Case No: QB-2017-002196

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

[2022] EWHC 738 (QB)

Royal Courts of Justice
Strand
London WC2A 2LL

BEFORE:

MASTER THORNETT

Hearing dates: 17 and 23 March 2022

BETWEEN:

CDE
(a protected party, by his litigation friend, FGH)

Claimant

- and -

BUCKINGHAMSHIRE COUNTY COUNCIL

Defendants

Mr Burton QC (instructed by Instalaw) appeared on behalf of the Claimant
Miss Ayres (instructed by DWF Solicitors) appeared on behalf of the Defendant

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JUDGMENT

1. This is the reserved judgment on the Claimant's Application dated 8 February 2022 which seeks an extension of time until 31 March 2021 to serve his Particulars of Claim. It follows a full hearing before me on 23 March 2022 following a 30-minute hearing before me on 17 March 2022 when the Application had been put in the Urgent and Short List.

2. The period of extension sought follows voluntary extensions through to expiration on 14 September 2021. The February 2022 Application is therefore late, by some considerable period of time. Where Particulars of Claim are not served in time in accordance with CPR 7.4, an application may be made to the court for an extension of time. Where such an application is made before the time for service has passed, the overriding objective will apply. Where such an application is made after the time for service has passed the relief from sanctions framework under CPR 3.9 will apply (*Price*

v Price [2003] 3 All E.R. 911). So, the Application must follow the familiar guidance given in *Denton v TH White Ltd* [2014] EWCA Civ 906.

3. The Claimant was born in Iran on 21 March 1996 and came to the United Kingdom as an unaccompanied child seeking asylum. The Defendant council began looking after him in 2010. The Claimant has numerous psychological and psychiatric disorders and contends that the Defendant, in failing in its duties to him in various respects over the course of several years, has caused or aggravated his mental health as well as leading him to follow a less successful lifestyle.

4. The claim was issued on 23 March 2017, just before the Claimant's 21st birthday, said by the Claimant so as to preserve his position on limitation. The Claim Form features a generally endorsed claim for personal injury and for damages under the Human Rights Act 1998. However, since issue the Claimant's position has been that he has remained unable to formulate his claim, hence why he had requested and been granted numerous extensions of time in which to serve the Claim Form; and, thereafter, to serve his Particulars of Claim.

   Between 14 July 2017 and 12 September 2019 the Claimant made six applications (without notice) for extensions of the time limited for serving the Claim Form that would otherwise would have expired on 20 July 2017, pursuant to CPR 7.5(1). A seventh application for an extension of the time limited for serving the claim form was made (again without notice) on 13 January 2020. As the Assigned Master, that Application was again referred to me for directions. I had responded on 22 January 2020 remarking that it seemed '*unreasonable to extend time yet further, as distinct from now serving the Claim Form but seeking an extension of time for service of Particulars of Claim and thus pleadings to follow'*.

5. That suggestion was not directly taken up by the Claimant, for reasons never explained. Instead, nearly a month later, an eighth application was made by the Claimant on 21 February 2020 to extend time for service of the Particulars of Claim until 2 September 2020. On 12 March 2020 I asked the Claimant's solicitors to confirm if this application was opposed. The Claimant's solicitors never replied to the court.

6. The Defendant opposed the Applications and instead sought to strike out the claim as an abuse of process. A Witness Statement dated 1 October 2020 from Ms Rebecca Hill, a solicitor from the Claimant's first firm of solicitors acting, confirmed that the proceedings had been issued on a "protective basis" and that there had been numerous other proceedings on the Claimant's behalf in the pre-issue period: for example, in the Administrative Court and the Court of Protection. Ms Hill explained that in April 2020 her firm had approached numerous independent social workers and psychiatrists but without much progress having been achieved. As such, as at the date of her statement, the Claimant was [Para 57] still in the process of seeking expert evidence on causation as to whether the Claimant's psychiatric injury had been caused or contributed to by the Defendant's conduct. A psychiatrist, Dr Obuya, was due to assess the Claimant in early October 2020. Similarly, they had identified two proposed Independent Social

Workers ["ISW"] who might be able to produce reports on either "18 January 2021" or "early spring next year". She therefore estimated [Para 59] that "we will have obtained expert evidence and considered the outstanding disclosure within six months". Referring to delays and errors in prosecuting the claim to that date, Ms Hill apologised [Para 60] "for the delays and procedural irregularities in this case……I am personally making every effort to try and rectify these mistakes and to ensure that these oversights are not repeated in this case..".

7. Such were the issues as came before Mr Justice Lavender on 15 October 2020. I note how at an earlier hearing on 24 September 2020, when the Defendant's strike-out Application had come before him, he had described the Claimant then as "now in the last chance saloon".

8. I do not propose to repeat the multiplicity of Applications and outstanding procedural issues then before the court in October 2020 and as set out in Mr Justice Lavender's reserved judgment, save to note [Para 25 in the judgment] that the court confirmed that the Defendant had been "quite right to bring this case to the attention of the court". In terms of procedure, Lavender J [Para 32] noted that the Claimant had sought numerous extensions of time to dates that had expired before the Applications came before the court. Mr Justice Lavender observed "It seems to me that in such circumstances it is open to the court to grant longer extensions than were originally sought".

   The judge accepted Counsel for the Claimant's submission that "drafting of the Particulars of Claim will be a substantial exercise, since it requires collating and considering a substantial quantity of medical and other records which have been gathered from different sources, obtaining instructions thereon from a claimant with mental health problems and obtaining a report from an independent social worker".

   Mindful of such requirements, Mr Justice Lavender extended time for service of the Particulars of Claim "as requested" to 31 March 2021. He declined the Defendant's invitation for this to be on an "Unless" basis but added "since it is a substantial extension, I will order that any application for further extension of time must be made by 17 March 2021".

9. It was, or at least ought to have been, plain to the Litigation Friend and those representing the Claimant following this judgment that:

   (i) The court had granted a "substantial" extension in the full expectation, based upon the representations and apologies made by those representing the Claimant to that date, that Particulars of Claim would be served by March 2021;
   (ii) The substantial extension provided recognised the work that had to be done;
   (iii) That whilst an "unless" order had not been made, the date for any extension application had to be made by the date specified. Further, that date was some weeks before the due date for the Particulars of Claim. So, it followed, the court obviously was not treating the proposition of further extensions of time lightly or in some way fluid or open-ended. The merits of any such Application would

have to be made out prospectively and not in hindsight after the due date had passed;

(iv) As is entirely consistent with ordinary practice in any event, and indeed as had been reflected by my similar observation in January 2020, nine months or so before the reserved judgment, an application for an extension of time can validly seek a further period of time to that stipulated [or even different relief if still in the context of the Application overall], providing the proposed variation to the Application is clear. In other words, expiration of the time sought in a completed N244 or featured in a draft Order does not necessitate a fresh N244 Application.

10. The Claimant did not serve his Particulars of Claim by 31 March 2021, nor any psychiatric report arising from a medical consultation apparently arranged back in early October 2020.

    On the last day directed for seeking any further extension, the Claimant (now having instructed new solicitors) applied for an extension for service of the Particulars of Claim until 30 June 2021. The N244 explained that the new firm had seen the Claimant's Legal Aid funding transferred just before Christmas and that an application to the Legal Aid Agency for permission to instruct an Independent Social Worker ["ISW"] had been made on 13 January 2021. That request had been refused on 10 February but allowed on appeal on 11 March. Ms Heath, the solicitor who signed the Statement of Truth on the N244, commented "The ISW has confirmed he is able to file a report by the end of May". She added "The Claimant has made every effort to progress his case since it was transferred but it has not been possible due to the lack of legal aid funding to instruct an ISW".

11. The Defendant agreed to this Application. However, it is relevant to point out that when a party agrees to a direction or relief claimed in an Application, this does not necessarily mean they agree to each and every fact set out by the Applicant in support. They agree only to the direction or relief in question. The feature of agreement does not expunge pertinent observations that might subsequently arise about the state of preparation of a claim as at the date of an earlier Application but as seem still relevant as at the date of a subsequent Application. Put more simply, I do not accept that agreement to an Application means the court cannot have regard to what was being said and maintained at the time.

12. Despite the Defendant's agreement, therefore, several observations can, and I am satisfied still must, be made about the preparation of claim between March 2021, when the Particulars of Claim was originally expected, and September 2021 when the last consensual extension expired. Such observations remain highly relevant in the context of the Claimant's present February 2022 Application.

13. First, the transfer of instructions to a new firm does not cause time to start afresh: whether generally or, more critically, in terms of court direction. It therefore remains unanswered why an ISW, and funding for an ISW, were not in hand by the date of transfer to the new firm, given the very clear representations by the previous firm that

such steps *were* possible and *were* in hand. Or, similarly, if some of those steps were in hand, to what extent they were as at the date of the transfer of new instructions. Had the March 2021 Application been opposed, I anticipate these would have been questions raised at the hearing. The failure of the Claimant to obtain such a report for many months thereafter revives those questions, irrespective of a new firm of solicitors having been instructed in early 2021.

14. Secondly, the need to instruct an ISW and psychiatrist as well as "outstanding disclosure" as form the basis of explanation in the February 2022 Application are by no means new. It is clear from Ms Hill that they preceded the October 2020 hearing before Lavender J by several months and indeed were emphasised as the basis for needing further time. The clock reflecting difficulties with obtaining this evidence therefore had started to run well before October 2020.

15. Thirdly, the Claimant's undeniable personal disabilities and limitations do not suspend or mollify the strict requirements of a court timetable that had been set very much having taken in account the difficulty of taking instructions from the Claimant. Mr Justice Lavender's judgment makes express reference to accepting the Claimant's counsel's submissions as to the range of difficulties presented. At the risk of stating the obvious, it is precisely in order to avoid a Protected Party's disability undermining the just progress of their claim that CPR 21 obliges them to be represented by a Litigation Friend. A Protected Party's disability will inevitably create particular demands and requirements. However, delay in satisfying those will lie in the hands of their Litigation Friend and legal representatives.

16. Fourthly, neglect, if not actionable negligence, of a previous firm of solicitors cannot simply be implied as a further reason for treating the procedural clock as if starting again upon the instruction of a new firm. Were neglect (or something more) have been intended as an explanation and justification for the 14 March 2021 extension request, then this should have been made clear and transparent and not left as an implied gentle undercurrent. I note the Application is, however, entirely silent in this regard. The reader simply cannot tell where fault and delay might have first arisen in circumstances when substantial progress was by then expected. This lack of clarity does not assist the current Application. The rational and objective conclusion has to be simply that "general" delay had set in by March 2021, despite being contrary to the predicted course before Lavender J. On this basis, delay was and remained as delay, regardless where the blame might be placed.

17. The Particulars of Claim were not served by 30 June 2021, despite the agreement. In the second post-Lavender J Application, issued at the eleventh hour on 29 June 2021, the N244 was unsupported by any reasoned endorsement but now sought extension of time for the Particulars of Claim to 31 August 2021. In a supporting witness statement, Ms Heath explained that funding for the instruction of an ISW had been achieved on 16 March 2021. However, they then had had to prepare the documents for instructing the expert and "liaise with the Litigation Friend who was in India with limited access

to emails. The expert was formally instructed on 14 April 2021. It was not possible to instruct him prior to this due to the above".

18. I pause at this point to observe that nearly one month seems a very relaxed period of time to have elapsed between funding and instruction of the ISW, given the obvious urgency and stringency of approach that was now required. I do not follow why much of that period should have been taken up by collating documents and the letter of instruction if, as one is entitled to assume, a full stock take of the claim had taken place upon transfer earlier that year. Ms Hill had, after all, mentioned "outstanding disclosure" at least six months previously.

    Nonetheless, if it would still be argued now that "collating documents" took a month before the ISW could be instructed, I do not follow why (a point to which I will deal shortly) outstanding disclosure problems in instructing the ISW again arose later in 2021.

19. I also pause to observe that the reference to the Litigation Friend's unavailability is not a reason that ought to be relied upon unless for very good reason; and still less be relied upon on more than one occasion. A Litigation Friend has a duty to both the claimant and the court to ensure that the process of the claimant's claim is not delayed by their own affairs or by their choice not to make themselves reasonably available. Not being in regular e-mail contact during such a critical point in the claim does not seem excusable.

20. In June 2021, Ms Heath went on to explain that the ISW had indicated a report would be available within eight weeks following instruction, so a report had been anticipated by about 9 June 2021. However, on 16 June 2021 the ISW had explained how he had experienced personal difficulties and was "unable to file" his report by the due date. Ms Heath produced an e-mail from him explaining how he was having to "limit" his time at his PC owing to an eye problem, secondly that his wife had had to return to New Zealand and, thirdly, that he was co-ordinating the care of his elderly father. He therefore proposed getting the report "by the end of July".

21. I question here in what state, if any, the draft report had reached in the intervening eight weeks or so following instruction in April 2021. Significantly, the expert does not state that he had been unable to work at all, either by reason of his eye condition or organising care for his father. A reasonable impression therefore is that some work must have been in hand by the time of his 16 June 2021 e-mail. Similar observations arise in respect of the [in the pressing context of the claim] generous request for another eight or so weeks. Accordingly, I do not accept it was – at least without more – reasonable for the Claimant's solicitors to have accepted without scrutiny the delay, both as already caused and as further requested by the expert. Solicitors are not obliged to accept at face value everything said about professional difficulties of either experts or counsel.

    Given the original extension to March 2021 had been described as "substantial", urgent and careful thought should have been given to whether the Claimant could afford to

wait until a full CPR 35 compliant report was available. It is trite to say that experts can frequently spend a greater part of their time concluding and formulating their report for Part 35 purposes than in reaching their initial conclusions. There is much preparatory and presentational distinction between an expert assisting a party to (for example) draft Particulars of Claim and producing a report upon which they will be cross-examined. There was, I am satisfied, a reasonable option at that stage for the Claimant's representative to assess the extent to which the expert could still provide a sufficient outline of their opinion to enable Particulars of Claim to be formulated. Such exploration could have taken place between the expert and counsel at a conference convened during the several weeks that were instead allowed to pass whilst awaiting the preparation of a "full" written report.

22. Ms Heath, in support of the 29 June 2021 Application, explained that the 31 August 2021 extension date was also to reflect that "counsel is on leave for the first two weeks in August and it will therefore not be possible for him to produce the POCs until 31 August. We are unable to instruct another counsel to prepare the POCs due to the complicated history and excessive documentation".

23. Unavailability of counsel is an occupational hazard for any litigation solicitor, especially if counsel has been retained from previous (and, as here, substantial) previous hearings. However, it is precisely because of that that advanced planning, liaison and strategy must be implemented. The Claimant's firm had an obligation to explore the earliest date the ISW could provide sufficient information to counsel to draft the Particulars [which, I reiterate, did not necessarily mean a "full" Part 35 report]. It follows the firm had an obligation to check Counsel's availability as part of that planning, especially when the summer holiday period was approaching. If despite such advance planning the exercise seemed unworkable, then serious consideration had to be given to whether one or both individuals may have to give way to others. I disagree with the impression given in this statement that matters were out of the hands of the Claimant's solicitors, who were obliged to wait until the expert felt he had time to conclude a full report and counsel had then returned from holiday.

24. Nonetheless, in a way that marks considerable forbearance and co-operation on its part, the Defendant again agreed to this further requested extension. A Consent Order was presented in support of the 29 June 2021 Application.

25. Even if the Defendant could be said to have agreed to the underlying facts of the June 2021 Application, then the Defendant must have done so in the wholly reasonable expectation that 31 August 2021 would see compliance. However, no Particulars of Claim were served on 31 August 2021.

26. In the Application dated 26 August 2021, being the third post-Lavender J application for an extension time, Ms Heath set out reasons for now seeking until 14 September 2021. The timing of this Application strikes me as unimpressive as well as the reasoning itself being weak. This Application stated that "Since the previous application was made, the expert contacted us and informed us that his father had passed away on 17

July 2021. He explained that, as a result, the remainder of July and early August would be taken up with sorting out the funeral and associated matters. He was therefore unable to prepare his report on time which meant the Claimant has been unable to finalise his POCs in time for filing on 31st August 2021. The expert has indicated that the report will be prepared by the end of August 2021."

27. Whilst sympathy must be expressed for the proposed expert's loss, it does not seem implicit that the expert would have been entirely unable to continue working on a "report" [parenthesis added to qualify the justification for a full report] during the period following his bereavement in mid-July. He had been instructed as far back as March 2021, after all. Whilst that period may well have been considered convenient and appropriate for him personally, delay was not the Claimant's prerogative to perpetuate by this point. If it had not happened earlier, this was another prompt for the Claimant's representatives to discuss with the ISW whether there was enough material and clarity to enable the Particulars to be drafted. Even if time in concluding a report may have been difficult for the ISW, a few hours in conference surely would have been achievable.

28. I also note how Ms Heath does not state when she came to know of the bereavement from the expert. If it was earlier than the date of the Application [26 August 2021] then the Application should have been made earlier. If was not until just before the date of the Application, then seemingly the Claimant's solicitors had left their expert without contact or monitoring in the interim yet still with the intention of ensuring counsel was available to draft and produce Particulars of Claim, as acceptable to the Litigation Friend, within only a matter of days before the then agreed extension to 31 August 2021. That strikes me as poor planning even without the added stringency of timetable the case presented at this point.

29. The Defendant's agreement to a yet further extension of time to 14 September 2021 surely could not have been received by the Claimant as anything less than a remarkably generous and fortunate gesture. Without any question whatsoever of tainting the events to that date with the adverse impression of those that subsequently occurred, I am clear that the Claimant's solicitors conduct through to the August 2021 request give an impression that they had adopted a somewhat passive view that events in question were beyond their control and incapable of adjustment, rearrangement or polite challenge. Plainly, time was not on the Claimant's side to adopt an approach of acceptance. If the Claimant's at this stage treated the Defendant's agreement to a yet further extension as evidence of acceptance of their explanation and conduct then, whether justified or not, it would still show a disregard of the court's process.

30. I am quite satisfied that even if some may take a more benign attitude to the events between the original due date in March 2021 for the Particulars of Claim and the third extended due date six months later on 14 September 2021, perhaps taking the view that the Defendant's sequence of concessions were more necessary than generous, even the most lenient of litigants would still expect compliance by the September 2021 date.

More than enough time had by then elapsed for compliance, the merits of which had been considered a year previously as presenting within the "last chance saloon".

31. Very unfortunately, no Particulars of Claim were served on 14 September 2021. Without explanation, the Claimant did not attempt to apply for a yet further extension until 6 October 2021 although even that was a procedurally unsuccessful attempt. The Claimant only successfully applied on 8 February 2022, which is the Application in hand.

32. The 6 October 2021 Application had sought an extension until 10 December 2021.

    In a supporting witness statement of the same date, Ms Heath reiterated the events as had given rise to the 14 September 2021 extension. She then explained that whilst the expert had produced a "draft report on 13th August 2021", in it he had noted a number of documents were missing and required sight of them "to finalise his report". Her firm "had not been provided with these documents from the Claimant's previous solicitors. A request was therefore sent to them on 25th August 2021….A similar request was sent to the Defendant on 24th August 2021. No response was received from the Defendant. The Claimant's previous solicitors provided a number of documents but none of which were the correct documents. On 14th September 2021 they confirmed that they did not have the documents requested. A "further" e-mail was therefore sent to the Defendant on 14th September 2021 requesting the documents again and informing them that as a result of the expert being unable to finalise his report, the Claimant was unable to prepare his POC. The Claimant requested that the Defendant agree to a further extension of time for service of the POC. The Defendant did not agree".

    Ms Heath went on to describe how the Defendant had produced the documents on 4 October 2021 such that the expert "had confirmed he is able to finalise his report by 22 October 2021". However, "The Claimant's counsel had advised that he is completely booked up during November and he therefore will not be able to prepare the POC until December. Alternative counsel cannot be instructed due to the complexity of the case and the voluminous material".

    Ms Heath placed blame upon the Defendant, remarking that it had not been clear when the Defendant would provide the documents and so when the Claimant might be in a position "to liaise with the expert and counsel to establish their working timeframes".

    Ms Heath concluded that the Defendant was "not prejudiced in this further extension of time. The Claimant does not foresee any further delays in this case".

33. In the exhibit to her 6 October 2021 Witness Statement, Ms Heath produces a copy e-mail to the Defendant dated 14 September 2021 commencing "As you are aware, the Claimant is due to file his PoCs today. We have received the expert report and he has identified some documents which he requires in order to finalise his opinion". The documents missing and requested were (i) an independent age assessment from 26

February 2011 and (ii) a judicial determination made in July 2013 along with its supporting materials.

The Defendant's solicitor promptly replied just over an hour later remarking:

"Thank you for your email. This is seemingly the latest in a long series of examples of the claimant and/or his various legal advisors leaving matters until the eleventh hour before addressing fundamental issues in this case.

As far as I can see this is the first occasion upon which my client has been asked to produce documents, some of which are more than ten years old. I note your suspicion that the documents in question may have been destroyed by your client's previous solicitors. That is a matter for your client and those previous solicitors.

You will not need reminding that the proceedings in this case were issued four and a half years ago. Last November the court granted your client a generous amount of time (until 31st March 2021) to serve the Particulars of Claim, the judge having noted during the course of the hearing that the claimant was effectively in the last chance saloon. Since then, you have sought and been granted two further extensions. Now, on the very last day for service of the Particulars you seek a third which you hope " not to be more than two months". Almost a year on from the hearing before Lavender J no procedural progress has been made by the claimant.

My client does not agree to the request for a further extension. You must make your application".

34. Had this Application come before the court in late 2021, as it would have done, it is very clear to me that owing to the chronology of delay to that date there would have been serious questions for the Claimant to answer. Many of which would have drawn upon observations I have already made above in the context of the earlier extension Applications.

In addition, as focused upon this particular Application and its new emphasis upon missing documents, one asks what documents had been originally provided to the expert in March 2021? Following what process of "collating" and consideration Ms Heath had said she had previously needed to carry out? Why had missing documents not been spotted earlier? Further, why had the expert only just asked for them, so tight against the deadline, if (as is the inference) he had been working on the report at at least certain points since being instructed in April 2021?

On the face of it, the subject matter of the "missing" documents does not seem novel in principle the context of a claim for negligent local authority care going back to 2010. The more embarrassing question is why had the relevance of such documentation not been foreseen by the Claimant's solicitors earlier, rather than needing the expert to ask for them at the 11th hour? Further, even if it took the expert to point out that relevant documents had not been provided, why was the request being made (according to the Defendant) a month after the draft report alerted the Claimant's solicitors to the problem in mid-August? Why had not an Application been made sooner and before the expiration of the last agreed extension date? Why should the interests of Counsel, as apparently being "fully booked up during November", be a sufficient justification for

both Defendant and court to wait yet further and so take the Claimant into a period of being in breach of an Order?

35. In short, the Defendant's prompt response to the 14 September 2021 e-mail would seem to have been entirely well placed and the Defendant's refusal to agree any further time entirely predictable.

36. In this context, the 6 October 2021 Application would have been both late and weak even had it proceeded. To no credit to the Claimant's solicitors, as I unfortunately have to remark, it was (i) not effective anyway and (ii) the Claimant's solicitors failed to realise this until shortly before the second hearing on 23 March 2022.

37. Believing that the Claimant had issued an Application on 6 October 2021, the Claimant's solicitors nonetheless took no further action to enquire of the court whether a decision had been made "without a hearing" as the N244 had somewhat ambitiously requested. Instead, they issued the current Application dated 8 February 2022, as again presupposed that a decision without a hearing would be appropriate in the circumstances.

38. The February 2022 Application was referred to me by the QB staff in the usual way. I directed it was not appropriate for a decision without a hearing and, given the long history, should be found a 30-minute hearing in USAL. As is required of any Applicant or Respondent in USAL, however, it remained for them immediately to inform the court if they considered such listing insufficient. Mr Burton, counsel at the hearing on 23 March 2022, admitted that Ms Heath accepted she had taken no steps to check with the Defendant the adequacy of the listing on 17 March 2022 but simply given them notice of it a few days' beforehand.

39. In Ms Heath's Witness Statement in support of the February 2022 Application, she referred to the 6 October 2021 Application as having been prompted by the Defendant's delay in providing documents and remarked that that Application "has not yet been considered by the court".

    The statement substantially repeated the material from the October 2021 Witness Statement but as updated to describe how the ISW had provided his report on 19 October 2021, that counsel had considered it in "November" but counsel had now advised that a psychiatric report was needed "to first understand the breaches and their consequences. Due to the outstanding matters, we were not able to prepare our particulars of claim by 10th December 2021".

40. In support of the proposition that the Claimant had an active but outstanding earlier October 2021 Application to protect the Claimant's position from that earlier date, at 11.00am and so one hour before the hearing listed for at midday on 17 March 2022, Ms Heath directly e-mailed to me two screenshots from the court CE Filing system acknowledging the submission of the October 2021 Application. The same e-mail also attached a skeleton argument from the Claimant's counsel for that hearing, Miss

Meredith. Miss Meredith admitted to me, when I asked her, that she had been instructed only the previous afternoon to the hearing. I observe that it was much to her credit that she had produced such a detailed skeleton argument in the short period she had been given.

As I pointed out at the hearing on 17 March 2022, however, CE File as viewed from a judicial screen featured no record of an October 2021 Application at all. I remarked that it would be surprising for such an Application, if correctly issued, to have seen no attention over a period of five months. I drew to the parties' attention that I had not received any direct enquiry from the Claimant's solicitors about the progress of this apparent Application since October 2021, despite being the Assigned Master and so the person to whom concerns could be raised through my clerk. On the face of it, there therefore was a disturbing discrepancy between Ms Heath maintaining an effective Application existed, supported by screenshots, and the court being unaware of it. Questions were also raised why an Application with such an obvious history, and as opposed for reasons cogently explained in the Defendant's skeleton argument, was thought sufficient to be concluded in the 30-minutes only permitted in USAL. I also was troubled why the need for a psychiatric report was now considered fundamental and so was being presented as a new reason for further delay. Either it was not entirely necessary, in which case where were the Particulars of Claim or, if necessary, why had the point not been considered far earlier?

These uncertainties rendered the hearing on 17 March ineffective and a longer hearing was provided for 23 March 2022.

41. In a Witness Statement dated 22 March 2022 (and so produced only the day before the restored hearing), Ms Heath described how in consequence to uncertainties expressed about the 6 October 2021 Application she had "discussed this with counsel" and accessed CE File. Only then had she realised that the Application had been rejected at the time of issue. She accepted she had failed to realise this fact could have been discovered by drawing upon an information tab on the relevant page. She apologised for not having sufficiently familiarised herself with the system. Further, she explained that she shared use of the CE Filing system with a colleague from whom she relied to inform her by e-mail if there was ever any update from the court about CE filed material. Ms Heath comments "After later reviewing her inbox, I understand that an email had in fact been received from the court dated 26 October 2021 which confirmed that the application had been rejected. The email had not been passed onto me prior to the 17th March and I had not been made aware of its existence. This was a clear error and in order to ensure that does not happen in future, I am setting up an account in my own name so that all emails go directly to me".

42. At the hearing on 23 March 2022, I asked Mr Burton why the Claimant had issued the 8 February 2022 Application anyway, given the Claimant's solicitors at least thought they had (until very recently) an active prior Application. I was informed that Ms Heath had understood that because the date for the extension to 10 December 2021 sought in

the intended October 2021 Application had since in any event expired, a fresh N244 was thought necessary.

I entirely reject this as a plausible explanation. As far back as January 2020, I had pointed out the facility of amending an Application if subsequent events but prior to judicial decision suggested a revised draft Order was appropriate. That observation ought to have been seen and noted when the Claimant's current firm read the former firm's file. In any event, the same point had more than clearly been made by Lavender J in his November 2020 reserved judgment. The Claimant's solicitors have no basis for believing that their (as they thought it) valid October 2021 Application had somehow expired with time.

A further irregularity is that if they had thought the October 2021 Application had simply expired with time, why send screenshots shortly before the hearing to endorse the quite contrary comment in the witness evidence that the October 2021 Application was still awaiting attention from the court?

43. I also describe the conduct and failure to attend to the intended October 2021 Application as inexcusable, despite the profuse apology offered to the court. Parties who litigate in the Queen's Bench Division have a professional obligation to familiarise themselves with the electronic filing system. That system is embodied within the CPR as PD51O. There remains additional information and assistance if asked. Furthermore and importantly, a party issuing an Application in the High Court Central Office retains a responsibility to ensure its progress. I am aware that in certain County Court Hearing Centres the progress of an Application has to await the attention in due course of time by time pressed judiciary and County Court staff. Representatives can do little in the interim. However, in the Queen's Bench Division Central Office, the feature of Assigned Masters with named dedicated personal clerks, all of whose e-mail addresses are published, means there is little excuse for a party believing that they are powerless to do anything from the point of submission of an Application.

    It also seems to be a clearly insufficient internal practice to have left to another colleague the responsibility of notifying a fee earner of anything arising on that fee earner's Applications. Either way, the Claimant's firm as a whole bears the responsibility for the failure of the intended system.

44. For these reasons, I am clear that the 8 February 2022 Application has to be treated as the first and only Application for an extension of time following expiration of the last extension of time for service of the Particulars of Claim on 14 September 2021. Accordingly, it is nearly one year after the contextually described "last chance saloon" date provided by Lavender J and just under five months after the last consensual extension.

45. In terms of explanation in the February 2022 Application, Ms Heath repeated verbatim much of that featured in her 6 October 2021 Witness Statement. She goes on to explain how she and the Litigation Friend needed time to consider the 156-page finalised ISW

report when it was provided on 19 October 2021 "prior to having a conference to discuss the same".

However, because counsel was busy, a conference could not take place until 10 November 2021. Following the conference, an offer of settlement was contemplated but instructions to make such an offer were delayed because the Litigation Friend "has been a full-time carer for her elderly grandparents during Covid lockdown in India. Her grandfather suffered from early onset dementia and passed away in July 2021. Her grandmother had a stroke in September 2021 and further hospitalisation in November 2021 and the Litigation Friend was responsible for her care and recovery so there was some delay in being able to obtain instructions from the Litigation Friend".

Accordingly, another request for voluntary extension was made to the Defendant on 2 December 2021 which was refused later the same day. The offer of settlement was made on 7 December 2021 and rejected by the Defendant on 27 January 2022.

46. The submissions on behalf of the Claimant at both hearings[1] emphasised the Claimant's personal vulnerabilities and condition, the sensitive and serious nature of the claim and its complicated procedural history even before issue of the Claim Form. Further, consistent with the Claimant's solicitor's witness evidence, the inability to particularise a Statement of Case until very recently owing to factors as were submitted to be substantially if not entirely beyond the hands of the Claimant and his solicitors.

47. A significant more recent factor explaining the delay has been, according to the Claimant, the need to obtain a psychiatric report. Whilst it had during 2021 been thought that the conclusion of an authoritative ISW report would facilitate the admittedly well overdue Particulars of Claim, following production of that report in its final form in mid-October 2021 and conference with retained counsel the following month, it then became apparent that a psychiatric report was required. Such has been submitted on behalf of the Claimant as "manifestly clear".[2]
48. At the hearing on 17 March 2022, I queried why the inability of the Claimant to-date to disclose and annex a full psychiatric report as part of the Particulars of Claim prevented compliance with the Order. I referred to *Mark v Universal Coatings and Services Ltd* [2018] EWHC 3206, as had decided that a failure to so annex did not give rise to any sanction and that there can be good reason in certain cases why it is not possible to annex a medical report.

    Significantly, even a draft Particulars of Claim had still not been produced by the Claimant in time for that hearing.

49. At the second hearing, Mr Burton sought to emphasise that despite the commentary in *Marks* PD 16 para.4.3 was nonetheless "a rule contained in a practice direction" and falls to be observed accordingly. Further, in this case the authority and conclusions of

[1] Principally as presented in Ms Meredith's skeleton argument because the hearing was mainly preoccupied with questions about the October 2020 Application and the insufficient time estimate
[2] Ms Meredith skeleton argument, para 24

a report remain essential in order to allege causation, a crucially important part of the case. Without causation being known and understood to be arguable, particularising the claim cannot proceed irrespective of the known merits of the Claimant's case as to breach. Further, this claimant is publicly funded and so is entirely reliant upon prior authority of the Legal Aid authority before an expert can be instructed.

50. Mr Burton also emphasised that the Claimant, through his solicitors, had been otherwise active in the case in seeking to compromise the proceedings (an event that can be disclosed for the purposes of this Application). His offer of compromise on 6 December 2021 was a genuine and progressive step having obtained authoritative ISW evidence two months earlier, even if still without the assistance of psychiatric evidence. He invited the court to treat the period between the offer and its rejection on 27 January 2022 as evidence of continuity and active progression in the claim.

    I was told that the detail and focus of the October 2021 ISW report had placed much emphasis upon the Claimant's treatment in the earliest years and this had presented as a "significant change" from the viewpoint and understanding of the issues adopted by both Ms Hills, the previous solicitor, and the Litigation Friend to-date. This, and the advice of counsel in November 2021 (the Claimant having been unable to obtain any earlier owing to Mr Burton's unavailability) as to the need for psychiatric expert evidence threw in disarray a timetable as had genuinely anticipated the Particulars of Claim being available for service in September 2021.

    Mr Burton clarified that it had taken some time to find a psychiatrist who was able to assist, such that the proposed expert was not instructed until 16 March 2022. In the circumstances, the Claimant nonetheless should be described as having acted promptly. A report can be produced by the end of the month. Mr Burton not only was entirely realistic as to the prospect of but expressly invited that any directions for the production of the Particulars of Claim and accompanying report should be in the form of an Unless Order.

    He argued that the importance of obtaining a psychiatric report was such as central and pertinent evidential step that the Application could not have been appropriately made much earlier. The Claimant needed to be able to provide a reliable indication to the court that a report would be produced by a particular date. Therefore, if the court accepts that such a report is necessary to formulate the claim, the only real delay is between 27 January 2022, when the Claimant learned that his offer had been refused and so the psychiatric report was still required, and the issue of his 8 February 2022 Application. Mr Burton posited that only if the court was satisfied that this period was so egregious that the claim should be lost, should the Application fail. Indeed, he suggested that the period between the December offer and the February 2022 Application was the only real period of delay, having regard to valid explanation for delay otherwise, such that the court was faced with a "straightforward decision" whether the decision to delay the February 2022 Application whilst a reply to the compromise offer was awaited was sufficient to deny the Application and hence stifle the claim entirely.

51. Between the hearing on 17 March and the fuller hearing on 23 March 2022, a draft Particulars of Claim had been produced to the Defendant and the court. I note this is a reasonably detailed document, pleading allegations of breach from the Claimant's earliest assessment in November 2010. In terms of particulars of personal injury, however, these are very briefly particularised, referring only to "distress and humiliation" and that the Claimant had [sic] *"experienced (an exacerbation of pre-existing his) psychiatric disorders*".

    Mr Burton confirmed that this draft was substantially that proposed to be relied upon but may still require further revision i.e. and not exclusively in terms of particularising personal injury.

52. On behalf of the Defendant, Miss Ayres submitted that the claim is unlikely to succeed owing to a lack of any duty of care as per *CN v Poole BC* [2019] UKSC 25. Further, claims under the Human Rights Act claims may be limitation barred. The Defendant submits it is severely prejudiced in defending this claim, given the unimpressive combination of the claim having been issued prematurely and then remaining undeveloped. The juxtaposition of such timing is difficult to follow, it is said. At various times the Claimant had suggested the claim was issued to preserve a limitation defence but yet it had also been suggested by his representatives that he lacks capacity, hence limitation is not an issue for a common law claim. A claim based on the 1998 Act would be statute barred if based on events which occurred in 2014 or earlier.

    The Defendant relies upon the procedural history leading to the Lavender J Order in late 2020 as presenting a significant and unimpressive backdrop against which delay in complying with the September 2021 extended date stands now to be assessed. The Defendant submits the claim has already taken up a grossly disproportionate amount of the Court's resources.

53. In specific reply to Mr Burton's submissions, Miss Ayres challenges whether psychiatric expert evidence is so fundamental that it otherwise prevents the pleading of the Particulars of Claim. Further, even if it is, why it could not have been commissioned much earlier in the case, alongside instruction of the ISW. Neither does the Defendant accept that the Claimant's December 2021 offer, in respect of which so much emphasis is placed by the Claimant as extending the period of breach, could not have been formulated much earlier too, given the Claimant's advisors at that stage felt that they could make a reasoned offer without the psychiatric evidence.

    In terms of the Claimant's asserted significance of that offer, the Defendant points out that it was made not only still without a draft Particulars of Claim (and yet as now produced for the second hearing, without psychiatric evidence) but against a general failure to provide much information about the claim. There had never been, for example, a formal Letter of Claim. The Claimant can hardly, therefore, realistically submit he had any real confidence that the Defendant would find appealing his December 2021 offer being accepted. So, the period that continued to elapse between it and rejection is a yet further example of unacceptably presumptuous delay.

54. *Is the breach serious or significant?*

The delay between 14 September 2021 and 8 February 2022 is, without question, serious and significant. Entirely realistically, the Claimant admits this. As at 15 September 2021, the Defendant and the court were fully entitled to expect to receive a fully pleaded Particulars of Claim as reflected worked deemed to have been carried out during the considerable number of extensions provided. Even as at 15 September 2021, there would have been only modest room for requesting a further short extension of a few days because, for example, a signature needed to be obtained or a date checked. On any view, however, had the proposition been made at 15 September 2021 that the Claimant needed a further six months it would have seemed remarkable.

One asks, therefore, whether good reason has been made out for this additional period of time having been unilaterally claimed by the Claimant and whether, in all the circumstances of the case, permission for late service should be granted.

55. *"Good reason" and "All the circumstances of the case"*

Although these are separate strands within the guidance and reasoning in *Denton*, marking different considerations, I find the exercise very closely related in this particular case.

I note with careful reference the significant and sensitive nature of the Claimant's case. So too the difficulties in preparing and presenting such a case, particularly for a firm reliant upon public funding and its need for prior authorisation. I also note that despite the delay to-date, the Claimant shortly is going to be in a position to comply with the original order. Draft Particulars of Claim have been produced and, the Claimant emphasises, there is sufficient confidence that the psychiatric report will be available that the Claimant will submit to an "unless" order.

I remind myself, however, that many parties in breach of an Order either have complied by the time of the hearing, or shortly will be able to. It cannot be that late, or imminently promised, compliance is sufficient reason alone to justify relief. Were that the case, then very few cases could be refused and compliance with court rules and directions would mean nothing.

The critical point, I am satisfied, is the markedly extended period the Claimant has taken in order to now be able confidently to assert that compliance is at hand. This period has to be set in the context that the very reasons explaining it [principally, disclosure, the need to conclude the ISW and then obtain psychiatric evidence] are far from new; either conceptually or in terms of actual case preparation. They had been mentioned as active months before the hearing before Lavender J and certainly did not become active only upon the commencement of the substantial extension period he granted. Further, there was then a very extended period during 2021 when the same factors were relied upon. I am satisfied those factors had been capable of far greater

advancement and development during the period of consensual extensions, for the reasons discussed. I do therefore do not accept there had been good reason for the delay during the period expiring on 14 September 2021 even though the need for "good reason" in the sense of *Denton* breach does not arise because the Claimant was not then in breach.

The period under consideration by reason of breach is, of course, that between 14 September 2022 and the 8 February 2022 Application. In terms of case preparation as is relevant to this period, the starting point is that delay was already significantly present from the first day of the period. This is not a case, for example, of simply a missed deadline in a case that had otherwise been sufficiently prepared.

Because that period already starts with an unfortunate history, the Claimant therefore has to satisfy the court the further and "relevant" delay nonetheless arose for good reason; or, even if it did not, the Claimant should see the permission sought having regard to all of the circumstances of the case.

I do not accept good reason for this period of delay has been made out. From the moment the Claimant's solicitors knew that the 14 September 2021 extension had expired without agreement as to further extension, there was a need for considerable promptness in applying to the court for direction. Promptness is a particularly relevant consideration on these facts, above and beyond the stricture that applies in any Application as set out at para 2.7 at 23APD.2 that "Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it". On the facts of this case, I agree with the Defendant's analogy to *North Midland Construction plc -v- Geo Networks Ltd* [2015] EWHC 2384 (TCC), where Edwards-Stuart J found that, 'The fact that the Claimant did not take steps, well before the expiry of the time limit, to ask or apply for the necessary extension of time is itself an indication of a fairly cavalier attitude towards the rules.' [65]. Quite simply, the Claimant has not made this Application at all promptly. It is just under five months late, with the intervening October 2021 ineffectual Application providing no mitigation whatsoever and, to the contrary, serving more as an aggravation to the Claimant's predicament.

I do not accept Mr Burton's ingenious attempt to define the period of delay as being limited that between the December 2021 offer and its rejection in late January 2022. I am not in a position to assess the viability of that offer, nor do I think that would be a particularly valid approach anyway. The more relevant observation is whether it was reasonable to delay compliance with the Order because an offer was being made. I do not accept that it was. The court had not agreed to an extension or stay for the purposes of ADR, not least because it had not been asked. Further, even without knowing the nature of the offer, the Defendant makes a valid point that the court is entitled to work on the basis that any offer unsupported by psychiatric evidence could therefore have been made much earlier. There is, I agree, a degree of inconsistency between a party arguing why they have been unable to satisfy a court order and yet at the same time feeling sufficiently able to make a reasoned offer that could result in a conclusion of the claim. If the Claimant was able to formulate an offer without psychiatric evidence but once there was ISW supportive opinion, then it follows such offer could have been formulated months previously.

Indeed, on my analysis, even earlier than that because the ISW ought to have been able to provide sufficient information about his opinion to enable the legal representatives to confer and draft an offer without the ISW having concluded his report in a fully Part 35 compliant format.

Neither do I accept the Claimant's submission that he has been obliged to obtain a full psychiatric report and so, even had this Application been made sooner, the same evidential predicament would have arisen. I do agree that some confidence has to be established by the Claimant's legal representatives that an arguable case of *some* loss having been incurred owing to at least *certain* of his allegations of breach before the Litigation Friend could commit herself to signing off Particulars of Claim with a Statement of Truth . However, to seek to pursue to conclusion a full Part 35 report in the face of already significant delay to the court timetable, yet without promptly applying to the court for direction, strikes me as not merely a counsel of perfection but, against this history, inappropriate. It smacks of the "cavalier attitude" referred to in *North Midland Construction.*

The Claimant plainly has a chronic multi-factorial mental health condition, so it would be unusual for a first psychiatric report to represent a finalised position on behalf of such a claimant. The Claimant's legal representatives should have been mindful of this. Given the continuing delay, what was far more obviously required and ought to have been entirely possible was for the Claimant to progress by particularising breaches supported by the ISW (even without a full report) and providing a reasonably full preliminary overview of such causally related personal injury apparent (even if not, at that stage, with the support of a "full" medical report). This case would seem to me to be a paradigm for not needing a full and finalised report, or at least not once it was apparent that procuring a full report was going to cause delay. It ought to have been possible, I am satisfied, for the Claimant to commission and obtain such preliminary psychiatric opinion at a far earlier stage. Indeed, it seems to be the very type of case scenario acknowledged in *Marks* as can negate the expectation of an annexed medical report under PD16.

Hence, I find there is no excuse for the delay that arose after September 2021. Ms Hill had told the court that a psychiatrist, Dr Obuya, was due to assess the Claimant in early October 2020. Nothing was said on behalf of the Claimant about that assurance in the course of the recent hearings. I therefore can reach no conclusion about what had happened in consequence to Ms Hill's assurances nearly eighteen months ago. However, I am satisfied this early reference to the need for supportive causal medical evidence establishes that the Claimant, through his Litigation Friend[3], were entirely aware of the need for such expert evidence from late 2020 and throughout 2021. It did not require counsel to tell the Claimant's solicitors and Litigation Friend again in November 2021 in conference. If the Claimant's solicitors felt unable to take decisions without further guidance, then a conference (with any competent senior counsel) should have been organised sooner. Conferral with retained counsel is plainly always desirable but I am not satisfied that advice from other senior counsel could not have been obtained earlier. As to the advice received at conference, that a full report was required even at

[3] It has been the same Litigation Friend throughout

that late stage before the Order could be complied with, I have already set out my reasons in not accepting this.

In conclusion, I find nothing in all the circumstances of the case as mitigates what is an admittedly serious breach for which there has been very poor explanation. Even had an Application appropriately been made before the expiration of the 14 September 2021 extension and had come to hearing before the end of 2021, I am by no means persuaded that it would have succeeded. The court would have needed considerable satisfaction that matters were well in hand. The Claimant's representatives' failure to apply either promptly or correctly until February 2022, and their choice instead to delay by several further months without reference to the Defendant or the court whilst they continued to make good the delay, represents a significant failure to have sufficient regard for compliance with rules, practice directions and orders. It constitutes a significant failure to conduct litigation efficiently and at proportionate cost.

I therefore dismiss the Application.

I invite a draft Order from the Applicant within 5 working days following the handing down of this judgment. In the usual way, that should be agreed or as sets out any differences between the parties as to its format. If a further hearing is needed, I ask that my clerk is informed as to time estimate(s) and preferred dates.