Neutral Citation Number: [2024] EWCA Civ 14

Case No: CA-2022-002427

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM COUNTY COURT AT BASINGSTOKE SITTING AT SOUTHAMPTON
His Honour Judge Glen
F11YY273

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/01/2024

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE MALES
and
LORD JUSTICE BIRSS

- -

Between :

Yesss (A) Electrical Ltd	**Appellant/ Defendant**
- and -	
Martin Warren	**Respondent/ Claimant**

- -
- -

Andrew McLaughlin (instructed by **DAC Beachcroft Claims Limited**) for the **Appellant**
Matthew Chapman KC and **Bernard Pressman** (instructed by **JF Law Limited**) for the **Respondent**

Hearing date: 21 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19th January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Birss:

1. This appeal concerns the question whether a late application for permission to rely on expert evidence in a new discipline not addressed by the existing directions is an application for relief from sanctions under CPR r3.8 and r3.9 to which *Denton* and *Mitchell* apply. The judges below allowed the new expert evidence into the case. They held that the application was not one for relief from sanctions but was to be decided in accordance with the overriding objective. The appellant contends that this is wrong in law. The appellant also contends that even if the application is not a matter of relief from sanctions, it should have been refused.

2. The claimant (respondent) Mr Warren was employed by the defendant (appellant). He alleges that he was injured at work on 29 September 2016 when loading goods into the back of a van. Proceedings were issued on 3 October 2019. The value of the claim is said to be £140,000. The defendant denies liability and asserts that in respect of a claim for care costs there has been fundamental dishonesty.

3. The order allocating the case to the multi-track was made on 3 August 2020 and the CCMC took place on 19 October 2020. Directions were given for expert evidence from orthopaedic surgeons. The claimant had already obtained four reports from an orthopaedic surgeon Mr Quaille, including the most recent (4th) report dated 2 September 2020. The CCMC order gave the claimant permission to rely on those four reports, and gave the defendant permission to rely on a report of their own orthopaedic surgeon Mr Oxborrow, to be served on 19 March 2021. A timetable for questions for the experts was set and July 2021 was provided as the date for a joint experts' report setting out their agreement and disagreement. The directions also included a pre-trial settlement hearing 10 weeks before trial, provisions about costs budgets and a direction for trial to be listed in a window starting in January 2022.

4. Notably, at the end of Mr Quaille's 4th report at paragraph 11.7, Mr Quaille said that he thought the opinion of a pain management expert should be sought. No point was made about this at the CCMC and no permission was sought or given for a pain management expert.

5. Witness evidence was exchanged on 4 February 2021 and pre-trial checklists were submitted in October 2021. On 1 November 2021 the pre-trial settlement hearing took place, but settlement was not reached. On 6 December 2021 a notice of trial date was issued listing the trial for 4 April 2022. This trial date was then vacated due to the unavailability of witnesses.

6. By an application notice dated 22 February 2022 the claimant applied for permission to rely on reports from pain management and psychological experts.

7. On 25 February 2022, a notice of trial was issued listing the trial for 20 and 21 September 2022. The claimant applied to vacate that trial due to unavailability of witnesses. It transpired that although the claimant had notified the dates when its witnesses were not available, due to an administrative error these had not been taken into account when listing the trial.

8. On 27 June 2022, DJ Stewart heard the various applications. He made an order on the same day which vacated the trial date and then later, on 18 August 2022, the judge made

the order granting permission to the claimant to rely on a pain management expert, and refusing permission for a psychologist. The order included further directions and set a further CCMC for January 2023.

9. In his judgment the judge recorded the claimant's explanation that the application arose because a new claim handler had taken over the file after the CCMC and had taken the view that pain management expertise was required as a result of Mr Quaille's opinion. He held that relief from sanctions did not apply (following *T (Child) v Imperial College Healthcare Trust* [2020] EWHC 1147 (QB) Stewart J) and so the matter was to be decided in accordance with the overriding objective. The judge noted the claimant's acceptance that the application was late but noted it was not "very late" because as a result of the trial date having just been vacated, the application would not cause a trial date to be lost. (For the distinction between late and very late see Stewart J in *T (Child) v Imperial College Healthcare Trust* itself and also *Quah Su-Ling v Goldmann Sachs* [2015] EWHC 759 Comm (Carr J as she then was)). The judge rightly described this as good fortune for the claimant (at paragraph [8]). The judge gave permission to the claimant to rely on this expert evidence. He also gave permission to appeal on the relief from sanctions ground.

10. HHJ Glen heard and dismissed the appeal on 11 November 2022. As one might expect rather more cases were cited before HHJ Glen. Nevertheless having reviewed them he concluded that none of the cited cases directly supported the proposition that CPR rule 3.9 applied to this matter. Addressing the new cases, the circuit judge held:

> "24. *Elliott v. Stobart Group Limited* [2015] EWCA Civ 449 concerned a failure to serve expert evidence in accordance with a deadline set by the court. *Altomart Limited v Salford Estates (No.2) Limited* [2014] EWCA Civ 1408 concerned a failure to file a Respondent's Notice in time. *Global Energy Horizons Corporation v Robert Gray* [2019] EWHC 1132 concerned an application to adduce supplementary expert evidence beyond the date fixed by directions. *Magee* [*Magee v. Willmott* [2020] EWHC 1378 (QB)] involved additional expert evidence from existing experts not disclosed in accordance with directions. *MS (a child) v Croydon Health Service NHS Trust* [2020] EWHC 2728 involved a failure to apply for permission for expert evidence within the time set by an order."

11. The circuit judge also drew attention to another case which had not been relied on, namely *S J Moore (Jeweller) Ltd v Squibb Group* [2018] EWHC 2731 (Karen Steyn QC sitting as a Deputy High Court Judge). In that case the Deputy judge drew an analogy between late fact evidence and late expert evidence, holding (at [50]) that:

> "just as an application to rely on late witness evidence falls to be determined by reference to the principles for relief from sanction, an application to rely on late expert evidence should also be determined by reference to those principles"

12. As HHJ Glen also held, and I agree, an application to serve late factual witness evidence after the deadline has expired is one for relief from sanctions. That arises because, as

explained in *Chartwell v Fergies* [2014] EWCA Civ 506, rule 32.10 operates as a sanction for that failure to have served a witness statement in time. It provides:

> **Consequence of failure to serve witness statement or summary**
>
> **32.10** If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission.

13. Therefore since relief from sanctions applies to witness statements, Karen Steyn QC held that so too should it apply to an application to adduce late expert evidence. However, as HHJ Glen noted, Stewart J in *T (Child) v Imperial* had expressly considered and declined to follow *S J Moore*, holding that late expert evidence of the kind this case is concerned with was not a matter of relief from sanctions. HHJ Glen also noted that the reasoning in *T (Child) v Imperial* was followed in *Chaplin v Pistol* [2020] EWHC 1543 (QB).

14. HHJ Glen concluded at [27] that to the extent it was open to him to do so, he preferred the approach in *T (Child) v Imperial*. He held that lateness itself did not engage r3.9 and that there is a logical distinction between cases where a party has defaulted in respect of a time limit imposed by a rule or order and those where there has been no such default. Therefore HHJ Glen concluded that DJ Stewart had approached the exercise of his discretion on the correct legal basis. He found no grounds for interfering with that exercise of discretion.

15. Permission for a second appeal was granted by Lewison LJ on 14 February 2023 on the two grounds I have already mentioned. In giving permission Lewison LJ noted that there were conflicting authorities in the High Court on the relief from sanctions issue.

16. Before this court the main submission of the appellant (defendant) was that the case was one for relief against sanctions. Counsel submitted that the starting point was first to identify the relevant breach, of a rule, practice direction or order, then second to identify the sanction for that breach and third to approach the application as one seeking to avoid the consequences of the sanction. At the first stage, breach, he identified a number of provisions in the directions, rules and practice directions which he contended had been breached. They were paragraph 7(f) of the allocation order of 3 August 2020, rule 29.4 of the civil procedure rules themselves, paragraphs 3.5, 5.6 and 6.2(1) of Practice Direction 29. I will come back to the detail below but broadly the provisions relied on are all designed to regulate when in the proceedings case management directions are applied for and made, and to make the CCMC the single occasion at which case management is undertaken, as far as that is possible. The alleged breach of these various provisions was the failure of the respondent to make an application to rely on a pain management expert at the original CCMC in October 2020. Breach of paragraph 11 of the CCMC order of 19 October 2020 was also alleged. This order required application for oral expert evidence to be made in the pre-trial checklists.

17. At the second, sanction, stage of the analysis counsel submitted that the applicable sanction was provided by CPR r35.4(1). This provides for the need for permission for expert evidence, as follows:

> **Court's power to restrict expert evidence**
>
> 35.4 (1) No party may call an expert or put in evidence an expert's report without the court's permission.

18. Accordingly the appellant submitted that the court ought to have approached the case as one of relief from sanctions applying *Denton* and *Mitchell* and, if it had done so, the application would have been refused.

19. On the second ground of appeal the appellant's case was that the judges' decisions below were plainly wrong. The delay between the CCMC and the application is very serious and the last minute introduction of pain management evidence into the case is grossly inefficient and disproportionate. Refusal of the application causes little prejudice to the respondent claimant, who will still have his claim, but is prejudicial to the appellant defendant, who will not recover costs under the QOCS system unless one way costs shifting is disapplied. (There is an allegation of fundamental dishonesty, relating to care costs.)

20. The respondent's submission is that this case does not engage r3.9 and relief from sanctions, and that the approach of the judges below was correct. The rules provide and ought to provide a framework which is clear and in which sanctions, if they are applicable, are made apparent. There is no order or rule (or PD) which has been breached in this case, and there is no sanction in place from which the respondent requires relief. Rule 35.4(1) did not contain an express or implied sanction. The second ground should be dismissed as well. There are no grounds for interfering with the exercise of the judges' discretion. Such a decision is only "plainly wrong" if it exceeds the generous ambit within which reasonable disagreement is possible. A crucial dimension below was that at the time the judge was deciding the matter there was no trial date in place. As the opinion of Mr Quaille made clear, pain management evidence on the claimant's condition, prognosis and appropriate treatment options would assist the court.

21. Before going further it is worth drawing attention to a point mentioned in the submissions as a possible further sanction but which in the end was not pressed. That further possible sanction was based on r35.13. It is convenient to explain now why it is not relevant. The rule provides that:

> **Consequence of failure to disclose expert's report**
>
> 35.13 A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the court gives permission.

22. It was common ground, and in any case I would hold, that this rule would operate as a sanction in different circumstances from the ones in this case. If the court at the CCMC had directed evidence from an expert of a given discipline and had set a timetable for that evidence and a party had failed to provide the report of that type of expert within the time specified, then a later application for permission to use the report would be one to which r3.9 (relief from sanctions) applied. It would be an analogous situation applied to an expert's report as the situation in *Chartwell* applies to witness statements with r35.13 operating in a manner analogous to r32.10. *Magee v Wilmot* (cited by HHJ Glen)

is a decision on this basis. I agree with the editors of the White Book at 35.13.1 (2023 Ed) that rule 35.13 presupposes that the party was required to disclose the report in the first place. That is why the rule refers to a failure to do something. In other words the rule will apply in the circumstance when a party has been directed to disclose the expert's report and has failed to do so. However that is not the situation which arises in this case.

23. The parties' submissions also took into account the recent judgment of the Court of Appeal in *FXF v Ishinryu Karate Association* [2023] EWCA Civ 891 in which the Master of the Rolls gave the leading judgment and Nicola Davies LJ and I agreed. Shortly before the hearing the judgment in *Lufthansa Technik v Panasonic Avionics Corp* [2023] EWCA Civ 1273 was handed down, which considered the ambit of relief from sanctions. I gave the leading judgment and King and Newey LJJ agreed. This was drawn to the parties' attention, along with *Chartwell v Fergies*, and counsel addressed the decisions in their oral submissions.

Relief from sanctions – the rules

24. I begin with the pair of rules which relate generally to sanctions and relief from sanctions. They are r3.8 and r3.9 which provide as follows:

> **Sanctions have effect unless defaulting party obtains relief**
>
> Rule 3.8
>
> (1) Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.
>
> *[…]*
>
> **Relief from sanctions**
>
> Rule 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.
>
> (2) An application for relief must be supported by evidence.

25. The critical starting point, as the appellant's submissions recognise, is a breach of a rule, practice direction or order. It may seem trite to say that if there has been no breach

of a rule, practice direction or order then the relief from sanctions provisions do not apply, but it is worth emphasising. That is because in some contexts it appears that the concept of "relief from sanctions" has been used as a label simply to characterise the tougher approach to case management and compliance which can be found in ***Mitchell*** and ***Denton***. That is not right. The courts today do apply an approach to case management in general which is less tolerant of delays than before. The modern approach has a greater emphasis on compliance and the need for efficient conduct of litigation at proportionate cost. There is recognition that the need for efficiency and proportionate cost applies both in the given case and in relation to knock on effects on other cases. The basis in the rules for this general approach, as I mentioned in ***Lufthansa*** at [23], is not r3.9 and relief from sanctions, rather it is that the two principles identified are now embedded in the overriding objective (r1.1(2)(e) and (f)) and they play an important part in its application. That is why it can be said that the "ethos" of Denton applies even when r3.9 (relief from sanctions) is not engaged (c.f. ***FXF*** paragraph 76).

26. Assuming a breach has been identified, the next aspect is sanction. The issue in ***Lufthansa*** was that although there was a clear breach of an order, that breach attracted no sanction and therefore the applicant did not need relief. The application therefore fell under the overriding objective in general. I refer to [21] of ***Lufthansa***, in which I addressed sanctions in this context and referred to the distinction between express and implied sanctions. Briefly, I sought to explain that rules 3.8 and 3.9 do not create sanctions, they apply when a sanction exists; and that when a sanction does exist and has been imposed, the onus is on the party seeking relief to come to court. ***Denton*** is not concerned with identifying whether or not a sanction exists. The sanctions may be expressly provided for in the rules or the relevant order, and certain classes of implied sanction have also been identified, in ***Salford Estates v Altomart*** (cited above) and ***Sayers v Clarke Walker*** [2002] EWCA Civ 645.

27. Also relevant is the Master of the Rolls's analysis in ***FXF*** at [59] and [60], in which he identified a third category over and above express or implied sanctions as follows

> "59. I hope that I have now dealt with all the truly relevant authorities. I have done so at some length, because they show a difference of approach that requires resolution by this court. As Birss LJ explained in argument, there are really three categories of case:(i) cases where the rule or order expressly provides for the sanction that will apply on non-compliance (e.g. failure to file witness statements on time), (ii) cases where the rule does not expressly state the sanction which applies for non-compliance, but permission of the court is needed to proceed (e.g. failure to file a notice of appeal on time), and (iii) cases where a further step is taken in consequence of the non-compliance, such as the entry of a default judgment (as in this case) or the striking out of a claim for non-attendance at trial.
>
> 60. The law as stated in *Denton* applies directly to the first category of case. *Sayers*, *Altomart* and *Hysaj* make clear that, despite *Matthews*, applications for extensions of time to file a notice of appeal (an instance of so-called "implied sanctions") should be approached in the same way as applications for relief from sanctions and should attract the same rigorous approach.

> This case does not raise the question of the second category of case and "implied sanctions" more generally and I propose to say no more about it.

28. The circumstances in ***FXF*** itself were in the third category described in this passage, however the present case engages the second category, in other words this appeal is about implied sanctions. That is because in the circumstances in this appeal there is no express relationship between breaches of the relevant orders, the rule or the paragraphs of the PD on which the appellant relies (if they are breaches at all), and the triggering of the sanction relied on, which is r35.4(1).

29. In relation to implied sanctions counsel referred to the judgment of Martin Spencer J in *Mark v Universal Coatings & Services* [2019] 1 WLR 2376 (QB). In that case the judge (at [54]) made the point that the fact a provision breached used the word "must" does not mean there must be a sanction for non-compliance. I agreed with this in ***Lufthansa*** at [22] and still do. Putting it another way, not every rule, PD or order made or applicable in the civil justice system, even if it is couched in mandatory terms, has or needs to have a sanction already built in somewhere in the rules (or PDs or anywhere else) which is triggered when that provision is breached.

30. However the judgment in *Mark v Universal Coatings & Services* also sought at [52] to identify the difference between the circumstances when a breach with no express sanction might attract an implied sanction, and those when a breach did not attract any sanction at all. The conclusion was that the answer depended on the significance of the circumstances the applicant found themselves in for the purposes of the litigation. While I sympathise with the attempt to identify a principled distinction to explain the cases in which implied sanctions have been identified, I cannot agree with that approach. It is too uncertain. I should say that I do agree with the judge that the degree of importance of breaches of all the rules, PDs and case management orders made by judges is variable. That is why in some cases sanctions are provided for (expressly) and in other cases they are not. Where I part company is in using that measure as a way of identifying unexpressed implied sanctions.

31. Bearing in mind the importance of clarity in the procedural framework to be followed by court users, the hurdle for identifying something as an unexpressed but implicit sanction must be a high one. It has been identified in the two circumstances mentioned in the cases above. I prefer to say that the scope for identifying any further implied sanctions over and above these two must be very narrow. Bearing in mind that the Denton "ethos" may apply even when r3.9 is not engaged, the need for further extensions of this concept is likely to be very limited.

32. At this stage I will mention the matter which came before Arnold J as he then was in *Global Energy* (see [31] to [33]). That was an application to adduce a supplemental expert's report beyond the date fixed for directions, which report sought to reopen an approach to valuation which was no longer open to the party as a result of previous findings (see [29] and [30]). The application was dismissed. The question was whether the application was covered by CPR r3.9 or not. The judge held on the facts that the relief from sanctions analysis in ***Denton*** was either directly applicable or was highly material to the circumstances ([31]). Then at [32] he held that the answer to whether the relief from sanctions approach applied depended on the circumstances of the application, so the actual supplemental report meant the application was for relief from

sanctions because it sought to reopen a decided issue, whereas if the supplemental report had been different and had sought to raise new points which only arose after an earlier expert's report, then the relief from sanctions approach was not applicable. I agree with Arnold J about the outcome, but in my judgment the way to answer the question posed about whether relief from sanctions is applicable is the approach described above. Rule 3.9 either applies or it does not and if not then the application will be governed by the modern approach to the overriding objective, which will in appropriate circumstances bring in the "ethos" of ***Denton***. The distinction between different factual circumstances identified in the judgment may carry weight relevant to the outcome either way but is not relevant to whether r3.9 applies or not.

33. In summary, in my judgment, the general approach to working out whether a case is covered by r3.9 is to start by identifying if a rule, PD or order has been breached. If there is none then the rule does not apply. If there has been a breach then the next task is to identify any sanction for that breach which is expressly provided for in the rules, PDs or in any order. If there is no such express sanction then, outside the third category identified in ***FXF*** and the specific recognised instances of implied sanctions identified in ***Sayers***, and ***Altomart*** (i.e. notices of appeal and respondent's notices), there is no relevant sanction for the purposes of r3.9, and so that rule does not apply. Only if there is both a breach and a sanction does r3.9 apply. It is worth noting that these circumstances are all concerned with sanctions which take effect as a result of a breach without further intervention. The court can always decide later to impose a sanction for a breach, such as a fresh order expressed as an unless order or an order for costs thrown away, but for either of those things to happen, a fresh decision would been needed.

34. I would also add this, just because a rule, PD or order provides that a party needs permission to take a step, does not mean that that need for permission has been imposed as a sanction for breach of something. There are cases in which a permission requirement has indeed been imposed as an sanction – such as r32.10 as it applies to witness statements - but there are other cases in which the need for permission under the rules is plainly not there as a sanction for breach. An example which springs to mind is the general requirement for permission to amend statements of case.

35. Some might misunderstand this reasoning as a signal of some kind of rowing back from the modern approach to timeliness and procedural compliance. Not so. The structure of the rules, PDs and for that matter the directions orders made by judges all the time, are aimed at taking a modulated approach to case management. Mandatory provisions in orders, rules and PDs are meant to be adhered to. Full stop. The point is that the system can and does accommodate a scheme in which some provisions have sanctions for breach expressly provided for, and others do not.

36. Turning to the facts of this case, I start with the allocation order of 3 August 2020. It contains a rubric warning parties that they must comply with it otherwise their case is liable to be struck out or have some other sanction imposed. That is a salutary warning however it does not provide that the strike out or other sanction will happen automatically on breach of the order, and counsel did not suggest otherwise.

37. The particular provision relied on is paragraph 7(f), requiring the parties to attend the CCMC with the dates of availability of all witnesses including experts. Self evidently the respondent did not do that in this case since the dates for the pain management

expert were not brought to the CCMC. The point of that direction in the order was to focus the party's mind, to require them to think about what they wished to do in the litigation and to bring the relevant information forward at the CCMC. The court and the other party need to know what evidence is to come into the case in order to manage it appropriately. I would hold that this order was not complied with. The fact this non-compliance was not evident at the time might be relevant to the consequences, but it does not mean that the order had been complied with just because at that stage the respondent had not identified that a pain management expert was wanted and only identified it later. The point of the order is to be forward looking. The respondent was required to identify what was wanted at that early stage. The failure is particularly evident given the reference to a pain management expert in Mr Quaille's 4th expert's report which was before the court at the CCMC.

38. Similarly the appellant alleges that the defendant was in breach of paragraph 11 of the CCMC order requiring applications for oral expert evidence to be made in the pre-trial checklists. Again in my judgment this order was not complied with for the simple reason that the pre-trial checklists made no mention of a pain management expert. The analysis is the same as for paragraph 7(f). The fact (if true) that this failure was not evident at the time to the party concerned will be relevant in deciding on the consequences, but it does not turn non-compliance into compliance. The point of that direction was to focus the parties' minds about the trial and think about what they wished to do.

39. Next is CPR 29.4, which is as follows:

> 29.4 The parties must endeavour to agree appropriate directions for the management of the proceedings and submit agreed directions, or their respective proposals to the court at least seven days before any case management conference. Where the court approves agreed directions, or issues its own directions, the parties will be so notified by the court and the case management conference will be vacated.

40. The rules require the parties to endeavour to agree directions and submit proposals. They are an important encouragement to the parties to litigation but I cannot agree with the appellant that these terms have been breached as a result of only raising the pain management expert after the first case management conference. The fact that the respondent ought to have raised the pain management expert earlier does not mean the terms of this rule were breached by not doing so.

41. Turning to paragraphs 3.5, 5.6 and 6.2(1) of Practice Direction 29, which I will consider compendiously, they are as follows

> 3.5 When any hearing has been fixed it is the duty of the parties to consider what directions the court should be asked to give and to make any application that may be appropriate to be dealt with then.
>
> *[…]*

> 5.6 To assist the court, the parties and their legal advisers should—
>
> (1) ensure that all documents that the court is likely to ask to see (including witness statements and experts' reports) are brought to the hearing,
>
> (2) consider whether the parties should attend,
>
> (3) consider whether a case summary will be useful, and
>
> (4) consider what orders each wishes to be made and give notice of them to the other parties.
>
> *[…]*
>
> **Variation of Directions**
>
> 6.1 This paragraph deals with the procedure to be adopted—
>
> (1) where a party is dissatisfied with a direction given by the court,
>
> (2) where the parties have agreed about changes they wish made to the directions given, or
>
> (3) where a party wishes to apply to vary a direction.
>
> 6.2 (1) It is essential that any party who wishes to have a direction varied takes steps to do so as soon as possible.
>
> (2) The court will assume for the purposes of any later application that a party who did not appeal, and who made no application to vary within 14 days of service of the order containing the directions, was content that they were correct in the circumstances then existing.

42. I indicated above that these provisions aim to make the CCMC the single occasion at which case management is undertaken albeit recognising in paragraphs 6.1 and 6.2, that circumstances can change and applications are made to vary directions. So they do. Nevertheless as with rule 29.4, the fact that the respondent ought to have raised the pain management expert earlier does not mean these terms of this PD were breached in not doing so.

43. Therefore to conclude on breach, I would hold that the claimant has not complied with aspects of two directions orders in this case but has not breached r29.4 or the PD provisions relied on.

44. The question then is whether r35.4 is a sanction for the breaches identified. In my judgment it is not. The fact that the claimant needs permission under r35.4 to call the pain management expert is not a consequence imposed for a breach of a rule, PD or order. The requirement for permission is imposed by the rules to control expert

evidence. Parties always need that permission. The court's role in controlling expert evidence is a more searching one than in relation to fact evidence and r35.4 plays a key role in that control. But it is not there to impose a sanction for non-compliance and I accept the respondent's submission to that effect.

45. The point is best illustrated by noting that the claimant would have needed the same permission at the first CCMC even if he had complied with the allocation order and brought the pain management expert's dates to that hearing.

46. In truth the rules, PD and orders relied on represent paradigm examples of provisions for which there is no *built in* sanction for non-compliance. The non-compliance may lead to negative consequences (so in *T (Child) v Imperial College Healthcare Trust* the very late evidence was not admitted) but that is not because of the application of CPR r3.9.

47. Accordingly I reject the first ground of appeal. This application is not one to which r3.9 applies. It is not a matter of relief from sanctions.

Ground 2

48. To recap, on ground 2 the appellant submits that even if r3.9 does not apply so that the case is to be approached as one under the overriding objective, it was plainly wrong to allow in this expert evidence in the circumstances as they were. The reasons why have been summarised above already. Even more briefly, the respondent ought to have raised this at the original CCMC, and I have accepted the submission that the failure to do so was a breach of the allocation order, and the later failure was a breach of the CCMC order as well. The delay is very serious, even if it is a late application rather than a very late application.

49. The case is very near the line, and many judges might well have refused the application, particularly bearing in mind the modern emphasis on compliance and the need for efficient conduct of litigation at proportionate cost (overriding objective r1.1(2)(e) and (f)). However I cannot hold that it was outside the wide case management discretion of the judge in this case. The judge clearly understood all the points which really mattered: the lateness of the application, the fact that it should have been raised at the original CCMC, and the fact that the only explanation why it had not been raised at the CCMC was the change in the file handler. However the critical factor, which the judge also had well in mind, was that at the time at which the judge's decision was being made there was no trial listed. Allowing the application would not vacate a trial or disrupt any extant lists. It would mean the case came on for trial later than it might have done but the judge understood that. A curiosity in the judgment is that it contemplates the possibility of refixing the trial for December 2022 after the new evidence is admitted (paragraph [12]) but the judge's order clearly provides directions for a new CCMC the following January 2023.

50. It was, as the judge recognised, highly fortuitous for the respondent that the trial had just been adjourned to be relisted, but there is no suggestion that this was engineered in some way by the respondent. In fact, as I have explained, the need for an adjournment was due to an administrative error by the court. If the application had jeopardised an existing trial date then I do not believe the judge would have allowed the evidence into

the case, nor would I have, but it is simply not what happened. I therefore dismiss the appeal on ground 2.

Lord Justice Males:

51. I agree.

Lady Justice Asplin:

52. I agree.