Neutral Citation Number: [2022] EWHC 872 (QB)

Case No: F90MA309
Appeal Ref: M21Q472

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Manchester Civil Justice Centre,
1 Bridge Street West,
Manchester M60 9DJ.

Date: 13/04/2022

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

EXN	**Claimant / Appellant**
- and -	
East Lancashire Hospitals NHS Trust (1) **Lancashire Teaching Hospitals NHS Foundation Trust (2)**	**Defendants / Respondents**

- -
- -

Kevin Latham (instructed by **Price Slater Gawne Solicitors**) for the **Claimant / Appellant**
Joshua Munro (instructed by **Acumension Ltd**) for the **Defendants / Respondents**

Hearing date: 31 March 2022

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Approved Judgment

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

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THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

INTRODUCTION

1. This case is about granting relief from sanctions. More specifically, it deals with the proper approach to the failure of a party to comply with the rules relating to giving notice to the other parties that a claim is being funded by a conditional fee agreement ("CFA") with a success fee.

THE BACKGROUND

2. The claimant in this sad case was born on 2 October 2011. As a result of the defendants' admitted negligence prior to her delivery, she now suffers from severe cerebral palsy.
3. The claimant's solicitors, Price Slater Gawne ("PSG") were promptly instructed by the claimant's mother to act on the claimant's behalf and a CFA was entered into on 6th March 2012. On the same day, PSG sent a letter seeking disclosure of the relevant medical records.
4. By letter dated 17th April 2012, PSG informed the first defendant that the claimant "is funded by way of a Conditional Fee Agreement".
5. As is often the case in claims involving serious injuries to very young claimants, years passed before it was considered appropriate to initiate formal procedural steps. In the event, the letter of claim was sent on 6th February 2018 which was promptly rewarded by a full admission of liability.
6. Proceedings were issued on 21st October 2019 and judgment against the defendants duly entered. Settlement was achieved at a Joint Settlement Meeting on 17th December 2020 involving payment of a lump sum of £2.85M and periodic payments starting at £190,250 per annum and thereafter increasing to £305,000 for life.
7. The matter came before District Judge Hassall (as he then was) on 1st July 2021. An issue had arisen as to the recoverability of PSG's success fee upon which he was required to adjudicate. In an ex tempore judgment, which is to be commended for its lucidity, he concluded that PSG had been in breach of the relevant rules relating to the disclosure of the existence of a CFA with a success fee and declined to grant relief from sanctions.
8. It is by way of appeal against this decision that PSG come to this court with the permission of the single judge. It is to be noted that the financial position of the claimant will remain unaffected whatever the outcome of this appeal.

THE RULES

9. With effect from 1 April 2000, section 27 of the Access to Justice Act 1999 amended the Courts and Legal Services Act 1990 by inserting new sections 58 and 58A authorising CFAs between litigants and their legal representatives which might include provision for a success fee. Section 58A(6) provided that rules of court might allow success fees to be recoverable as costs.

10. Since 1 April 2013, recovery of success fees as costs has not been allowed but s44(6) of the Legal Aid, Sentencing and Punishment of Offenders Act 2021 retains provision for the recovery of success fees as costs in cases where the CFA was entered into before 1 April 2013 and CPR r 48.1(1) states that the provisions relating to funding arrangements in Parts 43–48 and the attendant provisions of the CPD as they were in force immediately prior to 1 April 2013 will continue to apply after that date in relation to a "pre-commencement funding arrangement".
11. Accordingly, the rules applying to this appeal have been preserved as they had been at the time the CFA was entered into.
12. Of particular importance is that paragraph 9.3 of the Practice Direction on Pre-Action Protocol ("paragraph 9.3") provided:

> "Where a party enters into a funding arrangement within the meaning of rule 43.2(1)(k), that party must inform the other parties about this arrangement as soon as possible and in any event either within seven days of entering into the funding arrangement concerned or, where a claimant enters into a funding arrangement before sending a letter before claim, in the letter before claim."

13. Rule 43.2(1)(k) provided that:

> "funding arrangement" means an arrangement where a person has–
>
> (i) entered into a conditional fee agreement…which provides for a success fee…"

14. CPR r 44.3B(1) imposed a sanction on those who failed to provide funding information as required. For CFAs entered into on or after 1 October 2009, it provided, so far as is material:

> "Unless the court orders otherwise, a party may not recover as an additional liability …
>
> (c) any additional liability for any period during which that party failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order …"

15. It follows that PSG were under an obligation to give proper notification of the funding arrangement as soon as possible after it was entered into and no later than 27 March 2012.
16. On any view, no such notice had been given within this timescale and PSG duly applied for relief from the sanction imposed by CPR r 44.3B(1).

TIME OF COMPLIANCE

17. PSG contended that the indication in its letter of 17th April 2012 that the claimant was being "funded by way of a Conditional Fee Agreement" satisfied the requirements of paragraph 9.3. If this were correct then the

period of default would be in the region of 6 weeks and, even if relief were not granted, the relevant sanction would be limited to precluding the recovery of such success fees as were referable to that short period.

18. The defendants argued, however, that in order to comply with paragraph 9, it was not adequate simply to refer to the existence of a CFA. The defendants contended that they ought to have been put on express notice that a success fee was provided for in the terms of the agreement.
19. The District Judge agreed with the defendants; and so do I.
20. The provision of a success fee is an integral part of the obligation to inform the other parties. The rule, properly construed, mandated unambiguous notice that such a fee was provided for in the CFA. PSG failed to do this and therefore remained in breach until 6th February 2018 when the letter of claim satisfied the requirements of paragraph 9.3. Accordingly, PSG needed to ask the court for relief from the sanction which would otherwise fall to be imposed under CPR r 44.3B(1) throughout the preceding period.

THE THREE STAGE TEST

21. The proper approach to an application for relief from sanctions is set out in CPR 3.9 (1) which provides:

> "On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders."

22. Having correctly concluded that PSG required relief from sanctions for the whole of the period from March 2012 to February 2018, the District Judge went on to consider the application of the familiar "three stage test" as formulated by the Court of Appeal in ***Denton v White*** [2014] 1 W.L.R. 3926.
23. In that case, the Court held that a judge should address an application for relief from sanctions under CPR r 3.9(1) in three stages:
    (i) identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order which engages rule 3.9(1);
    (ii) consider why the default occurred;
    (iii) evaluate all the circumstances of the case, so as to enable the court to deal justly with the application including the factors in sub-paragraphs (a) and (b).

THE FIRST STAGE

24. The court in ***Denton*** held that the focus of the inquiry at the first stage should be not on whether the breach has been trivial but on whether it has been

serious or significant. If a judge concludes that a breach is not serious or significant, relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages.

25. The District Judge reached his conclusion on the operation of the first stage at paragraph 30 of his judgment:

> "It seems to me that a failure to notify the other party of additional liabilities as soon as possible is indeed significant. I would have come to the decision I came to on significance irrespective any non-trivial duration of delay. The fact that the delay here was six years puts the matter beyond doubt but, for the avoidance of doubt, I would have found this to be a significant breach if the delay was a matter of months let alone six years."

26. I am not sure that I would have been as emphatic as the District Judge in his suggestion that any "non-trivial duration of delay" would render the breach significant. In ***Denton***, the Court discouraged the deployment of a test of triviality at this stage:

> "25. The first stage is to identify and assess the seriousness or significance of the "failure to comply with any rule, practice direction or court order", which engages rule 3.9(1). That is what led the court in the Mitchell case to suggest that, in evaluating the nature of the non-compliance with the relevant rule, practice direction or court order, judges should start by asking whether the breach can properly be regarded as trivial.
>
> 26. Triviality is not part of the test described in the rule. It is a useful concept in the context of the first stage because it requires the judge to focus on the question whether a breach is serious or significant. In the Mitchell case itself, the court also used the words "minor" (para 59) and "insignificant" (para 40). It seems that the word "trivial" has given rise to some difficulty. For example, it has given rise to arguments as to whether a substantial delay in complying with the terms of a rule or order which has no effect on the efficient running of the litigation is or is not to be regarded as trivial. Such semantic disputes do not promote the conduct of litigation efficiently and at proportionate cost. In these circumstances, we think it would be preferable if in future the focus of the inquiry at the first stage should not be on whether the breach has been trivial. Rather, it should be on whether the breach has been serious or significant. It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which "neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation". Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most

> useful measure of whether a breach has been serious or significant. But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example of such a breach is a failure to pay court fees. We therefore prefer simply to say that, in evaluating a breach, judges should assess its seriousness and significance. We recognise that the concepts of seriousness and significance are not hard-edged and that there are degrees of seriousness and significance, but we hope that, assisted by the guidance given in this decision and its application in individual cases over time, courts will deal with these applications in a consistent manner."

27. It is important to note that cases may arise in which it is a matter of judgment as to whether any given factor more appropriately falls for consideration at the first stage or is best evaluated as part of all the circumstances of the case at the third stage. For example, it may be contended that the prejudicial impact (or lack of prejudicial impact) on the other parties goes to the seriousness of the breach and/or to the appraisal of all the circumstances. Whatever course is taken, the result of the exercise of the discretion ought to be the same. As the Court held in ***Denton*** at paragraph 35:

> "The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it…"

28. Accordingly, although I may well have reached a different view, I do not consider that the District Judge was wrong to find that the six year delay was, of itself, sufficient to render the breach serious. However, this means that the other factors potentially relevant to this issue (including materiality as opposed to duration) should be given no less weight because they fall to be considered under the third stage of ***Denton*** rather than the first.

THE SECOND STAGE

29. The District Judge found that there was no good reason for the breach. Again, I am unable to fault this conclusion. I would, however, observe that reasons, rather like people, are not normally either wholly good or wholly bad. At one end of the spectrum fall those cases in which a party acts in contumelious disregard of an order of the court in order to gain an unfair procedural advantage. At the other end lie those cases in which non-compliance was entirely unavoidable through no fault either of the party in breach or of his legal team. In between lie those cases (such as this one) in which non-compliance, although culpable, is accidental and based on a genuine, albeit undoubtedly flawed, construction of the CPR.
30. It follows that it would distort the necessary flexibility involved in the exercise of a discretion to treat all bad reasons as if they were equally bad for the purposes of evaluating all the circumstance of the case at stage three.

THE THIRD STAGE

31. The third stage of the ***Denton*** test requires the court to consider all the circumstances of the case, including (and to be given particular weight) the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with court orders. The District Judge is to be commended for his thoroughness in setting out the factors which he contended were material to the exercise of his discretion under stage three.
32. Many such factors were in favour of PSG. Of particular significance were the following:
    (a) PSG, in common with many solicitors at the time, believed that notice of the existence of a CFA with a success fee could, without breaching the requirements of paragraph 9.3, be postponed until they were, in due course, referred to in the letter of claim. Indeed this appeared to have been the view taken by the authors of the White Book. However, in ***Springer v University Hospitals of Leicester NHS Trust*** [2018] 4 W.L.R. 61 the Court of Appeal emphatically rejected this interpretation of the rules and, whilst acknowledging that the notes in the White Book were supportive of this interpretation, observed: "but the view of the learned authors of the White Book cannot affect the objective interpretation of paragraph 9.3, which is the task of the court." Whilst this mistake of law could not be categorised as providing a good reason for the default at ***Denton*** stage two; it fell very much towards the lower end of culpability.
    (b) The period over which a breach of the rules extends is likely to be significantly more serious where the party in breach knows that he or she is in default and yet does nothing to correct the position. In this case, although the breach endured for a long time, PSG did not realise that they were in breach until the decision in ***Springer*** came to their attention.
    (c) The letter of 17th April 2012 came very close to complying with paragraph 9.3 falling short only in the sense that no express mention was made of a success fee. For my own part, I consider this to be very significant factor to which I will return when considering the issue of prejudice to the defendants.

PREJUDICE

33. In my view, the District Judge fell into error in concluding that the defendants sustained any prejudice of the type identified in ***Springer*** as a result of the default of PSG. In ***Springer***, the prejudice was attributed to "the NHS Trust's loss of opportunity of acting in a different and pro-active way." This conclusion was inevitably based on the particular facts of that case. The defendant had been simply unaware of the existence of any CFA (whether or not providing for a success fee) for a period of about two and a half years. Had they been, then they could have taken steps to mitigate the potential

consequences of exposure of the success fee. However, in this case, I am satisfied that the evidence demonstrated that the defendant knew full well how the claimant's claim was being funded and there no was basis upon which it could be plausibly suggested that it would have conducted itself in any different way whatsoever in the event that the letter of 17th April 2012 had made specific reference to a success fee.

34. As I have already concluded, the delay in rectifying the default may have been correctly categorised as serious because of its length but, in the circumstances of this case, the alleged impact on the defendant's conduct of the case is illusory. I refer to the following features:
    (a) In my view, the evidence pointed overwhelmingly and inevitably to the conclusion that the defendants well knew that the CFA referred to in the letter of 17th April 2012 would have provided for a success fee. This letter had been sent in response to a request from a claims manger in a letter dated 20th March 2012 asking if the claimant: "is in receipt of Community Legal Services funding or whether this matter is being funded by way of Conditional Fee agreement or on a private basis." The claims manager's letter was not drawn to the District Judge's attention but it was a document which the defendant had in its possession and its contents are indisputable. I exercise my discretion to admit it in evidence on this appeal (although my decision would have remined the same even if I had not). The only possible interest that a claims manager would have had in the existence of a CFA is the potential vulnerability to the payment of a success fee. In 2012, it would have been wholly irrational for a firm of solicitors to take on a case of this nature without the benefit of a success fee. If there had been any doubt whatsoever in the minds of the defendants on this issue one would have expected it to have been raised. The fact that no such enquiry was made or clarification sought leads to the conclusion that there was no such doubt.
    (b) In ***Springer***, the defendant was not just ignorant of the existence of a success fee but did not even know for sure that proceedings were going to be brought until the date of the letter before claim and they therefore had no opportunity to consider the matter or make attempts to negotiate a settlement and thus mitigate the substantial additional liabilities for costs in the form of the percentage success fee. In this case there was no such lost opportunity.
    (c) The Court of Appeal in ***Springer*** recognised, in the circumstances of that case, that: "a statement from an NHS Trust employee saying that they would have acted differently, …would inevitably have been the subject of scepticism from the claimant's advisers as being self-serving." In this case, however, the central issue is a very different one and it is not hypothetical. It is whether or not the defendants were, in

fact, ignorant of the existence of the success fee between March 2012 and February 2018. For the reasons I have given, such ignorance would be implausible in the extreme and certainly such as to call for evidence from the defendants to substantiate any such proposition. In the event, the defendants have chosen to remain silent on the point. As the Court observed in ***Springer*** at paragraph 77:

> "Any respondent to such an application will also need to lodge evidence to support any case that he has suffered particular prejudice as a result of the breach."

It would have been simplicity itself for the defendants to serve evidence, had it in fact been the case, that they had approached the case on the basis that there was no success fee. Their silence on the issue was deafening.

35. I consider that the District Judge fell into error in affording any significant weight to "inherent prejudice" to the defendants arising out of or related to any notion that they were not fully aware of the existence of a success fee. In particular, he observed at paragraph 50:

> "It seems to me that the longer one does not tell the defendants of the additional liabilities, the further one departs from "as soon as possible", the worse the breach of the rules and the worse the inherent prejudice to the defendants, or at least the significant chance of prejudice occurring."

However, if, as I am entirely satisfied to be the case from the evidence, the defendants were not under any misconception whatsoever in relation to the existence of a success fee then no prejudice, inherent or otherwise, can be attributable to the breach. It was simply not open to them to remain mute on the central issue as to their state of knowledge and then invite the District Judge to treat the lacuna of information, for which they were directly responsible, as relevant to the speculative loss of a chance.

36. I appreciate that respect must be paid to the wide ambit of discretion exercised by any judge in determining the issue of granting or refusing relief from sanctions but where, as here, he is found on appeal to have gone wrong in taking into account an irrelevant factor then the appellate court must exercise that discretion afresh.

CONCLUSION

37. In the circumstances of this case, I am satisfied that, notwithstanding the significant weight to be attached to factors (a) and (b) under CPR 3.9(1), the absence of significant prejudice to the defendants, when taken together with all of the other factors to which I have previously referred, leads me to the conclusion that I should grant relief from the sanction which would otherwise have followed from the operation of CPR r 44.3B(1) from 17 April 2012 onwards but not before.