be admitted pursuant to the Civil Evidence Act 1995 or otherwise. In those circumstances I can see no ground for interfering with the Judge's decision on this issue.

62. This material, on the Appellant's case, went to key issues in the case. Even if I were wrong in rejecting the criticism of the judge's decision not to admit the evidence, it seems to me this would have been very unsatisfactory evidence on such critical issues. The weight that could have been attached to it would have been slight, if anything at all. As Warby J (as he then was) observed in *Aleksej Gubarev v Orbis Business Intelligence Limited* [2020] EWHC 2812 (QB) at [115(2)]:

> "*Hearsay is best used to establish peripheral or relatively uncontroversial matters. Reliance on hearsay as a means of establishing important facts is generally unsatisfactory: see Phipson on Evidence 19th ed at 29.16, Miller v Associated Newspapers Ltd [2012] EWHC 3721 (QB) [24], [36 – 37] (Sharp J), and my judgment in Hourani v Thompson [2017] EWHC 432 (QB) [25]*"

63. If Ms Bailey was indeed not being called as a witness, then there was no evidence that the notes were accurate. There was nothing to explain the context of the evidence in the Magistrates' Court or the meaning to be attributed to notes that were unclear or ambiguous. The Court could not have reached any conclusion about the demeanor of the witnesses or their reliability. Photographs to which witnesses had referred were not produced in the County Court. All the judge would have had to consider were the handwritten notes themselves. I cannot see how then judge could have attributed any significant weight to such notes.

64. For those reasons I see no ground for interfering with the Judge's decision on the matters raised in Ground 2.

Ground 3: The Urological Evidence

65. Ground 3 relates to the refusal to permit an adjournment of the trial to enable additional medical evidence to be obtained. That refusal was the subject of the first part of the judgment:

> "1. This is the first day of a two day trial which was listed on 27 July 2021 for the determination of liability and quantum in relation to a fully disputed road traffic accident which occurred

on 26 February 2017 in respect of which, in broad terms, the claimant's motorbike collided with the defendant's vehicle causing the claimant some unpleasant injuries to his groin area and various other parts of his body, most of which happily have sorted themselves out, but the groin area injuries are said to persist.

2. …The first application is dated 23 December 2021 and it seeks permission for the expert report of Mr George Meigal dated 19 June 2019... to be adduced into evidence notwithstanding that Recorder Cohen refused its adduction into evidence at the CMC on 7 April 2021. …

10. The second application is a sort of composite application which is dated 14 January 2020, which is some five or so working days before the commencement of the trial, which repeats the application to adduce the evidence of Mr Meigal, which I have refused, but also seeks an adjournment of the trial in order to adduce the evidence from a new expert, a urologist, and also because one of the applicant's witnesses, his mother, is unable by reason of her own health condition and also Covid, to leave her home country and fly to England to give evidence. I will deal with those two points in reverse…

13. Therefore the substantive issue relates to the adduction of evidence from a urologist, a completely new discipline. It appears that this was ventilated at the CCMC back on 7 April 2021 but, for whatever reasons, was either not pursued or was not determined. Whatever the position is, the principal reason for the adduction of the urological evidence is based upon an apparent incontinence of the applicant and also possibly the fact that he is still undergoing treatment for penile dysfunction. So far as the latter point is concerned, whilst the applicant's injury is of an extremely personal and intimate nature and is, I have no doubt, extremely unpleasant and uncomfortable, so far as the penile erection situation is concerned, I am very doubtful as to whether or not there is any material evidence which will be able to further assist the court in relation to either the curvature or the length of the penis was erect (sic), or which would have any material impact on the assessment of damages. The key question therefore relates to incontinence.

14. The problem with this aspect of the application is that on the applicant's own evidence, since at least 2019 he has been having incontinence problems which obviously, in a person who is now 44 years old is extremely unpleasant and embarrassing, and certainly a year later in November 2020 he was having some sort of treatment in relation to it, the key point being that it is quite simply too late to leave an application of this nature to four days before the commencement of the trial. …

> 16. I should say that matters did not stop in November 2020. There are a few additional communications from the odd expert, but none of that causes me to reach the conclusion that this application should have been made a very long time ago, which really should have been either at the CCMC, explaining fully and properly why the urologist was required, whether that be solely for incontinence or for penile malfunction and, if it was not successful at that CCMC, then either the decision should have been appealed or there would have to be a renewed application a long time ago in order to explain to the court why such evidence was required, and that would most probably have enabled the trial date to be held…

The Argument

66. Mr Armstrong submits that the Judge erred in refusing to grant the application dated 14 January 2022 for an adjournment so as to permit the instruction of an expert in urology.

67. He points to the Claimant's complex medical history and recent developments in respect of his penile injuries which required further investigation. He says the Judge failed to give proper consideration to the fact that the Claimant had undergone an operation on 5 August 2021 for correction of his penile curvature for which he required a 3-month recovery period. He failed to take into account the fact that a copy of the review of his urologist, Professor Watkin, dated 18 November 2021, was only provided to the Claimant's solicitors on 13 December 2021. That report asserted that the Claimant's erectile dysfunction was continuing and required further treatment but failed to address the continuing complaint of adult male urinary incontinence.

68. Mr Armstrong argues that the judge should have had regard to the fact that the Respondent recognised the importance of the awaited medical evidence and the continuing nature of the Appellant's penile injuries and the fact that the pre-trial review (listed for 10 December 2021) had noted the recent operation and the appointment for assessment on 18 November 2021.

69. Mr Armstrong says the judge failed to assess the application against the criteria set out in *British Airways PLC v Spencer* [2015] EWHC 2477. He argues that the judge wrongly held that he was entitled to make an assessment of the level of the Claimant's personal injury including the matters for which further evidence was sought without expert evidence. He says the Judge wrongly held that the Claimant's urinary incontinence issues could have been investigated contemporaneously with the treatment of the Claimant's penile curvature in the absence of any expert evidence to that effect and wrongly held that the Claimant's Application could have been made at an earlier date.

Analysis

70. The history of the Appellant's urological difficulties and urological treatment were explained to the Judge by counsel. Ms Khan explained that during the course of the accident the Appellant's groin was thrust into the fuel tank of his motorbike.

71. The Particulars of Claim, which are dated February 2020, particularise the injuries suffered by the Appellant. Those included development of a hematoma-lump on his penis which continued to affect his confidence and ability to enjoy intimate relations.

72. It is evident that his urological difficulties continued. Referring to his medical records, Ms Khan told the Judge that the Appellant had urological appointments from 2019 onward. Counsel told the Judge that her client had been informed that his penile injuries would get better but they did not. A further referral was made for urological surgery which took place on 5 August 2021. The success of that procedure was reviewed by Professor Watkin on 18 November 2021. Professor Watkin provided his report to the Appellant solicitors on 13 December 2021.

73. The trial in this matter was listed in July 2021 for hearing on 24 January 2022. The application for an adjournment to enable the instruction of an urologist was issued just 5 working days before the trial itself. Refusing that application, the Judge pointed out that the possibility of a urological report had been ventilated at the CCMC on 7 April 21 but not pursued. He pointed out that the Appellant had had incontinence problems since at least 2019 and was having treatment in November 2020. He said that the application to adjourn the trial to enable the instruction of a neurologist was to "*quite simply too late*".

74. As Mr Armstrong submitted the criteria identified in *British Airways plc v Spencer* are important. I accept that they will govern the disposal of an application to adduce expert evidence when the application is made in good time. But this application was not made in good time. This was a case management decision made in response to an application issued just a week before the substantive trial of this matter and heard on the first day of the trial. The consequence of acceding to the application for a new expert would have been the loss of the trial.

75. Furthermore, by the time the Judge came to consider the application no expert report had been obtained and there was nothing to suggest that an appropriate expert had even been identified. In consequence, not only would this court date have been lost but the delay in the hearing of the trial would have had to have been substantial.

76. In my judgment, the judge was entitled to find that there was no good reason for this late application. The need for urological evidence should have been obvious from a very early date in the history of this case. Certainly, by August 2021 steps should have been taken by those acting for the Appellant to instruct a urologist and obtain urological advice. The obtaining of such advice did not depend on the outcome of Professor Watkin's review. It is perfectly routine in personal injury litigation to obtain medico-legal expert reports before the clinical picture is settled.

77. The Appellant solicitors eventually obtained the report of the review of the Appellant's condition after the August surgery, but they did not do so until December 2021. Even then, after what was already very substantial delay, they waited another month before issuing the application to enable the instruction of a new expert. There was no good reason for that delay. The prejudice to the Respondent caused by the need to delay the trial, and the prejudice to good administration in loosing this trial date, were all obvious. They were all factors the Judge was entitled to take into account.

78. The judge was faced with a case management decision on the day of trial. The decision was a discretionary one for him. It had to be exercised judicially having regard to the overarching objective, but, as Davis LJ said in *Chartwell Estate Agents Limited v Ferges Properties SA* [2014] EWCA Civ 506 at [62] "*Appellant courts will not likely interfere with case management decisions. Robust and fair case management decisions by first instance judges are to be supported*"

79. As Mr Rowley fairly points out, it might have been possible for the Judge to express his reasons for this decision rather better than he did. But as Lord Hoffman said in *Piglowska v Piglowski* [1999] UKHL 27

> "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as given by the District Judge. These reasons should be read on the assumption that unless he has demonstrated the contrary, the Judge knew how he should perform his functions and which matters he should take into account... An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself"

80. In my judgement there are no proper grounds for interfering with this case management decision of the Judge and I would reject this ground also.

Conclusions

81. In those circumstances I dismiss this appeal on all grounds advanced before me.