Neutral Citation Number: [2023] EWHC 2039 (KB)

Case No: KA-2023-000043

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/08/2023

Before :

MR JUSTICE COTTER

- -

Between :

LEA JENNINGS	**Claimant/Appellant**
- and -	
(1) OTIS LIMITED	
(2) BRISTOL CITY COUNCIL	**Defendants/Respondents**

- -
- -

David Knifton KC (instructed by **Thompsons**) for the **Appellant**
Geoffrey Brown (instructed by **Kennedy Law LLP**) for the **1st & 2nd Respondents**

Hearing dates: 31 July 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE COTTER

Mr Justice Cotter:

Introduction

1. This is an appeal against a case management order made by Master Thornett in an employer liability personal injury case.

2. Permission was granted by Sir Stephen Stewart by his order of 26th April 2023.

3. This appeal covers issues which arose in a large number of applications before Masters and District Judges, in personal injury cases in particular, before the introduction of the Civil Procedure Rules, but now less commonly give rise to interim disputes before the Court.

Background facts

4. On the 16th October 2018 the Appellant, an experienced lift engineer employed by the first Respondent, suffered the traumatic amputation of his arm when it became entangled in lift drive machinery which he was inspecting at the Second Defendant's premises. It is the Appellant's case that the drive machinery was inadequately guarded and the accident occurred when he stumbled or lost his balance and his arm bypassed what guarding was present and went into the moving parts. It is the case on behalf of the Respondents that the Appellant's version of events is implausible and the accident occurred because the Appellant deliberately chose to put his arm through a gap in the guarding in order to undertake some work on the machinery.

5. The Claim was issued on 21st September 2021 with the Particulars of Claim verified by the Appellant, defences filed and a Part 18 request made by the First Respondent and answered by the Appellant on 20th May 2022.

6. The matter came before Master Thornett for a Costs and Case Management ("CCMC") hearing on 2nd March 2023. The Judge took the view that the pleadings and Part 18 response did not adequately set out the Appellant's case on the facts and it was necessary for it to be made plain to the fullest extent possible before directions were given (each of the three parties was seeking permission to rely on an engineering expert and determination of liability as a preliminary issue). He ordered that the Appellant serve a further reply to the existing Part 18 Request and also unilateral service of the Claimant's witness statements. The Appellant seeks to argue that in so doing the Master stepped outside the very generous discretion afforded to him when managing a case.

Analysis in summary

7. The Appellant's arguments can be very shortly dealt with. The Master was very clearly acting within his discretion when making an order which ensured that the Appellant's case on the facts was clarified, and specifically whether, and if so how, the Appellant came to stumble and/or lose balance, before any further steps were taken in the action. The order for unilateral disclosure of the Appellant's witness statement was not only permissible but of obvious good sense given the indication in the Part 18 response, and as given orally by junior Counsel at the hearing, that more detail would, or at least could, be forthcoming on

this central issue. Although Mr Knifton KC sought to clarify the Appellant's case, this appeal must be determined on the information before the Master.

8. The Master was also properly able to proceed on the basis that was no real possibility of prejudice in unilateral disclosure of the Appellant's statement as he was the only person in the machinery room at the time; so the only witness to what occurred. Sight of the Appellant's statement could not possibly affect the statement of any witness to the accident called by the Respondents as no such witness existed.

9. Although the Master also ordered both the unilateral service of all of the Appellant's witness evidence i.e. not just his witness statement and also a further reply (which at first blush would appear unnecessary and likely only to increase costs), it is plainly the case that;

    (a) Service of all the Appellant's evidence could not realistically cause any prejudice. The Appellant's other witness evidence concerned the now redundant issue of whether he had removed the guard and also his general attitude to health and safety;
    (b) There should be minimal costs associated with a further reply if all that needs to be done is to refer to the witness statement as served. If the statement does not fully set out the Appellant's case, then the existing document should be clarified/expanded upon.

10. It is also my view that this is exactly the type of appeal against a case management decision which CPR PD 52A, paragraph 4.6[1] was intended to cover in that the issues raised are not of sufficient significance to justify the (significant) costs of an appeal and also the procedural consequences of an appeal (here significant further delay in a case which concerns an event which occurred nearly four and a half years before the CCMC) outweigh the significance of the case management decision. The Court should not be slow to rigorously apply this provision. The potential value of a claim is a factor to be weighed into the assessment of significance but no more than that.

11. Despite my initial view that no more further detailed reasoning as to why this appeal is misconceived would be necessary, given the scope of the submissions made, and some ancillary issues arising (including in relation to expert meetings and the issuing of claims) I shall set matters out in more detail.

Pleadings

12. The relevant part of the Particulars of Claim is as follows;

> "5. The traction drive machinery for each lift was partially enclosed by a fixed removable guard, comprising a steel frame

[1] CPR PD 52 A paragraph 4.6 provides; "Where the application is for permission to appeal from a case management decision, the court dealing with the application may take into account whether –(a)the issue is of sufficient significance to justify the costs of an appeal;(b)the procedural consequences of an appeal (e.g. loss of trial date) outweigh the significance of the case management decision;(c) it would be more convenient to determine the issue at or after trial. Case management decisions include decisions made under rule 3.1(2) and decisions about disclosure, filing of witness statements or experts' reports, directions about the timetable of the claim, adding a party to a claim and security for costs".

with wire mesh infill, weighing approximately 40kg, designed to prevent persons from becoming entangled in the rotating machinery.

6. The guards that were in place at the time of the accident described below were inadequate, in that each guard only partially enclosed the left-hand side of the lift traction drive machinery, and left a significant gap measuring approximately 300mm by 200mm around the front of the machinery, together with a completely unguarded region towards the rear of the machinery on its right hand side. As a result, the guards did not prevent access to dangerous parts of the machinery.

7. A lift safety and risk assessment inspection, undertaken by Peter Allen on behalf of the 1st Defendants on or about 27th July 2015, identified that:

(a) The driving (traction) sheave within the machine room was not guarded, in that the guarding around the sheave was only 50% complete, such that new guards were required;

(b) The floor of the machine room was not free from tripping hazards (in particular, there was a 6 inch step positioned between the control cabinet and the traction drive machinery for lift number 1).

8. On 16th October 2018, at approximately 8.45am, during the course of his employment, the Claimant was undertaking routine maintenance on the lifts within the building when his right arm became trapped in the traction sheave of lift number 1, resulting in traumatic amputation of his dominant right forearm.

Details

(a) The Claimant entered the building at around 8.00am for the purposes of carrying out routine monthly maintenance on the lifts;

(b)……

(c) The Claimant intended to carry out routine maintenance in accordance with the 1st Defendants' Assurance Traction Maintenance Procedure, including: checking the lift control panels within the machine room; observing the lifts in operation; and watching and listening for unusual noise, excessive vibration or movement from the machine, motor or brake;

> (d) Upon entering the machine room, the Claimant could hear an unusual, grinding noise from the traction drive machinery for lift number 1;
>
> (e) Having opened the electrical control panel and checked the data log for any recorded faults, the Claimant walked to the front of the traction drive machinery, intending to watch it in operation, whilst listening to try and identify the cause of the noise;
>
> (f) At no stage did the Claimant remove the fixed removable guard from the traction drive machinery: it would have been unnecessary for him to do so in order to carry out the required routine maintenance;
>
> (g) As he was at the front of the traction drive machinery for lift number 1, the Claimant somehow stumbled and/or lost his balance, causing him to fall forwards;
>
> (h) The Claimant's left shoulder struck the fixed removable guard to the left of the drive motor winding wheel, whilst his right arm passed through the gap described in paragraph 6, causing his right forearm to become entangled in the traction sheave and wire ropes, resulting in traumatic amputation of his forearm"

13. I pause to observe that the relevance of the averment at paragraph 7 (b) and the cryptic phrase "in particular" was left unexplained.

14. Although there was no witness to the accident other than the Claimant, the First and Second Respondent set out fully pleaded denials; so was able to advance a positive case without the need for greater particularity on the part of the Claimant. Both Respondents maintained (and maintain) that the only likely and/or plausible explanation for the accident to have happened is that the Appellant deliberately inserted his arm through the gap in the guard, with it being near impossible for it to have occurred through an accidental stumble and/or loss of balance.

15. The defence of the First Respondent stated as follows;

DEFENCE OF THE FIRST DEFENDANT

> "8.1. It is admitted that the Claimant's arm became trapped in the traction sheave and he thereby sustained traumatic amputation.
>
> 8.2. It is, however, denied that the accident occurred as postulated.
>
> 8.3. The accident is not likely to have happened in any way other than through the Claimant choosing to bypass the guard and

> work by hand on the moving machinery. His arm would not otherwise have found its way into the moving machinery. That is accordingly how the accident must have occurred.
>
> 8.4. The above is strongly supported by the presence of oily rag remnants in the diverter rope stay. This is indicative of the Claimant having taken on himself to use such a rag to clean the moving ropes by hand. It is also supported by the Claimant having left his LOTO (Lock Out Tag Out) equipment in the van, and not having locked out and tagged out.
>
> 8.5. It is completely implausible that his arm accidentally found its way through a gap in the guarding and into entanglement, through him falling as suggested (or in any other accidental way).
>
> 8.6. The account given in the Claimant's Letter of Claim is entirely vague as to how the Claimant's arm could have supposedly have found its way accidentally inside the guard. It says merely: "Whilst our client was observing machine 1 in operation, his right arm got caught behind the inadequate guard and his arm got caught in the machinery". There is no reference at all to any suggested fall. The account given by the Claimant to the Defendant was almost as vague, along the lines of thinking (not knowing) he stumbled and his right arm thereby (in some inexplicable manner) going behind the guard.
>
> 8.7. It is also implausible that, as posited in his statement of case, the Claimant was seeking to investigate a problem of which he had only just become aware. In his SVR of 22 February 2018 he had recorded: "ropes showing signs of wear". On 18/20 July 2018 he had noted: "ropes in need of replacing urgently". In his SVR on 22 August 2018 he recorded: "ropes require replacing asap".
>
> 8.8. It is further implausible that supposedly hearing an unusual grinding noise would have led to him watching and listening to the machinery as posited, let alone from a position in which his arm could find its way inside the guard, and that in so doing he would have fallen, let alone in a way that would cause his arm to do that."

16. The defence of Second Respondent stated as follows

> "7…..
>
> (b) The Second Defendant is unable to say precisely how the Claimant suffered his accident, but such forensic investigations as they have undertaken to date, suggest that it would be near impossible to permit a person's right arm to pass beyond the

> guarding provided, as a result of some accidental stumbling or a fall;
>
> (c) Further it is averred that: -
>
> (i)When interviewed by the HSE following this accident the Claimant reported to them that he did not remember how his arm got trapped;
>
> (ii)The letter of claim dated 17th April 2019 prepared by Thompsons solicitors made no reference to the Claimant having stumbled or fallen, but rather that the accident occurred whilst he was observing the machinery;
>
> (iii) It is averred that contrary to best practice the Claimant had not isolated the lift machinery prior to inspecting it, and/or placing his right hand/arm beyond the protection offered by the guards;
>
> (d) The Second Defendant reserves its position, pending disclosure and exchange of witness statements, as to whether the Claimant's recollection of how he suffered his accident is a reliable and/or genuine recollection of what actually took place;"

17. The First Respondent served a Part 18 request for further information. In brief it requested that the Appellant clarify if he had in fact stumbled or fallen, if so how and/or on what, his body position when he stumbled/fell and if he was unable to say to make that clear.

18. It is necessary to briefly consider, as a very basic overview and without any detailed analysis, the importance of full and clear detail as to what the Appellant's case at trial will be on the issue of whether (and how) he stumbled and/or lost his balance. Neither Respondent denies that the Appellant's arm was trapped in the machinery and that the guarding present did not ensure that it was not possible for this to occur i.e. that it was possible to gain access to the obviously dangerous moving parts without removing the guard. It is obviously the case that it is arguable that this state of affairs, a fortiori the identification of this issue as set out at paragraph 7(a) of the Particulars of Claim, represented a breach of the duty of care owed to the Appellant and also, to the extent that they inform that duty, relevant statutory duties. If it is likely that through no, or limited fault of his own, the Appellant's arm bypassed the guard, then the Respondents may well carefully consider their stance, at least as to primary liability. However where an experienced employee, other than through momentary inadvertence, deliberately circumvents a safety measure, complex legal issues may arise (see generally **Boyle-v-Kodak** [1969] 2 All ER 439; **McCreesh-v-Courtaulds** [1997] PIQR P421; **Anderson-v-Newham College** [2002] EWCA Civ 505; **Sherlock-v-Chester City Council** [2004] EWCA Civ 201 and the impact of the Enterprise and Regulatory Reform Act 2013).

19. This is a high value case and the Respondents will wish to carefully assess, given the Appellant's case on the facts, the issue of liability and whether it is believed that the relevant fault is entirely or only partially that of the Appellant. If necessary offers can then be made. For obvious reasons the earlier that this happens in the litigation process

the better for all concerned; most obviously the Appellant. Nothing positive is gained by delaying this process and unnecessary costs may be incurred. Delay is against the aims of the overriding objective. For a party to be able to assess merits the other party's case must be clear and capable of being readily understood.

20. The Appellant's response to the Part 18 request was as follows;

> "(b) The Claimant's case as to the circumstances in which the accident occurred is clearly set out in paragraph 8 of the Particulars of Claim. In particular, it is his case that he did not remove the guard from the traction drive machinery, but that his arm passed through the gap in the guard at the front of the machinery when he stumbled and/or lost his balance.
>
> …..
>
> (d) The issues in dispute between the parties are thus clearly defined in their statements of case. There is no need for further clarification or additional information.
>
> ….
>
> (g) The Claimant contends that the 1st Defendant's Part 18 Request involves an attempt pre-emptively to cross-examine the Claimant, and is thus not a proper request. In particular, the attempt to suggest that the Claimant's pleaded case is somehow inconsistent with what has been recorded in other documents is undoubtedly a matter for cross-examination, not for a Part 18 Request.
>
> ….
>
> (i)The Claimant provides the information set out below on a voluntary basis, but makes clear under CPR 18 PD 4.1 that in doing so he objects to complying with the Request."

Response

> "1. The Claimant suffered a devastating injury involving the traumatic amputation of his dominant forearm. It is entirely unremarkable that he is unable in such circumstances to recall the precise sequence of events which led to that devastating injury. He has adequately set out the circumstances in which his accident occurred in paragraph 8 of the Particulars of Claim. To the best of his recollection, the Claimant was leaning forwards whilst standing in front of the lift machinery, endeavouring to watch and listen to the machinery in operation in order to identify the cause of the unusual noise. As he was doing so, he somehow stumbled and/or lost his balance. The Claimant is unable to state with certainty whether he stumbled, or whether he lost his balance in some other way. In either event he fell forwards

> towards the machinery. Insofar as the Request seeks any further information: (a) It is a request for evidence, which will be provided upon exchange of witness statements; and/or (b) It amounts to cross-examination, which is a matter for trial."

21. Obviously if the Appellant remembers no more than as set out in this part of the response, then the Respondents know the full extent of his case as to how his arm came to bypass the guard and can evaluate the likely findings of a trial Judge accordingly (and take a view on this issue of liability)

22. However the response continued as follows;

Response

> "2. The Claimant is unaware of what caused him to stumble and/or lose his balance, although there may be a number of factors which could have done so, which will be explored in evidence in due course. Insofar as the Request seeks any further information: (a) It is a request for evidence, which will be provided upon exchange of witness statements; and/or (b) It amounts to cross-examination, which is a matter for trial." (underlining added)

Response

> "3. As set out in paragraph 8(h) of the Particulars of Claim, the Claimant's left shoulder struck the fixed removable guard to the left of the drive motor winding wheel, whilst his right arm passed through the gap in the guard around the front of the machinery. Insofar as the Request seeks any further information: (a) It is a request for evidence, which will be provided upon exchange of witness statements; and/or (b) It amounts to cross-examination, which is a matter for trial."

Response

> "4.…The Claimant repeats his Response to Question 1. It is likely that, as the Claimant's arm became entangled in the traction sheave and wire ropes, he was pulled further toward the machinery which may have lifted him up slightly as he is said to have described in the accident investigation meeting on 16th November 2018."

23. With due respect I do not think all of the Master's comments about the Part 18 were entirely justified. It could not properly be described as useless. However, the statement that there may be "a number of factors" which could have caused a stumble or fall which will (not just may) be explored in evidence is opaque and as the Master described it "not very helpful". The argument that these words did not "dilute" the previous clarity is untenable. If the Appellant believes that there were potentially relevant factors, he should have set out what they are. What benefit could flow from holding them back until service of his

witness statement? The Master was entitled to take the view that the Appellant was not making his case plain and clear.

24. It would have been open to the Appellant and in my view sensible, helpful and entirely in the spirt of the overriding objective, to have simply responded to the request by unilateral disclosure of his witness statement. I repeat, the Claimant was the only person in the room. There will be no conflicting direct testimony from a witness who saw what happened. It would also have saved a significant amount of costs given that a detailed witness statement would have to be prepared and served in due course in any event.

Steps taken before the CCMC

25. The Appellant was invited to attend at the inspection which was to be (and was) undertaken by lift experts appointed by the parties on 16th November 2022 as it appears that it was hoped by the Respondents that he could provide further explanation as to how his arm came to be inserted through the gap in the guard. The Appellant agreed to attend then changed his mind about attending. The expert inspection proceeded without the benefit of any account other that contained in the Particulars of Claim and the response to the Part 18 request.

26. In my view the suggestion that the Appellant attend at the experts meeting to clarify or expand on the central factual issue how the accident occurred was most unwise. Ordinarily experts should have access to the potential versions of events through pre-action correspondence, pleadings and statements (here they already had access to the HSE statements). If the experts needed to know additional detail such as the Appellant's height and weight (at time of accident) they could have asked for it. In the absence of a fully recorded meeting the potential for satellite issues arising from a meeting where the Claimant was asked to explain/demonstrate what happened is obvious. Even if it was to be recorded, it is not appropriate for experts to have the ability to ask questions of a witness on a discreet factual issue of whether and if so how, a person came to stumble and/or fall.

27. By the time of the CCMC the fact that an arm could reach the moving parts of the equipment notwithstanding the presence of guarding, and also that further guarding which would have prevented this could have been installed, were not in issue. All parties also had access to a detailed report prepared by the Health and Safety Executive and a sensible suggestion was made that the Judge could have a short site visit and thus avoid the cost of extensive photographs etc. In these circumstances the extent to which expert engineers could assist the court had to be in some doubt. In their respective draft directions for the CCMC, each of the parties invited the Master to give them permission for expert evidence. However, just because draft directions have been largely agreed does not mean that a Judge necessarily has to approve them and make an order in those terms. It is also not the case that a Judge should consider him/herself somehow presented with a fait accompli because each side has already incurred significant costs in obtaining expert evidence. CPR 35.1 remains the requirement to be addressed going forwards in the case and CPR 35.7 provides that where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by a single joint expert. The issue of what expert evidence was needed was parasitic on knowing the full extent of the Appellant's case, underlining the need for clarity. I accept that it

may be that in the present case some engineering evidence (most likely through written reports alone) may assist and, as Mr Brown submitted, the time to reach a final conclusion on this issue is after the Appellant's case has been fully set out.

The hearing and order

28. After some discussion about the underlying facts, the Master asked Mr Gutteridge counsel for the Appellant about his client's recollection. He replied:

> "*he remembers the stumble, he remembers lurching forward and the strike*."

and that, in respect of whether he remembered what he was doing at the time

> "*I think the granular detail of no, the larger detail yes. So it's not that he's got amnesia or he's blocked it out, he does have PTSD*."

29. The Master described the reference in the Part 18 response to "a number of factors" as not very helpful and "the sort of fudge that I would expect in a low value claim" and "that really is to be criticised" and

> "*…we are here at an expensive CCMC having to explore the same ground again because somebody, and this is leading Counsel, think it's a clever answer. Its not. Its an unhelpful and expensive answer.*"

And

> "*…you've failed to answer a fairly straightforward question…I have only got to take one look at it to see that you're not being helpful…your leader and solicitors seem to think that this was a proper reply. Its obvious what is being asked. Its obviously, and I use "choreography" in its literal sense rather than some kind of frivolous sense, of movement and position is crucial…*"

30. The Master then stated:

> " *He's got to answer as fully as possible as aspects of the case and explain those in respect of which he cannot answer whether it be for medical reasons or simply lack of recollection. But the full panoply of all explanations, positive and negative, must be set out by him… he owes an obligation to the court and to the Defendants to fully explore and explain his position as best as he can.*"

and

"*he hasn't given the Court or the Defendants…opportunity to try pragmatically to piece together the missing link, to sort out, to solve the missing link."*

31. The Master then asked Mr Gutteridge the very reasonable question why, if the fuller version of what is known will become apparent in the witness statement it should not be disclosed first (i.e. before the meeting of experts and the CCMC)? The response, which the Master considered "hopeless "and not assisting the Court or the Respondents, was that if the Respondents were not happy with Part 18 response they should have applied to the Court

32. The Master then addressed Counsel

> "*So why do we go from here…doesn't the claimant need to be much more clear before proportionality and timing of directions are considered*";

to which he received the response

> "*Well the practical answer to the problem expressed by Learned Friends on behalf of the Defendants, is that the Claimant should serve his witness statement to those that…*"

33. The Master then asked if this had been suggested and was told no. Mr Gutteridge then suggested that the next steps should be disclosure, witness statements and "the first round of expert reporting". Challenged further Mr Gutteridge stated;

> "*I think that the easiest mechanism for the Claimant to achieve that clarity is inevitably the service of witness evidence…*"

However he maintained that this should take place as part of the usual set or directions e.g. disclosure, then mutual exchange of witnesses statements. I confess I struggle to see what his rationale for this was.

Judgment

34. Master Thornett then gave a short judgment which I shall set out in full;

> "….My formal direction on the CCMC is that I do not think it either appropriate in terms of court resources, time, proportionality of cost or, more particularly having regard to the overriding objective, the proper clarification and elucidation of the issues in this case, for this case to see directions through to a trial, even if, as I note the parties agree that that trial should be on liability alone. Indeed, paradoxically, the very agreement between the parties that liability should be tried first is a strong indicator why the factual premise of the claimant's case must first have been as clear as possible as it can be expected.
>
> Pausing there on the phrase "as can be expected", I wholly accept that matters of clarity and detail will emerge in the course of litigation principally by way of witness evidence upon exchange. Secondly, often upon further elaboration and inquiry by experts. Thirdly, upon the joint meeting of experts. The trial process is not a one-off event focusing on a particular procedural stage.

However, despite all that there is a trite and fundamental requirement of a claimant to make as clear as possible in their statement of case, in a case where the claim concerns an accident at work, the factual scenario upon which they rely. I've looked at the pleadings, the statement of case, it is not clear enough. It relies on an impression and an inference. On any view the defendants have made entirely clear in their defences that that impression and inference was not one they could follow. I return to the wording in the second defendant's defence that they regarded it as "near impossible" for the accident to have occurred on their understanding as to the claimant's description. Therefore, the statement of case are not sufficient in themselves or rather the claimant's statement of case is not sufficient for directions ordinarily to follow in what I will describe in a convention case.

Entirely predictably, because of that inadequacy of pleading, Part 18 were raised. I've read the Part 18, they do not help. The stance appears to have been taken in a Part 18 response in May 2022 to side step the obvious impertinent question asking the claimant to be more precise as to the exact basis on which he came to stumble, how he fell, on what and his overall positioning if he contends that his right arm came into contact in the way it did. The reply, and I say so by way of a formality of this short judgment, regardless of what I have already made clear in the course of this hearing, the reply is not a proper reply. It does not address the question. It incorrectly in my judgment, suggests that this is a mere request for evidence and amounts to cross examination. It does not. The question is not, nothing of the kind. It is a plain and simple and pertinent request in the face of a pleading that was not clear and in the face of defences that make that very point that it is not clear and requires to be elucidated. Therefore the suggestion it was a request for mere evidence if and insofar as that has ever been a response for a Part 18 request post CPR, is not correct. Neither does it amount to cross-examination.

Putting those factors together, it is not a helpful backdrop to then learn that it was agreed between the parties that there should be attendance of the claimant to assist the exploration and consideration of the accident circumstances upon a voluntary joint inspection by the engineering experts. It's not helpful to hear that the claimant in a matter of days beforehand decided not to attend. His reasons for doing so may have been valid on a personal level but it was not helpful in the scheme of litigation. It perpetuates the very uncertainty about the clarity of the pleading that is present today.

> My conclusion today is this, that uncertainty is wholly avoidable, wholly unwelcome and has resulted in the court not having the conviction that the case is appropriate to proceed on directions through to trial. The uncertainty remains, it needs to be excised and diffused by way of the following direction; first, the claimant shall reply to the Part 18 request and I'll elaborate….Shall reply to the first defendant's Part 18 request by, and I'll come back to the date. Two, shall disclose his witness evidence upon which he seeks to rely on liability by a date.
>
> Now, on that second point, I'm quite satisfied that the predicament that I have just described requires that unilateral disclosure of witness evidence. I'm sensitive and mindful of the principle ordinarily that witness evidence should be mutually disclosed. However, that principle arises only when there is a sufficient commonality between the parties as to what their witness evidence should comprise. This is not such a case. The defendants remain in the dark as to exactly what is being said in terms of the mechanism of the accident and that opportunity has not been taken up to elucidate on two, if not three occasions previously. So the principle of mutuality of disclosure is displaced in this case.
>
> I'm also fortified that that is the appropriate approach because I'm told that in lieu of inadequacies of recollection which may be entirely genuine I'm sure, but in lieu of inadequacies of recollection directly of the claimant, the claimant's proposal is that up to 10 witnesses from his workplace should be called. Quite what they have to offer is curious because one would have expected their objective contribution to have been the subject of the replies to the Part 18, to have been the subject of comment and presentation in the statement of case. It is not appropriate, whether it be on a cost budgeting context or proportionality of directions through to trial, to be told there is that many witnesses but the substance, the essence of their evidence still being unclear. This is a disjunct approach to litigation. It is liable to lead to problems further up the line and certainly will incur unreasonable expense and I'm quite satisfied the best way to avoid that, if it can be, is for extremely limited directions to be given today; obligation to reply to Part 18, unilateral disclosure of witness evidence by a date…."

35. As I have set out the ten witnesses to which the Master referred were to give evidence on the likelihood of the Appellant having removed the guard (raised in pre-action correspondence but no longer in issue) and to speak to the Appellant's general approach to health and safety.

The Appellants grounds of appeal and submissions

36. Mr Knifton submitted that the battlelines had been clearly drawn within the pleadings and the issue was the Appellant's credibility. Further that the Master fell into error as ;

    (a) There was no ambiguity in the Particulars of Claim.
    (b) The Master was wrong to refer to the Part 18 response as "entirely useless" or in any sense evasive. To the contrary it was a "crystal" clear and entirely satisfactory and unambiguous response.
    (c) There was no justification for the conclusion that the principle that witness statements should be mutually exchanged should be displaced and the order contravened the fundamental requirement that the parties be on an equal footing.

37. Recognising the high hurdle faced by an Appellant seeking to overturn a case management decision Mr Knifton argued that this was not "a finely balanced discretion"; rather the Judge chose to ignore entirely reasonable directions/timetable agreed between experienced solicitors. He argued that the Judge failed to take into account relevant factors; in particular the nature and severity of the injury and his assertion that he could not provide further detail as to how the accident occurred. Also that he wrongly took into account the assertion by the Respondents that it was impossible for the accident to have occurred as he the Appellant had set out.

38. In my view none of these arguments has merit.

39. The issue that troubled the Master was that the Appellant was not adequately setting out the full picture of what he recollected. There was reference in the Part 18 response to potential factors at play which were to be raised in due course about which the Respondents were, and remain wholly, in the dark. It cannot be right that the Respondents should be left to guess what this reference covers. Mr Knifton indicated during submissions that the reference was not meant to cover potentially having tripped over a step or his bag. He referred to the potential of a sudden loss of blood pressure (i.e. that he may have fainted), although this would at first blush be difficult to reconcile with the assertion that the Appellant remembered the stumble. In any event, as Mr Brown pointed out, the focus for the purposes of this appeal has to be on the picture as it was before the Master. In view of the answers given in the Part 18 response the Master was plainly entitled to require the Appellant to explain exactly what his case was as to what caused him, or is likely in his view to have caused him, to stumble and/or fall. If he does not know he should unequivocally say so. As it was the response begged questions. That the Respondents had not challenged the response by way of application in no way prevented the Master from adopting the approach that he did; i.e. that the Claimant's case needed clarification before matters proceeded.

40. The obvious way to achieve clarity of the Claimant's case in a cost effective way was as initially suggested by the Appellant's own Counsel; provision of his witness statement. To a large degree the issue of whether there should be unilateral or mutual exchange was a debate about something that really did not matter given the fact that Appellant was the only person in the room. The stance adopted that there should be mutual exchange of witness statements "in the usual way" was unhelpful and the Master was entitled to

disregard it as he tried to manage the case in a cost effective and pragmatic way. The argument that to order that the Appellant should serve his witness statement unilaterally would mean that the parties are not on an equal footing is wholly misconceived. Given that he is the only person who can give a direct account of what happened if anything the reverse is true. That the order covered all his witness evidence does not materially alter the picture.

41. Whether the decision is "finely balanced" or not does not affect the fact that it was an exercise of discretion. The operative test for appeal against a case management decision is, as per the judgment of Lord Neuberger in **Global Torch Ltd v Apex Global Management (No.2)** [2014] 1 WLR 4495 at p.4500:

> "Given that it was a case management decision, it would be inappropriate for an appellate court to reverse or otherwise interfere with it, unless it was "plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree."

42. There was nothing plainly wrong with the approach of ensuring that the Appellant's case was made clear before matters progressed further; quite the reverse. What this claim cried out for, and continues to cry out for, is a straightforward path through to a speedy resolution of the preliminary issue of liability. I regret to say that it is unclear to me how it was thought that this appeal, which would be obviously likely to create significant delay, would advance the Appellant's interests. Even when it is thought that a Judge at a case management hearing has exceeded the generous discretion afforded to him/her the aggrieved party should stake careful stock and carefully assess whether an appeal is worth the candle. They should also bear in mind that the Court will take into consideration at the permission stage CPR 52A paragraph 4.6.

The issuing of claims at the Royal Courts of Justice

43. The Master was faced with the position whereby the parties agreed that the venue for the trial should be Bristol. This was an accident which occurred in a building which is 5-10 minutes walk from the Bristol Civil Justice Centre, during which one passes the Appellant's solicitors' offices. The Claimant lives in Bristol, as presumably do his witnesses (including those covering any quantum issues) and the second Defendant is Bristol City Council. The First Defendant had a contract to install, repair and maintain the lift in the relevant building in Bristol.

44. Notwithstanding that the obvious and cost effective place to issue the proceedings was the Bristol District Registry the Appellant's solicitors issued at the Royal Courts of Justice. Mr Knifton indicated that it was the policy of the Appellant's solicitors, a very large firm handling a very high volume of personal injury work, to issue High Court claims in London notwithstanding any nexus between the accident and the relevant regional Court centre and/or that common sense would dictate that the claim be issued elsewhere. In my experience the Appellant's solicitors are not alone in this regard.

45. I do not accept that a policy of issuing all High Court personal injury (and /or clinical negligence claims) in the Royal Courts of Justice is sensible, complies with the overriding objective or serves the interest of any party. Any solicitor issuing a claim should make a

case specific assessment of the suitable place to issue. In the present case issuing in London has caused significant delay and I have no doubt extra costs. It also served to hamper effective case and costs management. The lack of good sense in the choice is obvious when it is appreciated that it was the combined view of the parties that the case should be transferred to Bristol for trial. If trial was to be in Bristol, why not the management?

46. A potential rationale advanced by Mr Knifton for the issuing of higher value claims in London is that the Masters have relevant expertise for personal injury/clinical negligence claims[2] and this is not, or at least not necessarily, the case when such a case is managed in a regional centre. I have also previously been given an explanation that it is more likely to achieve Judicial continuity and a trial (if appropriate) before a High Court Judge. These arguments, to the extent that they ever had validity, belong in the past. As long ago as December 2015 Lord Justice Briggs, as he then was, set out the principle that no case is too big to be resolved in the regions in his Civil Courts Structure Review; Interim (December 2015) and Final report (July 2016). All the main regional centres have resident Designated Civil Judges, experienced District Judges some well versed in personal injury/clinical negligence litigation (and solicitors based in a city with a regional centre should ensure that are aware of whether there are Judges with relevant expertise at that centre[3]) and six are appeals centres from the County Court with visiting High Court Judges before whom appropriate trials can be listed. Many High Court claims, and the present case is a paradigm, are unlikely to be of such value that they are unsuitable for hearing by a Deputy High Court Judge (it should be borne in mind that personal injury claims of a value under £1million may be suitable for transfer to the County Court). As I indicated during submissions it is my experience that a Claimant could even end up in the position of having his case heard at the Royal Courts of Justice by one of the section 9 Judges based in the relevant court centre where the claim should have been issued[4].

47. As for Judicial continuity Judges based at or visiting the Royal Courts of Justice do not ordinarily case manage higher value personal injury/clinical negligence claims through to a trial which they will conduct[5]. However this can and does happen in regional centres (and can be requested, as can listing a CCMC before a salaried and/or specialist District Judge). Also given the large number of cases (and the high percentage which settle) it is often, if not usually the case, that it is not possible to ensure that a personal injury or clinical negligence conducted at the Royal Courts of Justice has its pre-trial review before the trial Judge. Again, this can be achieved in a regional centre.

48. Issuing a personal injury or clinical negligence case in London which has its natural home in Birmingham, Manchester, Leeds, Bristol etc also creates unnecessary practical difficulties. In the present case the Master faced the wholly unnecessary issue of how to deal with a site visit without the appropriate local knowledge. Whether such a visit can take place can have a significant impact at the CCMC stage as the extent to which photographs and/or a video of the accident scene are necessary may depend upon the Judge's ability to visit the scene (without undue loss of court time) and /or local

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[2] There are specific Masters to whom clinical negligence claims and mesothelioma claims are assigned; but not other personal injury claims (see generally the Kings Bench Guide paragraphs 5.18-5.19)

[3] See CPR30.3(2)(c) and the notes in the White Book at 30.3.4 (p906).

[4] Taking just my own experience of 11 years as a deputy High Court Judge this could have happened on several occasions.

[5] Some trials are before Masters.

knowledge[6]. A Judge in the relevant regional centre is also likely to have been knowledge of other matters which may impact on costs budgeting[7] and to be able to set a fixed trial date at the CCMC hearing which can be of very considerable help to those who will need to attend (including experts yet to be instructed[8]).

49. Finally, but by no means an unimportant consideration, the need to attend a trial in London also often, if not usually, increases stress and inconvenience for parties and witnesses (in some clinical negligence cases impacting on the ability of clinicians to do other work within a day) and increases costs.

50. The common sense step would have been to issue this case in Bristol and as that had not happened consideration should have been given at the earliest opportunity by the Court for its transfer under CPR 30.3[9] (this being a matter either Respondent also could have raised). Both parties agreed at the appeal hearing that the best way to avoid any further delay was to transfer the Claim to Bristol District Registry with the adjourned CCMC to be listed before the Designated Civil Judge or his nominee.[10]

[6] An obvious example would be a claim following a road traffic accident.
[7] Such as relevant travel times and hotel costs.
[8] The availability of experts often affects potential trial dates and can lead to extensive delay. It can be avoided if a fixed trial date is set early in the claim's procedural path.
[9] Before the CCMC was listed.
[10] Such as one of four District Judges who are very experienced/ specialist in personal injury/clinical negligence claims