Neutral Citation Number: [2024] EWHC 639 (KB)

Case No: QB-2019-000403

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22nd March 2024

Before :

DEPUTY MASTER GRIMSHAW

- -

Between :

SHADI AL TARBOUSH
(A Protected Party by his Litigation Friend
ADBULHADI AL TARBOUSH) **Claimant**

- and -

YUSUF CASSAM **Defendant**

- -
- -

Mr A. Rauer (instructed by **Kinetic Law**) for the **Claimant**
Mr C. Phipps (instructed by **RPC**) for **Hegarty LLP**
The Defendant was not represented at the hearing but had filed written submissions beforehand.

Hearing date: 7 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 22 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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DEPUTY MASTER GRIMSHAW

Deputy Master Grimshaw:

1. This case has a sorry procedural history and serves as a good example of why one should not 'bury one's head in the sand' when problems in litigation arise.

2. The matter before me is an application for wasted costs against the Claimant's former solicitors, Hegarty LLP ("Hegarty"). As will be set out below, this application is somewhat unusual in that it is now pursued by the Claimant (through his Litigation Friend) himself rather than by the Defendant, for the reasons that will be set out below.

The underlying action

3. This is a personal injury case concerning a road traffic accident that occurred on 8 February 2016 on the A44 Phoenix Way/B4109 Bell Green Road roundabout in Coventry. In short, the Claimant was hit by a motor vehicle whilst crossing a dual carriageway through a pedestrian crossing. The Claimant, born in September 1993, was said to have suffered a severe traumatic brain injury as a result of the accident, with a number of ongoing difficulties as a result.

4. The parties reached agreement as to a liability split and therefore the case was proceeding on quantum only, albeit the Defendant made no admissions as to the nature or extent of the Claimant's alleged injuries.

The procedural background

5. The Claim Form was issued on 4 February 2019, with proceedings being served on or around 27 May 2019.

6. What followed was an extraordinary course of procedural failures on the part of the Claimant and/or Hegarty. I need not set these out in detail, but summarise the same as follows:

    i) The parties had agreed directions in 2019 (which included service of expert evidence in the fields of neuropsychiatry, neurosurgery, neuro-rehabilitation and care by 10 February 2020) but the Claimant failed to serve his expert evidence pursuant to those agreed directions and this resulted in the Defendant making an application for a case management conference ("CMC") on 20 September 2020; this hearing was listed on 10 November 2020.

ii) The Claimant agreed directions in advance of the CMC listed on 10 November 2020 and these were put before Senior Master Fontaine as an agreed consent order, which was approved by Senior Master Fontaine, and the CMC was vacated. This order set the date for the Claimant to serve his medical expert evidence as 3 March 2021.

iii) The Claimant again failed to serve his expert evidence and the Defendant therefore made an application for an unless order. This resulted in Senior Master Fontaine making (on the papers) the unless order of 30 July 2021, sealed on 19 August 2021.

iv) The Claimant did not serve his expert evidence within the time allowed by Senior Master Fontaine's unless order but instead made an application for relief from sanctions. This application was listed on 7 February 2022. The Claimant had still not served his medical expert evidence by this date. Senior Master Fontaine made a further directions order on 7 February 2022, which included a debarring order, and which also required Hegarty to show cause as to why a wasted costs order ("WCO") should not be made. A further CMC was listed for 15 June 2022.

v) The directions of 7 February 2022 were complied with. When serving his evidence, the Defendant served surveillance and social media evidence ("SSME"), along with commentary and opinions arising from this evidence from his experts. To put it as neutrally as possible, the Defendant's experts raised significant concerns about the apparent disparities between the Claimant's reported symptoms and the SSME.

vi) The parties then agreed further directions ahead of the CMC, which were approved by Senior Master Fontaine, and the CMC on 15 June 2022 was vacated. The agreed order included Hegarty's consent to the making of a WCO. The parties agreed directions concerning the service of factual and expert evidence and for expert joint meetings, with the joint statements due by 25 November 2022. A further hearing was then listed for 15 December 2022.

vii) The Claimant failed to serve any expert evidence in compliance with this agreed directions order, due to "*oversight*" on the part of the Claimant's Solicitor.

viii) The hearing on 15 December 2022 was the first hearing before me. I allowed the Claimant one further opportunity to comply and ordered that the Claimant should file supplemental reports from his experts arising out of the SSME by 20 January 2023 and that he would be debarred from relying on any evidence which was not served in compliance with the order. I also made a further 'show cause' order, as well as making it clear at the hearing and by way of a recital to the order that the Court was concerned about the lack of compliance by the Claimant.

ix) There was a further failure to comply. The case came before me again on 2 February 2023. I gave further case management directions and dealt with the late service of some of the Claimant's expert evidence and the Defendant's objections to some of the other expert evidence served. I debarred the Claimant from relying on two expert disciplines because of his failure to comply with the previous order. A WCO was made in relation to the 15 December 2022 hearing, Hegarty having consented to the same. I made a further show cause order regarding the costs that I ordered against the Claimant arising out of the further failures associated with the service of the Claimant's expert evidence.

x) As a result of the 2 February 2023 order, the Defendant considered it appropriate to pose Part 35 questions to one of the Claimant's experts, Dr Bavikatte, about whether the SSME had been sent to him in order to prepare his report. Dr Bavikatte responded that he was not sent either the social media evidence or the Claimant's witness statement. The Defendant therefore applied to vary my Order of 2 February 2023 to revoke permission for the Claimant to rely on Dr Bavikatte's report on the basis that there had been a failure to comply with my previous directions. The Claimant consented to this application, and I approved that order on 21 April 2023 and set further case management directions to trial. That order recorded that Hegarty had consented to (and paid) a further sum of wasted costs arising from the 2 February 2023 order and had consented to a further WCO in relation to the Defendant's application concerning Dr Bavikatte's evidence. I made a WCO against Hegarty accordingly. A further hearing was listed for 6 October 2023 to hear the Defendant's strike out application.

xi) The non-compliance continued in terms of the arrangements for expert joint meetings. In short, the Claimant did not co-operate with the arrangements for the meetings, nor were his experts instructed to attend.

xii) The Defendant therefore made an application on 3 August 2023 to strike out the Claimant's claim and for an indemnity costs order against the Claimant, as well as a WCO against Hegarty.

7. On 6 October 2023, I heard the Defendant's application to strike out the Claimant's claim as a result of the aforementioned procedural failings. I was invited to find that the Claimant's conduct amounted to an abuse of process and thus that I ought to strike the claim out pursuant to CPR 3.4(2)(b) and 3.4(2)(c). Unfortunately, the Claimant was not represented at this hearing before me as, despite being on notice of the hearing, the Claimant's solicitor, Mr Rowcliffe, emailed me directly late morning on the day of the hearing with a witness statement (dated 5 October 2023) that informed me that he would not be attending the hearing and seeking an unless order instead of striking out the claim; no adjournment was sought. I promptly responded to Mr Rowcliffe to inform him that the hearing would proceed and thus the Claimant should be represented. I received no further correspondence from Mr Rowcliffe that day, nor was representation arranged. For the reasons that I gave in my *ex tempore* judgment given on that day, I allowed the Defendant's application and struck the Claimant's claim out pursuant to CPR 3.4(2)(b) and (c).

8. I made the order broadly in the terms requested by the Defendant, which included the following paragraphs:

"*2. In respect of costs:-*

(a) The Claimant shall pay the Defendant's costs of and occasioned by the Defendant's application dated 3rd August 2023 and of today on the indemnity basis, summarily assessed in the sum of £14,000.

(b) The Claimant shall pay the Defendant's costs of the action on the indemnity basis to be subject to a detailed assessment if not agreed.

3. By reason of the Order made at paragraph 1 above, the Orders for costs against the Claimant set out at paragraph 2 above may be enforced in full by the Defendant against the Claimant pursuant to CPR 44.15(1)(b).

4. By 4pm on 27 October 2023 the Claimant's solicitor shall file with the Court and serve upon the Defendant a witness statement showing cause why a Wasted Costs order against his firm should not be made in respect of the costs ordered against the Claimant as set out in paragraph 2 above. Permission for the Defendant, if so advised, to file and serve a witness statement in reply by 4pm on 10 November 2023. The issue of Showing Cause/Wasted Costs shall be reserved to Deputy Master Grimshaw (if available) and shall be determined on the papers save and unless the Court considers that a hearing to determine the matter is necessary. In such event the Court will notify the parties that a hearing is required to determine the issue of Showing Cause/Wasted Costs and a hearing will be listed thereafter."

9. Mr Rowcliffe duly filed a witness statement on 26 October 2023. He did not contest that Hegarty should pay the Defendant's costs of the Defendant's application dated 3 August 2023 and the hearing on 6 October but contended that Hegarty should not be required to pay the Defendant's costs of the action as a whole. The thrust of Mr Rowcliffe's argument seemed to be that there were significant costs incurred in respect of aspects of the claim in which the Claimant/Hegarty had been compliant, and thus it was unreasonable for Hegarty to bear those costs, which, he argued, would have been incurred in any event. Mr Rowcliffe did not address the issue that the Defendant had a costs order in his favour as a result of the entire action being struck out, which in itself was due to abuse of process in terms of the manner in which the claim had been pursued.

10. Given that Hegarty LLP, through Mr Rowcliffe, did not agree to the WCO, I listed this hearing before me to resolve the issue.

11. Hegarty LLP came off the record and the Claimant is now represented by Kinetic Law, as of 19 January 2024.

12. On or around 26 January 2024, the Defendant notified Kinetic Law that the Defendant had settled its wasted costs application against Hegarty, where Hegarty had agreed to pay the Defendant:

i) £14,000 in respect of the Defendant's claim to the sum of £14,000 in costs which the Claimant had been ordered to pay on 6 October 2023;

ii) £10,500 in respect of the Defendant's claim to its costs of its application after 6 October 2023; and

iii) £10,500 in respect of the Defendant's claim to its remaining costs of the action.

13. On 29 January 2024, the Defendant emailed me directly to inform me that the Defendant had settled their wasted costs application against Hegarty and I was invited to approve the Order that they had agreed and vacate this hearing. Kinetic Law informed me that it was seeking instructions from the Claimant and objected to the vacation of the hearing. As a result, I informed the parties by email that, in view of the Claimant's stance, the hearing would proceed (while referring to the possibility of further discussions and compromise between the parties).

14. Thus the battle lines were drawn, and the hearing proceeded before me on 7 February 2024. Given the detailed legal submissions made, there was not time to consider the matter and deliver an *ex tempore* judgment on the same day. Given the significance of this judgment to the parties and the detailed competing legal submissions, I said that I would deliver a written judgment.

The law

15. Mr Phipps, on behalf of Hegarty, set out the legal position both within his skeleton argument and his oral submissions. Mr Rauer, on behalf of the Claimant, confirmed that he did not dispute the legal principles but did dispute Hegarty's application of the same. I therefore set out the legal principles relatively briefly.

16. The wasted costs jurisdiction stems from s. 51 Senior Courts Act 1981; subsection 51(6) of that Act provides as follows:

"*…the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court*".

17. This is then enshrined within the Civil Procedure Rules at CPR 46.8 and paragraph 5 of PD46. Paragraph 5 of PD46 provides as follows:

"*…5.5. It is appropriate for the court to make a wasted costs order against a legal representative, only if –*

(a) the legal representative has acted improperly, unreasonably or negligently;

(b) the legal representative's conduct has caused a party to incur unnecessary costs, or has meant that costs incurred by a party prior to the improper, unreasonable or negligent act or omission have been wasted;

(c) it is just in all the circumstances to order the legal representative to compensate that party for the whole or part of those costs…

…5.9. On an application for a wasted costs order under Part 23 the application notice and any evidence in support must identify –

(a) what the legal representative is alleged to have done or failed to do; and

(b) the costs that the legal representative may be ordered to pay or which are sought against the legal representative".

18. Mr Rauer referred me to the case of *Brown v Bennett* [2002] 1 WLR 713, cited in the White Book 2023 at paragraph 46.8.2, in support of the proposition that a party to litigation can seek a wasted costs order against their own solicitors. This was not disputed by Mr Phipps as a general proposition.

19. Mr Phipps drew my attention to the Court of Appeal authority of *Ridehalgh v Horsefield* [1994] Ch 205, and specifically to pages 237 and 238 of that judgment, extracts of which are as follows:

"*Causation*

…the court has jurisdiction to make a wasted costs order only where the improper, unreasonable or negligent conduct complained of has caused a waste of costs and only to the extent of such wasted costs. Demonstration of a causal link is essential….

Procedure

… The overriding requirements are that any procedure must be fair and that it must be as simple and summary as fairness permits. Fairness requires that any respondent lawyer should be very clearly told what he is said to have done wrong and what is

claimed… Hearings should be measured in hours, and not in days or weeks. Judges must not reject a weapon which Parliament has intended to be used for the protection of those injured by the unjustifiable conduct of the other side's lawyers, but they must be astute to control what threatens to become a new and costly form of satellite litigation.

"Show cause"

Although Ord. 62, r. 11(4) in its present form requires that in the ordinary way the court should not make a wasted costs order without giving the legal representative "a reasonable opportunity to appear and show cause why an order should not be made," this should not be understood to mean that the burden is on the legal representative to exculpate himself. ***A wasted costs order should not be made unless the applicant satisfies the court, or the court itself is satisfied, that an order should be made. The representative is not obliged to prove that it should not.*** *But the rule clearly envisages that the representative will not be called on to reply unless an apparently strong prima facie case has been made against him and the language of the rule recognises a shift in the evidential burden...*

Discretion

It was submitted, in our view correctly, that ***the jurisdiction to make a wasted costs order is dependent at two stages on the discretion of the court*** *… The second discretion arises at the final stage. Even if the court is satisfied that a legal representative has acted improperly, unreasonably or negligently* ***and that such conduct has caused the other side to incur an identifiable sum of wasted costs****, it is not bound to make an order, but in that situation it would of course have to give sustainable reasons for exercising its discretion against making an order*" (emphasis added).

20. I was then taken to the Privy Council decision in *Harley v McDonald* [2001] 2 AC 678 and in particular the following paragraphs regarding the restrictions imposed on the wasted costs jurisdiction by virtue of its summary nature:

"*50. As a general rule allegations of breach of duty relating to the conduct of the case by a barrister or solicitor with a view to the making of a costs order should be confined strictly to questions which are apt for summary disposal by the court. Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the*

prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples. The factual basis for the exercise of the jurisdiction in such circumstances is likely to be found in facts which are within judicial knowledge because the relevant events took place in court or are facts that can easily be verified. Wasting the time of the court or an abuse of its processes which results in excessive or unnecessary cost to litigants can thus be dealt with summarily on agreed facts or after a brief inquiry if the facts are not all agreed. Scope for the making of a costs order that will compensate as well as penalise is then ***likely to be found in making an order against the practitioner that will indemnify the opposing litigant against costs incurred as a result of the breach of duty that would otherwise not be recoverable****…*

53. Their Lordships do not say that the court has no jurisdiction to make a costs order in favour of the client against his own barrister or solicitor. ***But in cases where an order to that effect is contemplated the court must take great care to confine its attention to the facts which are clearly before it or to facts relating to the conduct of the case that are immediately and easily verifiable. Allegations that may raise questions about duties owed to the client by the barrister or solicitor and the conduct of the case outside the courtroom are unlikely to be of that character. They are likely therefore to fall outside the proper scope of that inquiry. The court must bear in mind that it is not its function, in the exercise of this jurisdiction, to adjudicate on the position as between the client and his barrister or solicitor.***

54. …Bearing in mind the extra cost which an investigation of that kind may involve, and the overriding requirement of fairness to those who are at risk of being penalised, the court may well conclude that further investigation under this procedure is not appropriate. ***This need not be seen as a surrender by the court of its responsibility. The client may have other remedies. A complaint may be made to the Law Society leading to disciplinary sanctions against the barrister or solicitor, or a claim may be made by the client against the solicitor in damages for negligence****"* (emphasis added).

21. Finally, I was taken to the decision of Turner J in *B v Pendelbury,* unreported, 28 June 2002, wherein he cited the decision of Lord Woolf MR (as he then was) in *Manzanilla v Certon Property and Investments and others*, as follows*:*

"*The ability of the court to make a wasted costs order can have advantages, but it will be of no advantage* ***if it is going to result in complex proceedings which involve detailed investigation of facts, and indeed actions of dishonesty****, then it may well be that the wasted costs procedure is largely inappropriate to cover the situation, except in what would be an exceptional case*" (at [20])

Turner J continued that:

"*In reaching this conclusion, I am not insensible to the apparent paradox (conundrum as it was expressed in submission) that in a complex case in which there are complex areas of disputed fact and possible fraud which would call for decision, the legal representative may appear to be in a more comfortable position than is the case in a simpler, and almost certainly less expensive, situation where, as here the costs of deciding the issue will be reflected in some hundreds of thousands of pounds if a fair and just result is to be had, if it can, for both parties. In case that should be thought to be an anomalous result, I would say that it is in the 'nature of the beast' as has been recognised in the earlier cases*" (at [27]).

The Claimant's submissions

22. Mr Rauer's submissions on behalf of the Claimant can be summarised as follows:

i) The Claimant's claim was struck out due to repeated non-compliance with court orders, which was, in reality, the fault of Hegarty. Due to Hegarty's repeated procedural mistakes/breaches, the claim was struck out before trial. Had it not been for the poor conduct of Hegarty in handling the claim, causing repeated delays, additional hearings and an unnecessary amount of (ignored) communication from the Defendant, much if not all of those costs would not have been incurred. Further, the Claimant may have succeeded in the substantive claim and had no costs liability at all. Hegarty also failed to arrange for any representation for the Claimant at the strike out hearing.

ii) Mr Rowcliffe's statement in response to the show cause order failed to sufficiently explain why Hegarty should not bear the costs of the entire claim.

iii) In the circumstances, given the repeated breaches of court orders and the acknowledged failings by Hegarty, it is appropriate that a WCO should be made against them in respect of the entire action.

iv) The Claimant was not part of the settlement reached between the Defendant and Hegarty and, whilst not seeking to challenge the Defendant's right to settle its costs against Hegarty, he does challenge the situation where, without any reference to him, an agreement can be reached between the Defendant and Hegarty that effectively ousts the Court's jurisdiction to determine wasted costs against Hegarty and/or cements his own liability for costs pursuant to the 6 October 2023 order. It is not for the Defendant and Hegarty, the Claimant says, to determine how much should be paid in costs by the Claimant, yet this is the purported effect of the settlement that they reached. By agreeing what sum of costs was payable by Hegarty, the Defendant and Hegarty in fact agreed that the remaining costs liability was to be paid by the Claimant personally.

23. Mr Rauer set out the large number of failings on the part of Hegarty and invited me to infer from Hegarty's acceptance that they were required to pay four sums of wasted costs between June 2022 and April 2023, as well as agreeing with the Defendant to pay a further £35,000 as part of the settlement with the Defendant, that Hegarty has acknowledged that its handling of the claim has been improper and/or unreasonable and/or negligent.

Hegarty's submissions

24. Mr Phipps accepted on Hegarty's behalf that its delays in conducting the Claimant's claim were reprehensible. He did not actively contend that Hegarty's (in)actions could not be categorised as improper and/or unreasonable and/or negligent.

25. Hegarty's position can be summarised as follows:

i) Any claim by the Claimant against Hegarty in respect of the costs of the action is not an appropriate subject for the Court's summary wasted costs jurisdiction and should be made (if at all) by way of a claim for damages.

ii) Alternatively, if the Court's summary wasted costs jurisdiction is engaged (which Hegarty did not accept), then (i) the Claimant should be required to

properly articulate and quantify his case, (ii) Hegarty should be given an adequate opportunity to respond to that case, and (iii) a longer hearing for the Claimant's application was required.

iii) The Defendant had accepted sums that, it was said, fairly reflect the extent of Hegarty's potential liability under the wasted costs jurisdiction. Hegarty argues that there could be no conceivable objection to the Defendant and Hegarty having compromised their dispute in the manner set out in the draft settlement order. Furthermore, Hegarty did not contend that its settlement with the Defendant determines the extent of the Claimant's rights, but it did contend that any application which the Claimant seeks to make against Hegarty for wasted costs must comply both procedurally and substantively with the requirements that have been established by court rules and substantive caselaw.

26. In terms of the first of those arguments, Hegarty argued that the situation in this case did not fit into the wasted costs regime as explained by PD46, paragraph 5.5. Mr Phipps argued that:

i) Hegarty had not been clearly told what it is said to have done wrong and what is claimed.

ii) Section 51 of the Senior Courts Act does not deal with the creation of a costs liability, it deals with costs that have been wasted. In any event, it was not clear that the Claimant was seeking an order on the basis that Hegarty's conduct created a liability for costs because the action had been struck out.

iii) If the Claimant has incurred losses due to Hegarty's (in)actions, the Claimant can pursue a claim for professional negligence against Hegarty and that would be a more appropriate route to deal with the multifaceted issues in this case, not the summary wasted costs jurisdiction.

27. In terms of causation, Hegarty argued that the Claimant had the following insurmountable issues:

i) Hegarty's alleged delays caused the Defendant to make repeated applications to the Court in order to compel compliance with the Claimant's obligations, but the Defendant had already been compensated for that consequence.

ii) The Defendant may well in fact have saved significant costs as a result of Hegarty's alleged delays. If the Claimant's action, instead of being struck out, had proceeded to a fully contested trial, the costs which the Defendant would have incurred would have dwarfed the costs which he in fact incurred.

iii) The Claimant had not pointed to any part of the costs that were attributable to improper, unreasonable or negligent conduct on the part of Hegarty; he adopted an 'all or nothing' approach.

iv) Hegarty's delays did not cause the case to be lost or the Defendant's costs to be wasted. The Claimant cannot say that the Claimant would not have incurred the costs in any event.

28. Even if I found against them on the above issues, Mr Phipps argued that the required factual investigation in this case to determine the costs wasted would be wholly unsuited to the summary wasted costs jurisdiction, particularly in a situation where it might be alleged that the Claimant had fraudulently exaggerated his injuries. It was argued that the truth or otherwise of the allegations against the Claimant were highly material to the apportionment of responsibility between the Claimant and Hegarty and the question as to how the Court should exercise its discretion. I was asked to consider the 'counterfactual' had the delays not occurred, such as whether the claim would have been lost, struck out for some other reason, or discontinued.

29. If I was against Hegarty on this issue too, it was argued that the Court still has to exercise discretion as to whether to make a WCO and that would not be appropriate where there were issues of fundamental dishonesty in play. It was argued that making a wasted costs order in the circumstances of this case would be unfair to Hegarty, whereas dismissing the Claimant's application would not be unfair to the Claimant as he still had recourse via a professional negligence claim if he so wished.

30. Finally, if I found against Hegarty on all of the above, I was asked to adjourn the hearing to allow time for the Claimant to serve an application notice and evidence in support of his application, time for Hegarty's representatives to review the Claimant's file following the waiver of privilege and time to take instructions from Mr Rowcliffe.

Discussion

31. This is an unusual case where the Claimant is seeking a wasted costs order against his own solicitor, or that is how the argument was framed. What the Claimant was really seeking, however, was a form of indemnity against any costs that the Defendant sought to enforce directly against him, or his Litigation Friend, from Hegarty. To put it another way, the Claimant wanted the protection of a WCO to shield him, or his Litigation Friend, from the Defendant trying to enforce any costs against him/his Litigation Friend personally.

32. I say that it is an unusual situation for this key reason. Had the Defendant not settled its wasted costs application against Hegarty, the issue would have been at large before me and I would have had to determine whether a WCO should have been made at all and, if so, the extent to which Hegarty should have been liable for paying the costs of the whole action. In these circumstances, one can see why the Claimant felt it unfair that the Defendant and Hegarty could reach an agreement without resort to him, leaving him in the position that the Defendant could recover any costs not recovered from Hegarty against him personally, particularly when the Defendant was clear that it was not waiving such right.

33. In deciding whether a wasted costs order should be made, I apply the three-stage test set out in *Ridehalgh*, namely:

    i) Had the legal representative of whom complaint was made acted improperly, unreasonably and/or negligently?

    ii) If so, did such conduct cause the applicant to incur unnecessary costs?

    iii) If so, was it, in all the circumstances, just to order the legal representative to compensate the applicant for the whole or part of the relevant costs?

Had Hegarty acted improperly, unreasonably and/or negligently?

34. The Claimant submits that he overcomes this hurdle given the repeated non-compliance with court directions and the failure on Hegarty's behalf to prosecute his action for him. Mr Phipps did not seek to oppose that Hegarty's conduct met this part of the test,

conceding, as in my judgment he was correct to do, that Hegarty's repeated failures in this case were reprehensible.

35. I would have little difficulty in finding that Hegarty's conduct was "improper, unreasonable and/or negligent" or was certainly capable of being so for the purposes of meeting this element of the test. There were repeated failures on the part of Mr Rowcliffe, which seemed to be caused by his own inactions and lack of compliance with court orders. It was particularly egregious that Hegarty left the Claimant unrepresented at the final strike out hearing in October 2023. If Hegarty felt that they could no longer represent the Claimant for whatever reason, they should have come off the court record; they did not. Hegarty's agreement to pay previous WCOs supports the above views.

Did Hegarty's conduct cause the applicant (the Claimant) to incur unnecessary costs?

36. This is where the Claimant comes into difficulty, in my judgment. I rhetorically ask, what unnecessary costs did the conduct on the part of Hegarty cause the Claimant to incur? The wasted costs regime is compensatory. I accept that Hegarty's conduct caused the Defendant to incur at least some unnecessary costs, but I am not persuaded that the Claimant has incurred unnecessary costs, and no evidence has been put before me as to any such costs being incurred.

37. Mr Rauer sought to argue that the Defendant was brought into this action and that therefore all of the Defendant's costs were wasted when the action was struck out. I do not accept that submission or understand how this creates a wasted costs liability to the Claimant. The Claimant, with Hegarty's assistance, brought the Defendant into the action by starting proceedings. This does not equate to Hegarty's conduct causing the Claimant to incur unnecessary costs. Furthermore, the Defendant made an application for wasted costs against Hegarty and has compromised that application. Insofar as the Claimant is pursuing the application for wasted costs against Hegarty for the Defendant's benefit, I am far from convinced that the wasted costs regime is a mechanism for doing so and the Claimant has not satisfied me that it is.

38. What the Claimant has incurred is a liability to pay the Defendant's costs of the action rather than incurring costs himself. The Claimant's new solicitor, Mr Hanif, sought an

order that Hegarty should pay the Defendant's costs[1]. The regime under s. 51 Senior Courts Act 1981 is not designed for this purpose.

39. This does create a *potential* lacuna. Had the Defendant not settled its application for wasted costs against Hegarty, I would likely have been invited to conclude that Hegarty should have been ordered to pay the Defendant's entire costs of the action given their conduct. Had I done so, the Claimant's costs liability in terms of the Defendant would have effectively been extinguished. There must be doubt in this case, however, that I would have reached that conclusion. It seems to me that there is a good argument that the Defendant's entire costs of the action were not 'wasted' costs *per se*, they were costs that had been incurred as part of defending the legitimate action, such action then having been struck out, and thus a costs order made in the Defendant's favour. I reach this view because:

    i) The Claimant had a liability judgment against the Defendant, subject to a modest reduction for contributory negligence.

    ii) The Claimant clearly suffered some injury as a result of the accident. He was making a claim that he suffered a significant traumatic brain injury.

    iii) The Defendant would have had to incur costs to defend what was presented as a very significant claim for damages.

40. Returning to the issue before me now, to make a WCO in the Claimant's favour, I must be persuaded that Hegarty's conduct has caused the Claimant to incur unnecessary costs. I am not so persuaded that the Claimant has himself incurred unnecessary costs, let alone what those costs are. The Claimant's application is therefore dismissed.

41. Insofar as the Claimant (or his Litigation Friend) now has to pay the Defendant's remaining costs of the litigation, his recourse is to bring a professional negligence claim against Hegarty.

In the circumstances, is it just to make a wasted costs order against Hegarty?

42. If my analysis above is incorrect, I then have to move on the consider whether a WCO is just in this case.

[1] §45 of his witness statement dated 23 January 2024.

43. Whilst I am critical of Hegarty's conduct, I am not satisfied that a WCO would be just in this case even if stage two of the *Ridehalgh* test was met. I have reached this view for the following reasons.

44. The issues between the Claimant and Hegarty are not suitable for summary disposal. The authorities set out above are clear that the wasted costs jurisdiction is a summary one and one where the court is dissuaded from entering into a prolonged inquiry as to various factual matters, least of all about the relationship between, and issues that have arisen between, a claimant and his solicitor.

45. I agree with Hegarty's position that matters are not so straightforward in this case that I can deal with the matter summarily where, for example, there are issues between the Claimant and Hegarty as to why procedural steps were missed and the impact of the surveillance evidence on the running of the claim.

46. I reject the Claimant's submission that the issue of potential dishonesty on the Claimant's part is irrelevant to the matters before the Court on this application. It would create an unfairness should the Claimant escape all liability for costs if, for example, the evidence was compelling that he had been dishonest with his solicitor or indeed within the action as a whole.

47. Should the Defendant pursue the Claimant for any of the remaining costs, the Claimant could bring a claim against Hegarty for professional negligence to recover, or seek an indemnity for, the same. That would be the more appropriate route to deal with the issues between the parties, rather than through the summary wasted costs procedure. Determination of such an action will likely require careful consideration of Hegarty's file and evidence from the Claimant, his Litigation Friend and Hegarty/Mr Rowcliffe.

48. If there is to be any apportionment of blame for the strike out, fairness dictates that there ought to be a proper inquiry, and that is not suitable for summary determination through the wasted costs process.

49. For these reasons, even if the first two stages were met, I would dismiss the Claimant's application.

Conclusion

50. For the above reasons, the Claimant's application for a WCO is dismissed.

51. I invite the Claimant and Hegarty to agree an appropriate order given my judgment above. Should such an order not be agreed, I will list the matter for a further hearing before me to deal with any outstanding issues if necessary.