Neutral Citation Number: [2018] EWHC 3206 (QB)

Case No: B32YM762

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
High Court Appeal Centre Leeds
On appeal from the Middlesbrough County Court

Leeds Combined Court Centre
1, Oxford Row, Leeds LS1 3BG

Date: 23/11/2018

Before :

MR JUSTICE MARTIN SPENCER

- -

Between :

Mr Stephen Mark	**Claimant/Appellant**
- and -	
Universal Coatings & Services Limited	**First Defendant/ Respondent**
Barrier Limited	**Second Defendant/ Respondent**

- -
- -

Ronald Walker QC & Mr J Swoboda (instructed by **Neumans LLP**) for **The Claimant**
Patrick Limb QC (instructed by **Weightmans LLP**) for **The First Defendant** and
(instructed by **Langleys LLP**) for **The Second Defendant**

Hearing dates: 5 November 2018

- -

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.

.....

MR JUSTICE MARTIN SPENCER

Mr Justice Martin Spencer:

Introduction

1. The Claimant appeals with leave of Barling J dated 29 November 2017 against the order and judgment of HHJ Mark Gargan sitting at Middlesbrough County Court on 8 May 2017 whereby he struck out the Claimant's claim against each of the three defendants. The Claimant was content that the action should remain struck out against the Third Defendant and appeals only in respect of the First and Second Defendants.

The facts

2. The facts are fully and clearly set out in the careful judgment of HHJ Gargan which has made my task on this appeal immeasurably easier. The Claimant claims to have sustained personal injuries, namely silicosis and massive pulmonary fibrosis, in consequence of the inhalation of silica dust in the course of his employment with the First Defendant for about one year including at the end of February 2012 and for various periods for the Second Defendant in 1991/1992 and again between 1997 and 2010. He ceased working at the end of February 2012 as a result of ill-health, having first received treatment on 27 June 2012. This date has been taken as his date of knowledge for the purposes of the Limitation Act 1980 and therefore the primary limitation period expired on 27 June 2015.

3. I am told that, in 2016, the Claimant was given a prognosis of only two further years to live. As at the date of the hearing before me, 5 November 2018 he remained alive but I do not have an up to date prognosis. The Claimant was born on 25 June 1957 and is therefore only 61 years of age.

4. The Claimant first consulted solicitors in February 2013 and on 22 February 2013 a letter notifying the claim was sent to the First Defendant, although the First Defendant say that they never received that letter. I do not have details of any further correspondence between February 2013 and May 2015 but there must have been some correspondence because, on 27 May 2015, a Claim Notification Form ("CNF") was sent to the First Defendant. At this time, the Claimant was represented by a firm of solicitors called GT Law and the person having conduct of the claim was Ms Caroline Butler who took over conduct on 8 October 2014. The reason why there must have been some further correspondence is that, in the CNF, the First Defendant's insurer is stated to be AIG (Europe) Limited and the policy number reference is also given. Thus, this information must have been imparted to Miss Butler at some stage.

5. Also, between the original letter of claim dated February 2013 and the sending of the CNF, GT Law had been in contact with HMRC seeking details of the Claimant's employment. On 30 March 2013, HMRC wrote to GT Law setting out all the Claimant's employers between 1972 and 2012, with more than 20 different employers included over that period. The Claimant was employed either as a shot-blaster or a shot-blast supervisor. It is his case that, in the course of his employment, he used a blast kettle, a container into which abrasive silicate is poured whereby a compressor blasts abrasive silica from the blast kettle using compressed air and a hose, and that he thereby inhaled silica dust.

6. After the initial letter of claim and the obtaining of the Claimant's employment details in early 2013, it is unclear what, if anything, was done by GT Law to investigate the claim until May 2015. In particular, there is no evidence that any medical evidence was obtained, particularly in relation to causation; nor, apparently, was a statement taken from the Claimant.

7. With the expiry of the limitation period on 27 June 2015 imminent, a Claim Form, citing only the First Defendant as a defendant at that stage, was sent and received by the court on 24 June 2015. Although the court did not issue the Claim Form until 1 July 2015, it was taken as having been issued on the date it was received and therefore in time for limitation purposes.

8. On 24 September 2015, Ms Butler made a Without Notice application to extend time for service of the Claim Form, the Particulars of Claim and supporting documentation. In a witness statement in support of that application, Ms Butler said, inter alia, as follows:

> *"8. The medical evidence to support Pneumoconiosis is highly specialised. The number of private medico-legal experts in the Claimant's area is restricted and as a result obtaining any medical report can take several weeks. Without the Claimant's medical evidence we will be unable to serve the papers upon the Defendant and fully assess the prospects of success.*
>
> *9. The Claimant's solicitors have now instructed a medical agency to arrange an appointment on behalf of the Claimant and we are currently awaiting an appointment date.*
>
> *10. The Claimant's solicitors will require to review the medical report, and if necessary, instruct Counsel to advise and to draft the Particulars of Claim and any supporting schedule of loss."*

On the basis of that application and supporting evidence, Deputy District Judge Greenan made an order extending time for service of the Claim Form until 1 March 2016, that order being dated 5 October 2015.

9. The order of DDJ Greenan of 5 October 2015 was not served at that time on the First Defendant, nor was the application and the documentation in support. This was in breach of the provisions of CPR 23.9 which provides:

> "(1) This rule applies where the court has disposed of an application which is permitted to be made without service of a copy of the application notice.
>
> (2) Where the court makes an order, whether granting or dismissing the application, a copy of the application notice and any evidence in support must, unless the court orders otherwise, be served with the order on any party or other person –
>
> a) against whom the order was made;
> b) against whom the order was sought.

> (3) The order must contain a statement of the right to make an application to set aside or vary the order under Rule 23.10."

Rule 23.10 provides:

> "(1) A person who is not served with a copy of the application notice before an order is made under Rule 23.9, may apply to have the order set aside or varied.
>
> (2) An application under this rule must be made within 7 days after the date on which the order was served on the person making the application."

Had the order and application with supporting evidence been served on the First Defendant, the First Defendant could have taken a number of steps. First, it could have applied to set aside or vary the order. Secondly, it could have sought an order requiring the Claimant to serve the Claim Form so that it could contest the jurisdiction. Thirdly, it could have sought an order from the court laying down a timetable for service of the Claim Form and for the Particulars of Claim. Thus, service in accordance with CPR 23.9 would have enabled the First Defendant to become engaged with the litigation and ask the Court to undertake some case management.

10. However, on 9 October 2015 the First Defendant was provided with a copy of the court's order of 5 October 2015 via its insurance broker, as acknowledged by the Defendant in paragraph 4.i of a "Position paper" dated 29 September 2016 (see further paragraph 23 below in relation to the Position Paper).

11. In early October 2015 GT Law went into administration and the Claimant's case was transferred to Messrs Neumans LLP. Ms Butler became employed by Neumans and retained conduct of the file.

12. On 22 October 2015, Neumans sent to the First Defendant's insurers, AIG Europe, a form N434 Notice of change of solicitor.

13. On 14 January 2016, Ms Butler sent a full letter of claim on behalf of the Claimant to the Second Defendant.

14. By a further Without Notice application dated 25 January 2016, Ms Butler on behalf of the Claimant made a further application to extend time for service of the Claim Form, the Particulars of Claim and the medical report and other supporting documentation. This time, the court refused the application and this was notified to the Claimant's solicitors in a letter dated 9 February 2016. This letter stated:

> "*Deputy District Judge Pickup sitting at Northampton County Court Money Claims Centre, PO Box 527, Salford, M5 0BG made the following comment:*
>
> *'Application dismissed. I see no reason why the Claim Form cannot be served upon the Defendant. If the Claimant wants to add more Defendants he will have to apply to amend the Claim Form in any event.'"*

15. It is to be noted that, in one respect, the order of DDJ Pickup of 9 February 2016 was erroneous. This was with respect to the reference to the Claimant needing to apply to amend the Claim Form if he wanted to add more defendants. In fact, not yet having

been served, the Claimant was entitled to amend his Statement of Case, including the Claim Form, without permission. This is provided for by CPR Part 17. The editorial introduction in the "White Book" states:

> "The rules in this Part deal with amendments to 'Statements of Case', a term which means 'a Claim Form, Particulars of Claim, where these are not included in the Claim Form, Defence, Part 20 Claim or a reply to a Defence'".

Referring to CPR Rule 2.3.1, Part 17 then provides:

> "i) A party may amend his Statement of Case at any time before it has been served on any other party.
> ii) If his Statement of Case has been served, a party may amend it only –
> a) With the written consent of all the other parties; or
> b) With the permission of the court …"

CPR Part 17.2 gives the court powers to disallow amendments made without permission, providing:

> "(1) If a party has amended his statement of case where permission of the court was not required, the court may disallow the amendment.
>
> (2) A party may apply to the court for an order under paragraph (1) within 14 days of service of a copy of the amended statement of case on him."

16. On 24 February 2016, the Claim Form was amended pursuant to CPR 17.1 to add the Second and Third Defendants as defendants and, two days later on 26 February 2016, the Claim Form was served on all three Defendants together with Particulars of Claim. It appears that, before the judge below, there was an issue as to the validity of the amendment of the Claim Form to add the Second and Third Defendants but, if so, that issue was not pursued on the appeal before me. No medical evidence or schedule of loss were served with the Particulars of Claim and there was no explanation in the accompanying letter as to why the medical report and schedule were not included.

17. The service of the Claim Form is acknowledged by the three Defendants in March 2016. The form for Acknowledgment of service includes the follow:

> "**Tick the appropriate box**
>
> 1. I intend to defend all of this claim ☐
> 2. I intend to defend part of this claim ☐
> 3. I intend to contest jurisdiction ☐
>
> If you do not file an application to dispute the jurisdiction of the court within 14 days of the date of filing this acknowledgment

> of service, it will be assumed that you accept the court's jurisdiction and judgment may be entered against you."

In its acknowledgement of service dated 14 March 2016, the Third Defendant ticked box 3 indicating an intention to contest jurisdiction. However, the First and Second Defendants simply ticked box 1 indicating an intention to defend all of the claim.

18. On 24 March 2016, two things happened. First, the Third Defendant, having indicated in his Acknowledgment of Service an intention to contest jurisdiction, issued an application to strike out the claim or for summary judgment. On the same day, the First Defendant served its defence. At paragraph 21 of that defence, the First Defendant pleaded:

> "The First Defendant submits that the Claimant's failure to comply with CPR 16 PD 4.2 and 4.3 is an abuse of process and/or is otherwise likely to obstruct the just disposal of the proceedings; as a consequence the First Defendant submits that the Claimant's claim should be struck out pursuant to CPR 3.4(2)."

CPR 16 PD 4.2 and 4.3 are set out in paragraph 33 below.

19. So far as the Second Defendant is concerned, it made an application to extend time for service of the Defence on 21 April 2016, an application to which, I understand, the Claimant consented, and the Second Defendant then served its Defence on 31 May 2016. In that Defence, the Second Defendant takes five preliminary points in paragraph 1.

    (i) It is pleaded that the Second Defendant reserved the right to contend the Claim Form had not been validly amended to join the Second Defendant so that the claim against the Second Defendant is a nullity.
    (ii) Secondly, the Second Defendant reserved the right to contend that the Claim Form had been served out of time against it.
    (iii) Thirdly, the Second Defendant reserved the right to contend that these proceedings should be struck out for failure to comply with the CPR and/or practice directions in that the Claimant had failed to serve a schedule of loss and a copy of a medical report with the Particulars of Claim.
    (iv) Fourthly, the Second Defendant reserved the right to contend that the proceedings against it are statute barred within the provisions of the Limitations Act 1980.
    (v) Fifthly, the Second Defendant pleaded that the Claim Form contained a deliberate understatement of the value of the claim, so stated in order to pay a reduced issue fee and/or to stop the limitation period from running and that this amounted to an abuse of process whereby the Claimant should be struck out.

20. On 9 May 2016, the Claimant received a medical report from Dr Bone and this together with a schedule of loss (marked "provisional") was sent to the Defendants under cover of a letter of 19 May 2016. On the same date, the Claimant applied to transfer the claim to the High Court and to increase the statement of value to more than £200,000.

21. On 9 June 2016, the First Defendant made an application to strike out the claim or seek summary judgment based on the Claimant's failure to serve a schedule of loss and/or a medical report and the Claimant's decision to value the claim at £1,500 for the purposes of issue. The Second Defendant made its application to strike out on 1 July 2016.

22. The matter was listed for the hearing of all outstanding applications on 15 July 2016 but the court was unable to afford the necessary time and the District Judge adjourned the matter, ordering the Claimant's solicitor to file and serve a witness statement by 12 August 2016 as to whether, and if so when and how, notice of acting and any notice of change of solicitor required to be given by CPR 42 was given to each Defendant and to the court and further to serve a composite witness statement by 30 September 2016.

23. On 29 September 2016, the Defendants jointly served a "Position paper" setting out the grounds upon which they each intended to rely in support of their contention that the claim should be struck out or summary judgment should be entered in their favour. In that Position paper, all three Defendants indicated that they wished to challenge the jurisdiction of the court but only the Third Defendant, being the only party that had ticked the appropriate box in the Acknowledgment of Service (see paragraph 17 above) pursued this argument in the court below and it was abandoned on behalf of the First and Second Defendants.

24. The applications were then heard by HHJ Gargan on 10 November 2016 and he handed down his judgment on 8 May 2017.

The judgment of HHJ Gargan

25. As stated, before HHJ Gargan only the Third Defendant pursued the jurisdictional argument. However, the basis upon which the learned Judge accepted that argument and struck out the case against the Third Defendant remains relevant so far as the First and Second Defendants are concerned because they rely upon the same matters in support of their contention that the case against them should be struck out as an abuse of process.

26. The Third Defendant's application to strike out the claim against it was based upon three matters:
    i) The Claim Form deliberately understated the value of the claim upon issue;
    ii) The order of 5 October granting the Claimant an extension of time to serve the Claim Form should be set aside;
    iii) There was a failure to serve a medical report and schedule of loss with the Particulars of Claim.

27. In the event, the learned Judge struck out the claim in reliance upon (ii) alone and he did not see the need to rely on or decide this application on the basis of (i) or (iii).

28. Before the learned Judge below, it was agreed that the Third Defendant, by ticking the box challenging the jurisdiction of the court, was entitled to challenge the decision of DDJ Greenan to extend the time for service of the Claim Form. The learned Judge started by examining the reason which the Claimant had put forward for seeking to extend the time for service (see paragraph 9 above). He referred to the fact that, at the

time of the statement in support of the application by Ms Butler, GT Law had been instructed for over two and half years and she had failed to explain why it had not been possible to obtain medical evidence at a much earlier stage. More importantly, the learned Judge relied upon an inconsistency between the reason proffered by Ms Butler and what was later said by the case handler who took over conduct of the case on behalf of the Claimant in April 2016, Mr Taylor. In a statement dated 12 July 2016, Mr Taylor stated:

> "5. … following the transfer of this case to Neumans LLP a notice of change of solicitor was filed with the court on 22 October 2015.
>
> 6. Following a review it soon became apparent that no steps had been taken to obtain medical evidence or indeed to obtain a witness statement from the Claimant. …
>
> 13. Following Neumans LLP being instructed in mid-October 2015 steps were taken to obtain medical evidence."

HHJ Gargan contrasted Mr Taylor's statement that no steps had been taken to obtain medical evidence by GT Law with Ms Butler's statement that the Claimant's solicitors had instructed a medical agency to arrange an appointment on behalf of the Claimant and that they were currently awaiting an appointment date and he found that, given Mr Taylor's evidence, Ms Butler's evidence was materially inaccurate. He did not, however, think it appropriate (or necessary, at that stage at least) to make the finding that Ms Butler was lying.

29. The learned Judge then referred to the decision of the Court of Appeal in *Hoddinott v Persimmon Homes* [2007] EWCA Civ 1203 where the Court of Appeal had reviewed the decision of a District Judge to extend the time for service of the Claim Form on the basis of evidence from the Claimant's solicitor that he was not in a position to serve detailed Particulars of Claim because he was waiting for further expert evidence. In that case the District Judge had said:

> "What is clear to me is that the reasons put forward for extending the time for service of the claim form in this case are wholly unacceptable. The reasons claimed by Mr Patterson may well be strong reasons for delaying service of the Particulars of Claim but to my mind they come nowhere near sufficient reasons for extending the time for service of the claim form. There is just no reason why the claim form could not be served on an application to extend the time for serving the Particulars of Claim."

In the course of his judgment on appeal, Dyson LJ said:

> "39. In *Glass v Surrenderan* [2006] 1 WLR 1945 the reason given by the claimant's solicitors for not serving the claim form was that they were awaiting receipt of an accountant's report. In fact, the report was received more than one month before the expiry of the four months' period. This court said at paragraph 150, that there was no basis on which a competent litigation

> solicitor could have justified delaying service of the claim form beyond the four months' period. The extension of time granted by the District Judge was therefore set aside by this court.
>
> 40. We have referred to these decisions because they illustrate the general principle that, where there is no good reason for the failure to serve the claim form within the four months' period the court still retains a discretion to grant an extension of time, but is unlikely to do so.
>
> 41. We would agree with the District Judge that there was no good reason for the claimant's failure to serve within the four months' period in this case."

The Court of Appeal referred to the solicitor in that case as having made a serious error of judgment in failing to serve the Claim Form and found that the reason he gave at paragraph 26 of his witness statement was not a good reason for so failing.

30. Following *Hoddinott's* case, the learned Judge here found that there had been no good reason for failure to serve the Claim Form within the initial four-month period. Firstly, he found that a medical report should have been obtained in the two-year period that GT Law had been instructed. Secondly when it became apparent that it would not be possible to obtain a medical report before the time for service of the Claim Form expired, the Claim Form should have been served and an extension of time sought for the service of Particulars of Claim. Thirdly he referred to Mr Taylor's evidence that no steps had been taken to obtain medical evidence before Neumans were appointed. He found that no District Judge would have been prepared to extend time to serve the Claim Form ostensibly on the ground that further time was required to obtain medical evidence when in fact no attempts had yet been made to obtain such evidence. On that basis, and having considered that it would not be appropriate to exercise his discretion to extend time for service of the Claim Form, the learned Judge decided that the application on behalf of the Third Defendant should succeed and the claim against the Third Defendant should be struck out.

31. In relation to the First and Second Defendants, the learned Judge considered the application on two alternative bases: first, the failure to serve a schedule of loss and medical report with the Particulars of Claim was a failure which brought the Claimant within the principles of *Mitchell/Denton* so that the Claimant was obliged to make an application for relief from sanction; secondly on the basis of abuse of process.

32. The references in this judgment to the "Mitchell/Denton principles" or "Mitchell/Denton regime" refer to the series of cases principally arising pursuant to CPR 3.9 which provides:

> "3.9 - (1) 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."

This provision was considered by the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2014] 1 W.L.R. 795 and then reconsidered by the Court of Appeal in *Denton v TH White Ltd* [2014] 1 W.L.R. 3296. The principles laid down are that a judge should address an application for relief from sanction in three stages:

(i) The first stage is to identify and address the seriousness and significance of the failure which engages Rule 3.9. If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages.
(ii) Secondly, the court should consider why the default occurred.
(iii) Finally, the court evaluates all the circumstances of the case.

33. In relation to relief from sanction, the learned Judge found that the latest time for service of the Particulars of Claim was 1 March 2016. Although the Particulars of Claim were served on 26 February, no medical report or schedule were included. This engaged the provision of CPR 16 PD 4.2 and 4.3 which provide:

> "4.2 The claimant must attach to his Particulars of Claim a schedule of details of any past or future expenses and losses which he claims.
>
> 4.3 Where the claimant is relying on the evidence of a medical practitioner the claimant must attach to or serve with his Particulars of Claim a report from a medical practitioner about the personal injuries which he alleges in his claim."

The learned Judge referred to the fact that there had been no application for permission to serve the Particulars of Claim without the medical report or schedule and, further, there had been no formal application since service for permission to serve the medical report/schedule out of time or for relief from sanction.

34. Having considered the respective contentions of the parties, the learned Judge said this:

> "105. In my judgment a claimant who cannot prove his claim without medical evidence is 'relying on the evidence of a medical practitioner' for the purposes of CPR 16 PD 4.3 whether or not a medical report has yet been obtained. Therefore, such a claimant is under an obligation to serve the evidence of a medical practitioner with the Particulars of Claim. To hold otherwise would mean that a claimant in a personal injury action who delayed in obtaining medical evidence would **never** be required to seek permission to extend the time for service of the medical evidence and/or seek permission from the court to serve the Particulars of Claim without such evidence. There was widespread acceptance among personal injury practitioners that such applications are required. (Indeed, the claimant's solicitors in this case included applications for such extensions when applying to extend the time for service of the Claim form). It is quite clear that medical evidence will be required to establish causation and quantum in this case. Therefore, in my judgment, the claimant was obliged to serve a medical report with the Particulars of Claim unless the court granted an extension of time for such service."

I would comment, at this stage, that it seems to me that, in this passage, the learned judge elided the distinction between a medical report dealing with causation and a medical report dealing with condition and prognosis. It is the latter which needs to be served with the Particulars of Claim. The former will usually be served at a later stage, upon an exchange of medical reports as laid down in directions at a case management hearing, and it is this report to which the learned judge was referring as needed by the Claimant in order to prove his claim. See further paragraph 48 below).

35. The learned Judge went on to consider that the failure to serve the medical report and schedule of loss engaged the principles of *Mitchell/Denton,* relying upon the decision in *Altomart v Salford* [2014] EWCA Civ 1408. He found that although there is no express sanction for the failure to serve the medical report/schedule of loss in time, a claimant

> "cannot simply ignore the provisions of the practice direction. The implied sanction is that the claimant is not entitled to rely upon any such medical report/schedule unless the defendant has waived the breach. Therefore, I'm firmly of the view that the claimant has an obligation to apply for an extension of time."

36. Having thus decided that the *Mitchell/Denton* principles are engaged, he found that there was no good explanation for the failure on the part of the claimant's solicitors to serve a medical report and schedule of loss with the Particulars of Claim. He found that the delay in so doing was about 11 – 12 weeks but went on to say:

> "117. … however, the provisions of the practice direction are designed to ensure that defendants generally know the case that they have to meet at an early stage in order to promote settlement and so that the parties can concentrate on the material issues, thereby avoiding unnecessary expense.
>
> 118. Therefore I'm not prepared to regard the breach as *immaterial*. In my judgment it is a form of breach which should be regarded as serious and significant although I regard it as very much at the lower end of the scale of such breaches."

He considered that the conduct of Neumans was wholly unacceptable and compounded the earlier problems arising from the failure of Ms Butler to obtain medical evidence and, in addition, Neumans could be criticised for failure to serve a schedule of special damages. For these reasons he considered there was no good explanation for the failure.

37. Finally, the learned Judge considered "all the circumstances of the case" and found:

> "126. Therefore when the claimant's default is placed in context, it shows what amounts to a flagrant disregard for the rules and practice directions governing the conduct of litigation. The claimant's overall conduct has, in my judgment, significantly prejudiced the defendants and has undoubtedly affected the smooth running of the litigation as a whole. Therefore in all the circumstances of the case I do not consider that relief from sanctions should be granted even though the effect of that is to deprive the claimant of a substantial personal injury claim. It

> follows that the claimant cannot rely upon the medical report and/or the schedule. Therefore, it necessarily follows that his claim must fail and be struck out."

In addition to the failure to serve the medical report and schedule, the learned Judge relied additionally upon the following:

> "1) The Claimant's solicitors procured an extension of time for the service of the Claim form by misrepresenting the attempts which had been made to obtain medical evidence;
>
> 2) The Claimant's solicitors failed to serve the September 2015 application to extend the time for service of the Claim form or the statement from Ms Butler on the First Defendant at the time the order was obtained;
>
> 3) More significantly, the Claimant's solicitors failed to serve those documents on the Second and Third Defendants when they were joined;
>
> 4) Further still the Claimant's solicitors failed to serve any details connected with the failed application to extend the time for the service of the Claim form (and the Particulars of Claim, and the medical report and schedule) made in January 2016 and dismissed in February 2016."

38. At paragraph 128 of his judgment, HHJ Gargan also considered the position on the basis that this was an application to strike out as an abuse of process and not a case to which the provision on relief from sanction applied. Having considered all the circumstances of the case including the failure to serve the medical report/schedule in accordance with CPR PD 16 and the factors set out in paragraph 37 above he stated:

> "In my judgment the claimant's conduct (or that of his solicitors with which he is fixed) represents a flagrant disregard for the rules. In my judgment the failures have (cumulatively) had a significant adverse impact upon the way in which the defendants have been able to deal with the claim.
>
> 131. Therefore, even were this not an implied relief against sanctions claim I would strike out the Claim."

This appeal: The Claimant's arguments

39. Mr Ronald Walker QC, for the Claimant, submitted that the decision by HHJ Gargan that the failure to serve a medical report and schedule with the Particulars of Claim engaged the principles of *Mitchell/Denton*, that the *Denton* criteria should be applied and that the Claimant was not entitled to relief against sanction was plainly wrong in law. He submitted that the starting point is that PD 16 does not itself contain any sanction for failure to serve a medical report or schedule of loss. He further submitted that this is not the kind of case where an implied sanction applies as in the *Altomart* decision (as to which, see further paragraph 45). He submitted that the *Mitchell/Denton* regime only applies where either the rule/order itself lays down the sanction or where the default position carries an implied sanction. He submitted that where PD 16.4 is

not complied with, then the remedy is for a defendant to apply for an order for service of the medical report and/or schedule of loss but what the claimant does not need to do is apply for relief against sanction. He stated that were that to be the case the courts would be inundated with such applications. He relied upon the decision in *Walsham Chalet Park Limited v Tallington Lakes Limited* [2014] EWCA Civ 1607 where, equally, it was found that it was possible for the claim to proceed without an application being made by the party in default where there had been a failure to comply with a rule, practice direction or order and no sanction was imposed by the rule, practice direction or order for failure to comply. In *Walsham*, Richards LJ said (at paragraph 44):

> "It must be stressed, however, that the ultimate question for the court in deciding whether to impose the sanction of strike-out is materially different from that in deciding whether to grant relief from a sanction which has already been imposed. In a strike-out application under rule 3.4 the proportionality of the sanction itself is in issue., whereas an application under rule 3.9 for relief from sanction has to proceed on the basis that the sanction was properly imposed (see *Mitchell* at 44-45). The importance of that sanction is particularly obvious where the sanction being sought is as fundamental as a strike-out."

Mr Walker submitted that the learned Judge, by introducing and assuming an implied sanction that, where the medical report and/or schedule is not served, the claimant cannot rely upon the medical report or schedule, thereby excluded consideration of the proportionality of the sanction which is an important consideration in relation to strike out applications, as the decision in *Walsham* shows. He submitted that the implied sanction contended for (and which the learned Judge found applied) is disproportionate to the default and cannot be said to arise by logical implication. The learned Judge incorrectly equated permission to rely on the medical evidence and schedule of loss with the steps required by PD 16 paras 4.2 and 4.3.

40. So far as abuse of process is concerned, Mr Walker QC submitted that the failure to serve the medical report and schedule of loss was, on the learned Judge's own finding, venial, not serious, by reference to paragraphs 67 and 69 of the judgment. He disputed that the learned Judge had been entitled to find that there had been a deliberate attempt to mislead the court at the time the first application to extend the period of time for service of the Claim form was made and that there were other potential explanations for the apparent discrepancy between the statements of Ms Butler and Mr Taylor including, for example, that the error was Mr Taylor's not Ms Butler's so that the court had not in fact been misled by Ms Butler when the application was made. Mr Walker submitted that, certainly, the learned Judge should not have made a finding such as he did without having made arrangements for Ms Butler and/or Mr Taylor to be called and cross-examined.

41. Having further considered the matters relied upon at paragraph 125.2 – 125.4 of the judgment, Mr Walker submitted that these matters did not amount to sufficient reason for the court to hold that there was an abuse of process sufficient to justify striking-out the claim.

The Defendants' Arguments

42. For the Respondent Defendants, Mr Patrick Limb QC first submitted that this was a case where the learned Judge had taken a discriminating view, finding for the Claimant on some points and against the Claimant on others, where he had fully explained his reasons and had made clear which factors were important and which he regarded as makeweights. Thus, the judgment was clearly reasoned and an appellate court should be slow to interfere with the judge's reasoning. He reminded me that it is necessary to show that the Judge's decision is wrong. He relied upon the following passage at paragraph 52.21.5 of the White Book:

> "There are some cases where the first instance judge has made the decision which involved the assessment and balancing of a large number of factors, for example, determining whether an action constitutes abuse of process. Such a decision is not an exercise in discretion, because there is only one right answer to the question before the judge. The Court of Appeal is reluctant to interfere with such a decision. However, the Court of Appeal will interfere if the judge has taken into account immaterial factors, omitted to take into account material factors, erred in principle or come to a decision that is impermissible: see *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260. The Court of Appeal will also interfere if the judge's decision was "plainly wrong": see *Stuart v Goldberg* [2008] 1 WLR 823 (CA) at [76] and [81]."

Mr Limb submitted, correctly, that my position on an appeal from HHJ Gargan is the same as the position of the Court of Appeal referred to in that passage.

43. In relation to the issue of the application of the *Mitchell/Denton* regime and the need for the claimant to apply for relief against sanction, he submitted that the wording of 16 PD.4 is significant. First, the use of the word "must" shows that the need to comply with this practice direction is mandatory; secondly the requirement to comply with a practice direction is equal to the requirement to comply with a rule of the CPR or with an order of the court; thirdly, 16 PD.4 makes it clear that there is a temporal requirement, namely that the documents in question (medical report and schedule of loss) must be served with the Particulars of Claim and not at some indefinite time in the future.

44. Mr Limb accepted that no sanction is expressly laid down in the practice direction itself and therefore, for him to succeed in upholding the decision of the learned Judge in relation to the application of the *Mitchell/Denton* regime, he needs to go down the route of implied sanction. In this regard he relied strongly on the decision of the Court of Appeal in *Altomart v Salford Estates* [2014] EWCA Civ 1408 and the judgment of Moore-Bick LJ.

45. In *Altomart v Salford Estates* the respondent to an appeal applied for an extension of time in which to file a Respondent's Notice under CPR 52.5 (2) (b). Counsel for the appellant submitted that where there had been a failure to file a Respondent's Notice in time, the consequent need to obtain an extension of time to enable the grounds to be

argued is analogous to a sanction so that such an application should attract the same degree of rigorous scrutiny as an application for relief against sanction. It was submitted that the courts have now become less tolerant of failures to comply with the rules and have adopted a more robust attitude towards them. Moore-Bick LJ referred to the language of CPR 3.8 (1) and 3.9 (1) and found that an application for an extension of time is not one that falls within the scope of rule 3.9, either expressly or by analogy and such applications are governed by rule 3.2 (1) (a). Thus, there is a distinction between a sanction imposed by a rule which is a consequence which the rule itself explicitly specifies and imposes and where no such sanction is imposed. Referring to the consequences of failing to file a Respondent's Notice within the prescribed time, although they are not spelled out in the rules, Moore-Bick LJ referred to:

> "a number of cases dating back more than a decade [in which] the courts have recognised the existence of implied sanctions capable of engaging the approach contained in rule 3.9 and the *Mitchell/Denton* principles."

Thus, he referred to *Sayers v Clarke Walker* [2002] 1 WLR 3095 where the court considered the approach to be adopted to applications for permission to appeal out of time. Implying the application of rule 3.9 and the *Mitchell/Denton* principles, Brooke LJ said:

> "In my judgment it is equally appropriate to have regard to the checklist in CPR 3.9 when a court is considering an application for an extension of time for appealing in a case of any complexity. The reason for this is that the applicant has not complied with CPR 52.4 (2) and if the court is unwilling to grant him relief from this failure to comply through the extension of time he is seeking, the consequence would be that the order of the lower court will stand and he cannot appeal it. Even though this may not be a sanction expressly 'imposed' by the rule, the consequence will be exactly the same as if it had been, and it would be far better for courts to follow the checklist contained in CPR 3.9 on this occasion, too, than for judges to make their own checklists for cases where sanctions are implied and are not expressly imposed."

Thus, applications for permission to appeal out of time are considered to be analogous to applications under rule 3.9 and are therefore to be decided in accordance with the same principles. Moore-Bick LJ said:

> "16. The reason given by Brooke LJ in *Sayers v Clarke Walker* for treating an application for permission to appeal out of time as analogous to an application for relief from sanctions was that without such an extension the appeal could not proceed. Mr Knox submitted that an application for permission to file a Respondent's Notice out of time is different because the proceedings will continue in any event. That is certainly true, but in my view that is not a significant ground of distinction. The purpose of the Respondent's Notice to enable *Altomart* to rely at the hearing of the appeal on grounds for upholding the judgment that were not before the court below. If an extension of time is not granted it will be unable to do so. To that extent that area of

> dispute will not come before the court. In my view for a respondent to be prevented from pursuing the merits of a case it wishes to pursue on the appeal is no more or less of an implied sanction than it is for an appellant to be prevented from pursuing its case on appeal. In my view, therefore, the *Mitchell* principles apply with equal force to an application for an extension of time in which to file a Respondent's Notice."

46. In the course of argument I suggested to Mr Limb QC that, with regard to rules or practice directions which carry no sanction for breach on their face, there might be a distinction between rules which have a consequence that follows from breach (without that consequence being spelled out) such as the failure to appeal in time (a consequence that the judgment of the court below stands) or a failure to put in a Respondent's Notice in time (with the consequence that the respondent is bound by the reasoning of the judge below and cannot seek to uphold the judgment on different grounds), and rules or practice directions which do not have such a consequence. Mr Limb submitted that this is not the proper basis for distinguishing between rules which carry the *Mitchell/Denton* regime and those that do not, but rather he proposed a test whereby the court should ask itself whether the default is egregious. He said that the correct approach is to look at the importance of the rule, the reason for the rule, the way in which it is expressed (whether mandatory or not) and whether breach of the rule can be described as "a mere error of procedure". He submitted that the schedule of loss and the medical report are fundamental parts of the Particulars of Claim and when this is allied with the mandatory terms of 16 PD.4 failure to comply is properly designated as a failure which carries the *Mitchell/Denton* regime.

47. So far as abuse of process is concerned, Mr Limb referred to the learned Judge's finding that there had been an abuse of process in relation to the way in which the Claimant had obtained an extension of time for service of the Claim Form, not only that this application was made on the back of a witness statement which was either deliberately or recklessly wrong and inaccurate. Furthermore, the Claimant had failed to comply with the provisions of CPR 23.9 by failing to serve the application notices and statements on the Defendants. This was compounded by the failure to serve any details connected with the failed application to extend the time for service of the Claim Form, the application which was rejected by DDJ Pickup. Mr Limb submitted that when these are combined with the failure to comply with the rules and serve the medical report and schedule of loss with the Particulars of Claim, they were rightly found by the judge below together to amount to an abuse of process which justified striking out the claim. In this regard, Mr Limb submitted that the evaluation of the judge came within the ambit of his discretion such that his decision should not be interfered with on appeal.

Discussion

48. The first question that arises for decision is whether the learned Judge was correct in holding that where, in breach of the provisions of 16 PD.4, a claimant fails to serve a medical report and schedule of loss with the Particulars of Claim, they are thereby in breach such as to require relief against sanction so that the principles arising under *Mitchell/Denton* are engaged.

49. At first blush, this is a surprising contention. Frequently, particularly in complicated personal injury or clinical negligence litigation, the focus is on difficult questions of causation which may or may not resolve the matter. Often, at a relatively early stage, a medical report and schedule of loss served with the Particulars of Claim are simply uninformative. Thus, the medical report, which the practice direction requires should be "about the personal injuries which he alleges in his claim" is no more than a relatively anodyne and brief recitation of the claimant's condition and, so far as known, prognosis. So far as the schedule of past and future expenses and losses claimed is concerned, this frequently contains no more than outline heads of loss with "TBA" (to be advised) or "TBC" (to be confirmed or to be calculated) inserted. Although it may be possible to set out some of the special damages, such a schedule says nothing about the true value of the case when the heads of future loss cannot be determined until the case in relation to causation is fully explored and known. In such cases, the court, as part of its case management powers, will lay down a timetable for the service and exchange of properly drawn medical evidence and schedules of loss further on into the litigation. In such cases, an alternative to serving an anodyne and relatively uninformative schedule of loss and medical report with the Particulars of Claim is to do what was done in the present case and state in the covering letter when the Particulars of Claim are served that these will follow and then leave it to the court to case manage the claim and make provision for service of these documents in due course. In such cases, it is always open to the defendant to ask the court to require the claimant to serve a schedule and medical report if the defendant so desires but, in the more complicated cases, there is no point because the document which will be served, although strictly compliant with the rules, will often take the matter no further forward at that stage. By contrast, in a simple personal injury action such as a road traffic accident claim, there will usually be no difficulty at all in serving a medical report and schedule of loss with the Particulars of Claim and this is the norm in such cases. That then enables the defendant to take a view about the merits and value of the case at an early stage and make an offer of settlement, if so advised, with a consequent saving of costs. It seems to me that 16 PD.4 sets a benchmark because it is a practice direction which covers all personal injury claims from the most simple to the most complicated but which, in many of the more complicated cases, is honoured more in the breach than in the observance where the parties sensibly recognise the limitations of what can be achieved at the early stage of service of the Particulars of Claim. Thus, a defendant's advisors will often agree that service of a medical report and schedule of loss at that stage is pointless. However, as I have stated, the defendant always has the option of recourse to the court. The point is that most practitioners would, I strongly suspect, be surprised at the suggestion that the *Mitchell/Denton* regime for relief from sanction applies to the obligation to serve a medical report and schedule of loss with the Particulars of Claim, with all the hurdles which need to be surmounted within those principles.

50. Nevertheless, it is necessary to consider whether, in law, the Defendants' submission in this case, and the ruling by the learned Judge, to the effect that a claimant who has failed to serve a medical report and/or schedule of loss with his Particulars of Claim, is in need of relief from sanction, is or is not correct.

51. The starting point is CPR 3.9 which for convenience I set out again:

> "1) On an application for relief from any sanction imposed for any 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;
>
> b) To enforce compliance with rules, practice directions and orders.
>
> 2) An application for relief must be supported by evidence."
>
> It is to be noted that this provision refers to "any sanction imposed for a failure to comply …". Often such a sanction is imposed by the order of the court. Thus, if the court orders something to be done within a certain period of time and lays down a sanction if that is not done, then a defaulting party needs to apply for relief from sanction. Alternatively, the rule or practice direction may itself contain a sanction. An example is CPR 3.7 A1, a rule which provides sanctions for non-payment of the trial fee by the claimant. Part of that rule states that if the claimant has had notice to pay the trial fee and has not applied to have the trial fee remitted in whole or in part and the trial fee has not been paid on or before the trial fee payment date, then the claim will automatically be struck-out without further order of the court and the claimant will be liable for the costs which the defendant has incurred.

52. There are, however, some rules or practice directions which, without themselves expressly laying down a sanction for non-compliance, carry with them an implied sanction by reference to the consequences of the rule not having been observed. Two examples are those referred to in paragraph 45 above: the failure of a respondent who wishes to resist an appeal on grounds other than those relied on in the court below to serve a Respondent's Notice (*Altomart*); and a litigant who wishes to appeal from a court order or judgment but fails to serve and file a notice of appeal in time (*Sayers v Clarke Walker*).

In my judgment, the principle behind the reason why those rules carry with them an implied need to apply for relief from sanction when breached can be discerned by reference to the default position if the application is refused. In the case of a litigant who fails to serve and file a notice of appeal in time, without an extension of time the litigant is unable to appeal as any notice of appeal would be invalid as having been served out of time and the judgment in the court below will stand. This is so significant for the purposes of the litigation that the need to apply for relief from sanction is implied. Similarly, as explained by Moore-Bick LJ in *Altomart*, the failure to serve a respondent's notice means that, without permission to do so, the respondent is fixed with relying on the grounds relied on below and may not argue that the judgment below should be upheld for different reasons. This may so significantly confine the scope of the appeal as to be highly significant for the purposes of the litigation and has therefore also been held to require relief from sanction although, as it seems to me, this is much closer to the line than the failure to serve a notice of appeal in time considered in the *Sayers'* case.

53. However, in my judgment the failure to serve a medical report and/or a schedule of loss with the Particulars of Claim is not in the same category, for the reasons which I have endeavoured to set out in paragraph 49 above. Often, within the context of the

particular litigation, this will be a trivial breach because compliance can be achieved with the service of documents which, in the end, are relatively uninformative and do not take the matter any further. This comes back to the wide range of personal injury litigation and the significant difference between, at one end of the scale, a simple running-down action and, at the other end of the scale, a complicated clinical negligence action or, as here, personal injury action. It seems to me that the provisions of 16 PD.4 are in reality intended to be directed towards the former, rather than the latter. The "one size fits all" approach of the CPR leads to documents being served with the Particulars of Claim in complex cases which, in reality, are unhelpful and uninformative. In my judgment, 16 PD.4 is not in the category of the kind of rule or practice direction to which the implied relief from sanction doctrine should be applied and, with the greatest respect to HHJ Gargan, I disagree with him in this regard.

54. In his submissions, Mr Limb referred to the wording of 16 PD.4 and the use of the word "must" indicating that it is a mandatory provision. Whilst this is true, I would observe that this is a characteristic of the drafting of the CPR and the word "must" is used liberally. However, to imply the need to apply for relief from sanction in all cases where a rule or practice direction contains such wording would, as Mr Walker submitted, result in the courts being inundated with applications quite unnecessarily.

Abuse of process

55. The application to strike out the claim for abuse of process is, as already observed, in a different category to the application in relation to relief from sanction because in relation to the latter, the proportionality of the sanction is not considered in the same way. To strike out for abuse of process has rightly been described as a draconian measure and it has been recognised over the years since the CPR came into force that there will often be alternative ways of dealing with a case justly without taking such a step. Thus, in *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926, Lord Woolf said (at page 1933):

> "Under rule 3.4(c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."

Similarly, in *Marstons plc v Charman* [2009] EWCA Civ 719, Rix LJ said at para. 21:

> "… the well-known case of *Biguzzi v Rank Leisure* plc, almost the first and perhaps, in its way, to this day the leading case in this court from the judgment of Lord Woolf, the Master of the Rolls himself, on the case management powers of the then new CPR. The essence of the decision in that case was that, while it had to be recognised that under the CPR delays in complying with court orders would not be tolerated in the leisurely way in which they had perhaps been tolerated under the Rules of the

> Supreme Court, nevertheless courts exercising their new case management powers were not to abuse those powers by going to the extreme of striking out a case for delay in compliance with court orders when a more proportionate use of the much more flexible powers granted under the CPR would be more attuned to the problems in question in a particular."

56. In the present case, it seems to me that the fact, as the learned Judge found, that the court had been deliberately or, at best, recklessly misled by the Claimant's solicitor into granting the initial extension of the time for service of the Claim Form, played a significant part in the decision below. However, in my judgment Mr Walker is right to contend that there were other potential explanations for the discrepancy between the statement of Ms Butler and the statement of Mr Taylor which the learned Judge could have considered. In particular, Mr Taylor's statement raised question marks because he referred to a review taking place following the transfer of the case to Neumans in October 2015 (see paragraph 28 above). However, Mr Taylor did not take over the conduct of the case until April 2016 and until then, conduct of the case remained with Ms Butler. Thus, there was no significant "regime change" in October 2015 and it seems to me that there is no proper basis upon which the court could find that it had been misled by Ms Butler, and certainly not without the matter being further investigated and the court hearing oral evidence about it.

57. Without the court having been misled into granting the initial extension of time for service of the Claim Form, it seems to me that the other complaints and breaches of the rules, without condoning them or suggesting that they were in any way excusable, did not, whether individually or collectively, amount to the kind of abuse of process which justifies a claim being struck out. There were, in my judgment, other and more proportionate steps which the court could have taken including the making of Unless orders and penalisation in costs. In the context of a significant personal injury claim, in my judgment to strike out a case was not a proportionate response and in this regard I prefer the submissions of Mr Walker to those of Mr Limb.

58. For the above reasons, the appeal will be allowed and the case will be reinstated.

59. Before leaving this case, I cannot refrain from remarking that it is utterly tragic that, for a Claimant with such a foreshortened life expectancy, it has taken just a few days short of two years for the appeal to come on for hearing before me from the time it was heard in the court below. I cast no blame for this, but I sincerely hope that the parties will be able to agree a timetable for the future conduct of this case which will enable it to be resolved as expeditiously as possible and, in any event, whilst the Claimant remains able to see the outcome of the litigation.

.