NEUTRAL CITATION NUMBER: [2020] EWHC 1119 (QB)
CLAIM NO.: HQ17P01696

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Before:
MASTER MCCLOUD

Between:

JASON TULLY **Claimant**

- and -

(1) EXTERION MEDIA (UK) LIMITED (IN LIQUIDATION)
(2) LONDON UNDERGROUND LIMITED **Defendants**

Marcus Grant (instructed by Slater and Gordon UK Limited) for the Claimant
Andrew Davis (instructed by Clyde & Co LLP and Kennedys Law LLP) for the Defendants
Hearing dates: 13 June 2019 & 12 March 2020

JUDGMENT

MASTER MCCLOUD:

1. Can a Claimant who has permission to '*further exchange … expert medical reports … limited to issues arising from … surveillance footage and the Claimant's witness statement*', in circumstances such as those which apply in this case, proceed to instruct their expert to conduct a re-examination of the Claimant and produce an updating report which deals generally with the Claimant's medical position as well as addressing the surveillance footage and witness statement? Or is the Claimant limited to simply producing a report limited to the issues arising from the surveillance evidence and the Claimant's explanatory statement?

2. I will need to unpack the above somewhat by reference to the specific sequence of events in

this case. It is an important disagreement because at the heart of it is the general practice in personal injury cases that once a party has finally pinned him- or herself down evidentially, the Defendant can expect to be able then to serve any covert surveillance material in the anticipation that what will happen is, usually, a process mainly focussed on the Claimant's explanation for what the footage shows and an indication whether the experts' views have changed as a result and in what ways.

3. The Claimant is normally entitled to say that '*things are not always what they seem*', to resurrect Phaedrus, in response to the footage. Yet speaking from experience, much of the time surveillance footage is very much how it seems, which is to say equivocal. It is seldom '*the Rockford Files*' and more often closer to '*slow TV*'. Then again sometimes it is indeed conclusive. I have not needed to view it in this case. Frequently such films show shopping trips on foot: this I understand is an example of that genre.

4. Before I address the issues, I simply mention CPR 35.1 (expert evidence restricted to that which is reasonably required), CPR 35.3 (that it is the duty of experts to help the court on matters within their expertise), CPR 35.4(1) (that no party may call an expert or put in evidence an expert's report without the court's permission), CPR 35.13 (a party who fails to disclose an expert's report may not use it without permission), and CPR 35.16(1) (by which experts may make written requests to the court for directions for the purpose of assisting them in carrying out their functions). I also of course mention the Overriding Objective set out in CPR Part 1.

The case.

5. Mr Tully claims to have sustained injuries caused by an accident at work whilst putting up advertising materials on the London Underground. Nothing turns on the detail of that save that his injuries led to directions in this personal injury claim which relate to experts in the fields of Orthopaedics and Psychiatry and that the issues of liability and of quantum are live and that the Defendants' position is that the Claimant either did not sustain injuries as claimed or that they were not as serious as claimed.

6. The Defendant covertly obtained video footage said to show that the Claimant is far more mobile than he claims. He claims he needs to walk with a stick or crutches, and I have quoted below the extent to which that was what he told experts, to the effect that he could not walk more than a few steps without a crutch or stick.

The orders.

7. By my CCMC order of 26 April 2018 I directed that witness statements of fact were to be served by 9 August 2018, and that expert evidence in the above fields was to be served by both sides by way of simultaneous exchange by 28 September that year. After allowing for joint statements by the experts I timetabled a further CCMC to consider any additional expertise in other fields. The order permitted reports from both sides in the above fields but in the case of Mr Unwin (Claimant's Orthopaedic expert) it provided that 'any updated evidence' from him was to be exchanged by that date since he had provided an initial report the previous year.

8. The date for exchange of reports passed. The parties duly served their reports save that the Claimant elected not to produce an updated report from Mr Unwin, and the evidence before me is to the effect that the Claimant had informed his solicitors that his condition had not changed since the first report, and the solicitors appear to have taken the view that no update was needed. That is a surprising stance to take given that Mr Unwin's report was long in the tooth and that not only would there have been up to date medical notes and records which he had not seen but also the Claimant himself had made his witness statement. Furthermore the decision not to obtain such an update meant that the Defendant's first and only set of reports were more up to date than the Claimant's and that is not an ideal position for a party ahead of a joint expert meeting. However that was the position and hence time would have stopped for

expert reports on 29 September 2018, with C and D each having one report apiece in the two expert fields permitted save only that an agreed extension was granted to 3 October 2018. The Defendant's expert Orthopaedic surgeon Mr Cobb disagreed with Mr Unwin's diagnosis.

9. On 4 October 2018, once experts' reports and witness statements had been exchanged the Defendant served surveillance footage and made it clear that it was adopting the position that this showed that the injuries if any were not as claimed in the witness statement. I have not needed to view the footage but it is clear from the Claimant's own statement that it shows him walking without support on short local shopping trips (he says he is nonetheless limping but that is in dispute). Neither Mr Unwin nor Mr Cobb had seen or been aware of the footage.

10. I need not go into details since it is not disputed materially but adopting the approach of serving the surveillance material in this manner is appropriate and the Defendant cannot on these facts be said to be engaging in a late ambush, or for example failing in disclosure duties. See, eg Douglas v O'Neill [2011] EWHC 601 (QB). The usual procedure is that a Claimant is served with surveillance material, if there is any to be relied on, once he or she has first clearly pinned his/her colours to the mast by way of factual and expert evidence (where the expert evidence is of a sort which might be affected by, eg, malingering).

11. At that date, 4 October, the follow-up CCMC to which I have referred in para. 4 above was imminent and was listed for 19 October 2018. It had been intended to be used for considering further fields of expertise and other matters.

12. The fact that surveillance evidence had been served changed matters so that the first, and perfectly usual, thing to ensure was that the Claimant having now seen the surveillance, had a fair opportunity to respond to it by way of an extra witness statement with his account of what it showed and so that any relevant experts could be shown the footage and the Claimant's explanatory statement and asked to comment on the issues raised by those in relation to the content of their reports which had been written without knowledge of it.

13. Sensibly the parties agreed a consent order by which I vacated the CCMC on terms that by 4pm on 9 November 2018 the Claimant was to serve a statement responding to the surveillance footage and that there was to be a further exchange of expert reports in both specialisms on both sides "*limited to issues arising from the surveillance footage and the Claimant's witness statement*" by 4pm on 14 December 2018. Joint meeting was then to take place, joint reports and a further CCMC.

14. The claimant served his explanatory statement which I need not say much about save that it indicates for example that he is not a sophisticated man, that he had been using a crutch all the time when he first saw Mr Unwin (his expert) but that he accepted that he '*haven't sat down … and read every word of every document prepared by my solicitor for me to sign*' and that he understands the need to explain why the film shows him walking without a crutch. He accepts he did not mention to the Defendant's expert that he sometimes did walk without a crutch and says he is not a man who is '*particularly precise with words*'. In fact looking at the Defendants' orthopaedic report by Mr Cobb, it does not appear that he simply did not mention he sometimes walks without crutches but rather that the account given by Mr Cobb of what he was told by the Claimant was that *"… the knee feels weak, unstable and would give way and cause him to fall if he did not use the crutch and walk with the knee stiffly straight"*, and "*He said he can manage only a few steps without a stick*".

15. The next step was to be a report by the experts which, as directed, was to be '*limited to issues arising from the surveillance footage and the Claimant's witness statement'*. It will be recalled that permission had been given before service of the surveillance for an updated report from Mr Unwin, the claimant's orthopaedic expert but the decision had been taken not to do so and the time had expired.

Contact with the Expert for the Claimant.

16. What happened next was the focus of evidence from the solicitor for the Claimant, Mr Denton, who (in his application for relief from sanctions) says:

"*Prior to expiry of the deadline for further evidence on 28 September 2018, I considered whether I required the Claimant to be re-examined by Mr Unwin in accordance with the original directions order and took the view that because Mr Unwin had reached a firm diagnosis and that as far as I was concerned, the Claimant's situation had stayed more or less the same … I did not see any value in having the Claimant re-examined*".

Notably the Claimant's solicitor made that decision without consulting Mr Unwin as to whether (given the age of his original report and the availability of for example the witness statements in the case) he might have wanted to update his report.

There are then in evidence various complaints that the surveillance was served without warning, etc, which I attach no weight to and which seem to be a misunderstanding of the correct approach in relation to such material, which was handled appropriately by the Defendants.

He then says he was "*faced with a difficult decision to make*" because the CCMC on 19 October 2018 would have limited benefit until the Claimant had had opportunity to respond to the surveillance. Hence the consent order referred to above was agreed by which the parties were permitted to serve new reports limited to the issues arising from the surveillance and the Claimant was permitted to serve an explanatory statement to be seen by the experts.

So far, so conventional. This is how one would expect matters to proceed in the circumstances. There was no argument or suggestion, now that the deadline for doing so had expired, that the Claimant would need to re-open the permission to obtain an updating report on the Claimant's medical condition of the sort which had been allowed in the CCMC order with a deadline of 28 September 2018.

17. It is in relation to what happened next that the roots of the dispute arise. Mr Denton explains that "*Shortly after the sealed consent order was signed, I contacted Mr Unwin to inform him that the Defendants had served surveillance evidence and medical evidence. I advised him that the surveillance evidence revealed that the Claimant was moving more freely than he had done at the time of Mr Unwin's examination in March 2017 and that Mr Cobb felt that Mr Unwin's diagnosis… was either wrong, or alternatively the Claimant had made a full recovery …*"

He continues to then say that Mr Unwin "*told me emphatically that he would need to re-examine the knee and review up to date radiology because the diagnosis could be confirmed or refused by reference to both; he explained that was necessary for him to be able to discharge his duty to the Court.*"

18. Mr Unwin has produced a letter to Mr Denton in which he states that he was (a) given the surveillance evidence, (b) given a copy of Mr Cobb's report and (c) that he was contacted by Mr Denton to ask whether he "*was able to adequately comment on both the surveillance evidence and also the medico-legal evidence of Mr Cobb.*" and that "*I confirm that I replied that because of the significant discrepancy between the objective clinical findings at the time of my first report in March 2017, and the findings of the surveillance evidence and Mr Cobb's objective findings, that I was not able to do so without further interview and examination of Mr Tully, and could therefore not confirm or refute the Defendant* [sic] *evidence without further review and examination of Mr Tully, and thus could not discharge my duties to the Court without a further assessment.*"

19. Mr Unwin then met Mr Tully, examined him, and produced an updating report which addressed the diagnosis given by Mr Cobb, and expressed views on the surveillance and the Claimant's

account.

20. Mr Unwin's new report was then provided to Dr Howard, the psychiatric expert for the Claimant.

The Dispute

21. The Defendants say that the Claimant is in breach of my directions order by which I gave permission to serve new reports limited to the issues raised in the surveillance footage and the (explanatory) witness statement of the Claimant. They say that what the Claimant has achieved is a new, fully updating report of the kind which had been permitted under my first case management order but which the Claimant had deliberately elected not to obtain at the time (allowing the permission to lapse). They say that the provision to Mr Unwin of the surveillance evidence ought not to have taken place (and even if it had been appropriate to allow a complete re-examination and report it ought not to have been supplied beforehand) and also that the approach taken effectively manages to gain for the Claimant a sequential exchange of material whereby Mr Cobb's report (made in ignorance of the surveillance) was taken into account by Mr Unwin when, in fact, my original order had been for simultaneous exchange. As we have seen, that right was not made use of by the Claimant in time for the original deadline and the Defendants only thereafter served the footage. The Claimant by his approach is said to be conflating the right to have obtained a full update (as long as it was by the specified date) with the right to obtain a later report limited to the surveillance issues and is mis-applying the concept of the duty of an expert to assist the court, so as to expand it to enable a solicitor to serve material and seek a wider update than permitted.

22. Furthermore now that the report of Mr Unwin has been supplied to Mr Howard and taken into account the situation is, says the Defendant, that his report, too, is tainted. The permission for the new reports was limited and the reports obtained exceed that limit.

23. The Defendants have declined to proceed with the preparation of joint expert reports until the issues are resolved over the alleged breach, and the technical form of the first application before me is an application by the Claimant for an unless order requiring that to be got on with. That was subsequently bolstered by an application for relief from sanctions in the event that the Claimant is found to be in breach of my order (which is denied).

24. The Claimant's position is that it was right and proper to have instructed Mr Unwin to re-examine and produce the new updating report given the passage of time since the first report. The order has not been breached. The Claimant had had no advance notice of the surveillance, there had been no reason for the Claimant's solicitor to anticipate that Mr Cobb was going to disagree with Mr Unwin and hence no reason to have made use of the original permission to serve a full updating report. The Claimant's solicitor says he has never had a Defendant tell him that he cannot go back to his expert and to prohibit the expert from re-examining the client if he wants to. The Consent order (with permission to obtain expert evidence limited to surveillance) had, per the Claimant's skeleton, been agreed 'in some haste', and in any event the terms of the order did not expressly exclude a re-examination. This should not, it was argued, be seen as a 'relief from sanctions' situation but is a case calling for a collaborative approach. The obtaining of the updating report was to enable the expert to comply with his duty to the court and to ensure a level playing field, and it would not be right to dictate to an expert whether he should examine the Claimant if that was what he said he needed to do to comply with his duty to the court.

25. In a supplemental skeleton for the Claimant I was referred to two first instance decisions of Masters (Jebaraj v Esure, unrep, and Mustard v Flower, unrep., plus one Court of Appeal decision from 2000 namely Walker v Daniels [2000] 1 WLR 1382). In my judgment neither of the

first instance decisions assist me and are illustrations of how two Masters exercised discretion on different facts, and the Court of Appeal Case of *Walker* related to an (allowed) application to instruct a new expert where a party was unhappy with their original one (which is far from the facts here). The principle was said there to be that there was a presumption that a party should be permitted to commission a second expert report if they were disaffected with the first provided the reasons were more than merely fanciful. The obligation, per the Overriding Objective was to deal with cases justly.

26. I do not feel that *Walker v Daniels* assists here beyond the point that the Overriding Objective says what it says. This is not a case of a party wanting a new expert and being disaffected. Rather this is a case of a party having not made use of a right to obtain an updated report from an expert in which it has confidence and arguing that so as to retain confidence the Claimant wants (after the event) to obtain the updated report which he had originally elected not to obtain. If such an approach were held generally then there would be widespread re-instruction of experts 'ad hoc' without the court controlling how much expert evidence is appropriate and the timing of when it has to be obtained and on what issues.

Decision

27. I shall deal here with the basic issue. Was there a breach of my order? Yes in my view clearly so. The way in which the case had been managed was in very standard form namely that the parties could obtain expert evidence after service of statements (and in Mr Unwin's case an updated expert report by him). There was a deadline. The deadline passed and the Claimant decided not to make use of that permission. It was not a mistake, it was a deliberate choice for the reasons given in evidence to me. Thereafter once the evidence had been 'pinned down' the Defendant served surveillance material and a very standard type of order was made for experts to opine further but limited to the issues raised by the surveillance and on the basis of an explanatory statement from the Claimant.

28. It would have been perfectly possible, if the Claimant had at that stage reconsidered whether to seek an update from Mr Unwin, to have asked this court at the CCMC and to have explained why none had been sought in time, and hope for relief. Thereafter if granted the expert could then, after reporting by way of update, be asked to report further on surveillance. That is what Mr Cobb had to do – he was properly kept in the dark about the surveillance at the time he served his report.

29. The choice by the Claimant to go back to Mr Unwin and to decide, without the court being asked, to effectively modify the limited permission so as to allow a full update and to address the evidence of Mr Cobb not only meant that the material obtained went well beyond the permission granted but also that the playing field was rendered uneven: it became tilted towards the Claimant who has obtained Mr Unwin's update on the basis not merely of the surveillance but on the basis of re-examination, speaking to the claimant, and also having a copy of Mr Cobb's report which would not otherwise have been given to Mr Unwin at the point where the original updating permission was in force (since exchange was to be simultaneous). I do not think in any way that this was intentionally tactical but that is the effect.

30. The correct approach in my judgment would have been (if the claimant wanted to re-open the right to have a full update from Mr Unwin) to come to the CCMC, seek relief so as to try to get permission for the full update out of time, and to do so without having informed Mr Unwin about the content of the surveillance. Relief may or may not have been granted but one would not have found oneself in the position where the horses had left the stable and the expert had already seen and reported on not merely the surveillance but also the position generally.

31. Fairness would mean that (if relief was granted) it would only have been once Mr Unwin reported (without sight of Mr Cobb's report or the surveillance) that Mr Unwin would then be asked to report in the light of the surveillance. I do not accept that the notion of the obligation

on an expert to assist the court extends to mean that a solicitor can effectively expand the scope of an order for a report simply because the expert wishes to.

32. The expert has the right under the CPR to ask the court for directions if he or she wants, and in this case also the CCMC was imminent and the consent order need not have been signed if it was hoped to have a wider report (in which case the court would have managed whether and how that was to happen). Disclosure of the report of Mr Unwin to Dr Howard effectively also means in my judgment that his report was produced on the basis of instructions which exceed those allowed by my limited permission in relation to the implications of the surveillance. Permission was therefore not given for the reports obtained.

Relief from sanctions

33. Relief from sanctions has been sought in the event that I am of the view that the order was breached, as I am. The nature of the breach is ambiguous in the application, and it became apparent that the Claimant would like me both to consider relief from the *original* failure to serve a full update by the deadline in September 2018 *and* in the alternative relief against the fact that the report served under my limited permission in respect of surveillance was not compliant with the limits of the order.

34. I need not summarise either *Mitchell* or the *Denton* case the names of which are by now as ingrained passively in the paintwork of E117 as the smoke of long departed past Masters preceding me. Was there a breach? Yes. The breach is that the report of Mr Unwin exceeds the permission which I granted after the service of the surveillance footage. The omission to serve a full updating report back in September 2018 is not in my view a breach, it is simply that permission lapsed once the time had expired and the rules do not permit expert reports without permission. Nonetheless rather as is the case with the CPR rules relating to witness statements, service of a late statement requires consideration of much the same factors as one would consider on a relief application.

35. Was the breach trivial or not material? No. Once the full updated Unwin report was commissioned the impact on fairness was considerable. The effect of what occurred was to achieve sequential service and to ensure that the examination of the Claimant took place with knowledge of the surveillance (which self-evidently would not have been the case if the update had been obtained, in accordance with permission in September 2018). The Defendant is entitled to have relied on the Claimant having made his evidential and expert case clear and final, prior to the revealing of the surveillance footage, as was the plain purpose of the directions made. After surveillance is served it might sometimes be appropriate for a re-examination to take place, if permission is sought and obtained for it after the surveillance is revealed, but in that event *firstly* the court retains control (which it lost here) and *secondly* the product of such a new examination is able to be compared with any substantive update prior to the surveillance disclosure (which is now not possible). Mr Howard's report, based on instructions containing impermissible material is itself also served in breach (by being out of scope of the order) and that too is a serious breach.

36. Was there good reason for the breach? No. I accept that Mr Denton acted in the way he felt was correct and there was nothing tactical or underhand here, but it was simply incorrect in my view to have proceeded with the substantive instruction to Mr Unwin in this form without returning to court to explore what if any late permission could be granted and how, prior to any mention of surveillance to the expert. The original decision not to obtain a substantive update before the surveillance was plainly not a mistake and was a deliberate choice.

37. Should relief be granted in all the circumstances? The impact on fairness here is in my view substantial for reasons already stated, as is the use of resources which we have had to deploy to consider the issues. The ultimate trial timetable will be delayed. It would be unfair to the Defendant to allow the reports of Mr Unwin and Dr Howard to be relied upon as they are in all

the circumstances. I would be prepared to hear argument over whether some order such as allowing solely the paragraphs of Mr Unwin's report which cover the surveillance to stand since they are quite separate parts, and to consider allowing a new psychiatrist to be instructed in place of Dr Howard, without knowledge of the surveillance. But there may be arguments to the contrary and I have not heard specific points on that. I therefore refuse both applications in their fullest sense but am prepared to consider limited relief as suggested in this paragraph.

38. I invite the parties to agree an order in default of which I shall hand down at a hearing and consideration can be given to whether any limited form of permission might be granted such as I have canvassed above.

MASTER MCCLOUD

12/3/2020