Neutral Citation Number: [2023] EWHC 2722 (KB)

Case No: M22Q664/G73YJ960

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
HIGH COURT APPEAL CENTRE MANCHESTER
ON APPEAL FROM THE COUNTY COURT AT BURNLEY
HIS HONOUR JUDGE CARTER

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

Date: 31/10/2023

Before :

MR JUSTICE FREEDMAN

- -

MR DERMOT JOSEPH DOYLE **Appellant/Claimant**

- and –

HDI GLOBAL SPECIALTY SE **Respondent/Defendant**

And

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
HIGH COURT APPEAL CENTRE MANCHESTER
ON APPEAL FROM HIS HONOUR JUDGE KHAN

Case No: KA-2022-MAN-000011/G74YJ855

MRS EILEEN ROWE **Appellant**

- and –

HDI GLOBAL SPECIALTY SE

Respondent

\- -
\- -

Rebecca Sabben-Clare KC and David Bowden (instructed by **SSB Law**) for the **Appellant/Claimant (Mr Doyle)** and the **Appellant (Mrs Rowe)**
and

James Malam (instructed by **Weightmans LLP**) for the **Respondent/Defendant** (in both cases)

Hearing dates: 7 and 20 June 2023
Handed down in draft: 18 October 2023
\- -

Approved Judgment

This judgment was handed down remotely at 11.00am on Tuesday 31 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FREEDMAN:

I Introduction

1. This is a conjoined appeal of two matters. The first is an appeal by the Appellant Mr Dermot Doyle ("Mr Doyle") against an order of HH Judge Carter made on 19 August 2022. By way of amendment, Mr Doyle also appeals an order of HH Judge Khan of 6 September 2022. The second is an appeal in a different action by the Appellant Mrs Eileen Rowe ("Mrs Rowe") against an order of HH Judge Khan made on 14 November 2022.

2. In both cases, claims were made against HDI Global Specialty SE ("HDI"), insurers under the Third Parties (Rights Against Insurers) Act 2010 for declarations and damages (the schedules of loss comprise the sums of £65,910 in the case of Mr Doyle and the sum of £51,879.86 in the case of Mrs Rowe). The alleged liability of HDI is as the insurer of Heatwave Energy Solutions Ltd ("the Installer") for breach of contract and/or negligence in respect of the installation of cavity wall insulation ("CWI") at their respective homes in Burnley. In the case of Mr Doyle, this was on 10 April 2014, and in the case of Mrs Rowe, this was on 1 July 2014.

3. It was alleged by Mr Doyle that the work had caused problems of damp and moisture which caused damage to the property internally. The work was carried out by the Installer, but this company went into liquidation on 4 March 2019. The claim was brought against HDI as insurers in late 2020. The proceedings are defended on numerous grounds.

4. The appeals have grown in their ambit. In the Doyle appeal, the appeal has expanded from Grounds of Appeal dated 8 September 2022 comprising 9 grounds to an additional 4 grounds in an application to amend the appeal dated 12 June 2023. Mr Doyle's appeal is supported by a skeleton argument dated 15 September 2022 (12 pages) and to what is entitled the Appellant's Replacement Skeleton Argument dated 6 June 2023 (more than 21 pages). The Replacement Skeleton Argument at [3] expressly preserves the standing of the first skeleton argument. It is more expansive than the original grounds of appeal, but I do not propose in this judgment to rehearse HDI's analysis of how the appeal has grown. HDI's respondent skeleton argument is dated 13 March 2023 and updated 19 May 2023 (15 pages). Here too there is a Respondent's further skeleton argument dated 15 June 2023 (9 pages). In addition, there was a supplementary argument at the request of the Court to show the inter-relationship of the appeals dated 9 June 2023 (6 pages).

5. In the Rowe appeal, the Appellant's skeleton argument dated 6 January 2023 comprises 18 pages. There is a Respondent's skeleton argument dated 15 June 2023. There are a number of bundles comprising hundreds of pages.

6. At the instigation of the Court and without objection of the parties, the two appeals have been ordered to be heard together. The reason for this is that the two appeals arise out of very closely related subject matter, the same kinds of allegations in terms of allegations about defective installation works and a very similar problem as regards the same expert not observing orders of the court, and issues arising as to the management of the expert evidence and the impact on the trial itself. In both cases, the appeals arise

out of case management decisions which are said to have been wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

7. Indeed, there is some cross reference from one appeal to the other on the face of the papers. There had been cross reference in the Doyle case to the judgment of HH Judge Khan in the Rowe case. It was in the interests of justice and consistent with the overriding objective for the appeal of Doyle to be heard with a rolled-up hearing in the Rowe case of permission to appeal, and the appeal to follow if permission were granted.

II Background in the Doyle case

8. By notice of 18 November 2021, a trial was listed in the case of Doyle to be heard on 6 September 2022 with an estimate of three days.

9. Mr Doyle obtained an initial report from an expert Mr Muir, but he returned to a full-time position in Saudi Arabia. An application was made to substitute for Mr Muir. This expert will be referred to in this judgment as ABC. ABC made a visit to the home and produced an expert's report on 1 December 2021. The report was ordered to served on HDI by 24 January 2022. By order of 24 February 2022, DJ Clarke permitted Mr Doyle to substitute ABC as his expert witness and to rely on the report of ABC dated 1 December 2021. A report in response for HDI was ordered to be served by 21 March 2022, and that was done through a report of Mr Mancini.

10. In relation to expert evidence, a joint statement of issues was ordered to be produced by 2 May 2022, and this was later extended to 15 June 2022. No joint meeting of experts took place. This was due to the failure of ABC to engage with Mr Mancini, the expert for HDI.

11. By an order of 21 June 2022, DJ Clarke permitted HDI to rely upon a report of Mr Tony Mancini to be served by 20 July 2022. Mr Mancini's report dated 6 July 2022 was served accordingly. By the same order, DJ Clarke ordered that unless the expert reports were agreed, the experts were to prepare a joint statement by 3 August 2022.

12. In breach of the order of 21 June 2022, there were no joint discussions between the experts due to the fact that ABC did not attend discussions with Mr Mancini.

III The email of 3 August 2022 from ABC

13. HH Judge Carter referred to an email of ABC dated 03 August 2022 which the Court had received from in relation to this claim. This was headed *"CASE: G73YJ960 Application to be struck from the record"*. The email was not copied to the solicitors for either side. It stated:

> *"Dear Sir/Madam*
>
> *This letter concerns my participation as Surveyor Expert Witness in court case number: G73YJ960.*

> *I am a chartered surveyor and my firm (REEF) is regulated by the Royal Institute of Chartered Surveyors (RICS).*
>
> *Under the RCIS Guidance: UK surveyors acting as expert witnesses 4th edition, amended August 2020 and in line with GN4 section 4.2 and PS3 section 3.2 of that documents, I am required to bring your attention that I should not be on the court record and request my removal for the reasons set out below.*
>
> *My appointing lawyers in this case were SSB Law of Sheffield.*
> *1) Following 2 meetings with SSB Law at their offices in Sheffield (I live in south west Devon) and having multiple calls with them, and redrafting my Standard Terms and Conditions and Letter of Engagement to meet their required amendments, SSB have not signed Terms with my firm. These Terms of Engagement are a requirement of my regulator. At the time of writing this letter, my invoices for all works in connection with this case and other cases undertaken for SSB Law remain unpaid and overdue. Wesley Bower, managing director of SSB Law asked (in a phone conversation on 26.7.22) that I wait until the end of September 2022 but disclosed this is subject to a successful application being made by SSB Law for funds, I am forced to reasonably conclude that there is no guarantee that SSB Law have, or will have, the funds to pay for my firm's services.*
>
> *2) [there is no sub-para 2]*
>
> *3) SB Law have routinely named me on cases, often without my consent of knowledge, and then issued instructions after the event.*
>
> *4) SSB Law have been submitting Part 35 report for cases that purport to have my signature on. However, in ALL instances I have not seen or participated in the creation of the report – save the inclusion of my site notes without any of my photos."*

14. At the PRT on 19 August 2022 HH Judge Carter read out part of the email which said that ABC could not continue as the Claimant's expert in this matter. At the hearing, the Judge said that he understood that SSB maintained that ABC is prepared to act in the proceedings which Counsel confirmed to be the case. The Judge then said that some written confirmation from ABC was required that he was going to attend and engage in these cases because the documentation which he has got is to contrary effect. The Judge proposed to give half an hour to sort that out. After an adjournment of 25 minutes, Counsel returned and said that there was nothing in writing. The Judge then said: *"I think the difficulty that you have got, is that there is no real evidence to show that ABC is going to attend anyway. And it seems that you have not paid them."*

15. In his judgment, HH Judge Carter said the following about the email:

> *"10. ....But in effect, those emails (there were two others in other cases) inform the court that ABC is not now prepared to act as the expert on behalf of the claimants due to the failure of the claimants' solicitors to pay him his outstanding invoices.*
>
> *11. In bold, towards the end of those emails, he makes it quite clear: "I am not able to act as expert witness in this case, and furthermore I no longer have the professional capacity or resources to act in these circumstances."*

16. Mr Doyle had not been copied by ABC into his email and neither he nor his legal advisers had seen any of these emails prior to HH Judge Carter referring to them at the hearing.

17. On 9 August 2022, HDI issued an application seeking an order that Mr Doyle should not be allowed to rely on oral or written evidence of ABC at trial.

18. By application dated 16 August 2022, Mr Doyle applied to the Court to vacate the trial listed on 6 September 2022 and stay the claim for six months at the PTR to allow time to liaise with his expert and that the PTR be vacated. This would involve the loss of the three-day trial fixture. He applied for relief from sanctions in respect of some procedural defaults including most significantly the failure to comply with a direction about the preparation of a joint statement of experts contrary to an order of DJ Clarke dated 15 June 2022. There was another application of much lesser consequence of minor delay in paying a trial fee, which was regarded by the Court as neither serious or significant. On 19 August 2022, HH Judge Carter dismissed the Claimant's application to vacate the trial and for a stay. It is from this that Mr Doyle appeals.

19. Mr Doyle relies on the original skeleton argument dated 15 September 2022 and on the replacement skeleton argument dated 6 June 2023. Mr Doyle relies on various grounds of appeal which have been supplemented by amended grounds of appeal. The application was supported by the witness statement of Mr Alexander Howe dated 16 August 2022 and Mr Melvin Pemberton dated 26 May 2022, of Mr Doyle's solicitors as well as the witness statement of ABC dated 29 June 2022.

20. At the hearing on 19 August 2022, the Court was informed orally that ABC had spoken by telephone with Mr Doyle's Solicitors, saying that he would be continuing to act as expert in this matter. ABC was then away on holiday for two weeks. Thus, realistically, ABC would not be able to complete the Joint Statement before the end of one month, and therefore, the trial would need to be vacated.

21. HH Judge Carter was not satisfied about the willingness of ABC to give evidence since it was contrary to the information provided to the Court including in the email of 3 August 2022. He asked for confirmation to be provided within 30 minutes that ABC would attend, but when this was not provided, the Judge disallowed the application, and refused an opportunity over the ensuing few days for the confirmation to be given.

IV The Judgment of HH Judge Carter of 19 August 2022

22. The Judge referred to the fact that ABC had been instructed in a large number of cases through an intermediary called Pearl Legal Claims Limited ("Pearl"). The Judge referred to evidence before him in connection with the application to vacate the trial. In the witness statement of ABC, he made some observations which were summarised by HH Judge Carter in his judgment at [7] that he had issues with Pearl. He had concerns about the number of cases which he had been assigned. He was unwilling to deal with these cases where he had not inspected the properties in question and he made complaints about the number of properties or cases that were allocated to him.

23. HH Judge Carter said the following in the Judgment at [8]:

> *"At paragraph 56 of Mr Howe's witness statement, Mr Howe says as follows: "As ABC states within his witness statement, he could not cope with the volume of work and was not able to properly manage claims. This would therefore explain why his report was not available within the deadline imposed by the court. Therefore, I submit to the court the reason the breach occurred was not due to the claimant 's actions but clearly the issues encountered with the expert witness and the agency. To summarise the claimant's opinion, the breach occurred through no fault of their own, has born (sic) simply because they have been let down by their expert witness and the agency used to obtain their expert."…"*

24. In the Judgment at [9], reference was made to the application of HDI dated 9 August 2022 seeking an order preventing Mr Doyle from relying upon any expert evidence, written or oral, of ABC. An email of ABC was placed before the Court dated 28 July 2022 from ABC to Mr Mancini saying *"unfortunately, SSB are now telling me they have no money to pay my long overdue invoice until the end of September. They will 'try' and pay in two weeks' time. I have advised them that even though I have a duty to the tribunal/court I am forced to withdraw my services. I simply cannot work for free because I do not have the resources. I have given them the RICS practice statement as well. It is really sad but I have now got no choice. It has put me through the wringer in these last two months. I am sorry to mess you around, but I also need to pull out of the meeting on Tuesday, 2 August."*

25. The email dated 28 July 2022 was not sent to SSB, but it formed a part of the evidence in support of the application of HDI of 9 August 2022. When Mr Howe gave evidence in a statement of 16 August 2022, he failed to deal with this central evidence. That was said by Ms Sabben-Clare KC to be a matter of regret, but it was said that there was no basis to reject the evidence of Mr Howe about the possibility of ABC still giving evidence.

26. There then followed in the Judgment at [12-14] the following:

> *"12. The application, as I say, is to vacate the trial date and*

> *to allow the claimant time in which to resolve the issues with the expert. It seems to me that the application by the claimant to vacate and to be allowed time to resolve the issues with this expert has been predicated on an incorrect version of facts. I do not accept that Mr Howe could not have known of the concerns of ABC about his non-payment. Although I have seen no direct evidence of conversations or issues being raised between ABC and SSB, I am satisfied on the basis of the emails between Mr Mancini and ABC that this is clearly an issue that has been ongoing for some time. As I say, it is not dealt with by Mr Howe. Indeed, Mr Howe appears to be inviting the court to adjourn or vacate the trial and give the claimant more time in relation to its expert on the basis of matters which, in my view, are not accurate.*
>
> *13. In any event, I have to consider whether it is in furtherance of the overriding objective and fairness to the claimant and the ability to rely upon expert evidence that the matter should be vacated in any event. In my view, it would be wrong and not in furtherance of the overriding objective to vacate this trial, for the reasons I have already identified.*
>
> *14. I am not satisfied that the reasons set out in Mr Howe's witness statement for the failure to attend the joint meeting and preparing the joint statement are accurate. I am not satisfied that he has been open with the court in relation to this application. Further, the obvious reason for the failure of ABC to prepare the joint statement and to engage with Mr Mancini has been and is failure of SSB (the solicitors for the claimant) to pay him, as he makes clear in his emails. Those are not, in my view, good reasons for vacating a trial date and giving the claimant, as he seeks, a six-month window in which to find presumably either a different expert or to pay ABC such that he attends the necessary meetings and the trial. I am not prepared therefore to vacate the trial, and it will remain listed as it does at present."*

27. HH Judge Carter stated at [17] that Mr Doyle had extensions of time to prepare the joint report, and had failed properly to take steps to do so. He also reiterated his view that even in the application, they had not been open with the Court. In connection with an application for permission to adduce oral evidence from ABC, the Judge said that it would be wrong to give permission where there is no joint statement and no basis upon which HDI could realistically anticipate the issues that ABC might raise. HH Judge Carter then said *"… even bearing in mind my own concerns about whether ABC is likely to attend even if permission were granted, it does not seem to me appropriate there should be permission for the claimant to rely on the oral evidence of ABC in the absence, as I say, of that joint statement."*

28. HH Judge Carter refused permission at [18] to debar Mr Doyle from relying on the written report of ABC. It was a matter for the trial judge as to what weight should be given to the written report in the absence of ABC attending to give oral evidence and in the absence of a joint report.

29. At the end of the judgment, HH Judge Carter said that he did not vacate the PTR. He saw no reason why a claim such as this should be stayed for a further six months to allow Mr Doyle's solicitors to get their case in order.

V Trial on 6 September 2022

30. At the trial HH Judge Khan heard Mr Doyle's application dated 2 September 2022 to vacate the trial and stay the claim pending the appeal. Upon the parties agreeing that without oral expert evidence from ABC, Mr Doyle would not succeed in his claim, the Court ordered by consent to dismiss the claim with costs orders pending the appeal.

VI The Doyle appeal

(a) Grounds of appeal

31. The original grounds can be summarised as follows:

    (i) HH Judge Carter ought to have vacated the trial given the issues in respect of ABC;

    (ii) HH Judge Carter ought to have allowed a longer time to seek confirmation that ABC was willing to act as a witness for Mr Doyle;

    (iii) HH Judge Carter ought to have permitted Mr Doyle an opportunity to respond to the allegations contained in the email of ABC to the Court dated 3 August 2022.

(b) Amended grounds of appeal

32. They comprise four additional grounds, namely:

    (i) The claim should not have been dismissed at the trial on 20 September 2022 without hearing oral testimony from Mr Doyle and the expert for HDI, namely Mr Mancini. The written report of ABC ought to have been allowed in evidence.

    (ii) The email of 3 August 2022 of ABC should have been treated in accordance with CPR 35.14, and in the absence of an application, ought not to have been allowed into evidence.

(iii) Other ways of proceeding ought to have been considered given that ABC appeared to be unwilling to give evidence for Mr Doyle at trial.

(iv) HH Judge Khan was wrong not to follow the approach of HH Judge Gosnell in his judgment dated 9 September 2022 in Mr Badar Din and Ms Fozia Bashir v Aran Services Limited (Leeds County Court claim number: G67YJ577) by not allowing Mr Doyle further time to appoint a substitute expert, to vacate the trial and to set a new trial timetable.

(c) Submissions on behalf of Mr Doyle

33. Mr Doyle submitted that the decision of HH Judge Carter of 19 August 2022 was wrong and/or unjust because of a serious procedural irregularity in that:

(i) Mr Doyle was 'ambushed' by the e-mail of ABC dated 3 August 2022 which he did not see until provided by the court usher at the hearing on 19 August 2022;

(ii) he was given insufficient time to obtain written confirmation from ABC that he would give evidence;

(iii) he was not given an opportunity to respond to the allegations contained within ABC's e-mail;

(iv) he should have been permitted time properly to consider and provide rebuttal evidence to the correspondence of ABC, and had this been given, he could and would have provided the witness statements of Lucy Helen Flynn dated 6 September 2022, Debra Jane Allen dated 5 September 2022 and Wesley Bower and Jeremy Brooke.

34. In a supplementary skeleton argument, it was submitted on behalf of Mr Doyle that the email to the Court ought to have been returned to ABC, saying that an application has to be made on N244 accompanied by a fee, witness statement and a draft order. It was also submitted that the email was in effect an application under CPR 35.14 which deals with "Expert's right to ask court for directions" and provides:

> *"(1) Experts may file written requests for directions for the purpose of assisting them in carrying out their functions.*
>
> *(2) Experts must, unless the court orders otherwise, provide copies of the proposed requests for directions under paragraph (1) –*
>
> *(a) to the party instructing them, at least 7 days before they file the requests; and*

> *(b) to all other parties, at least 4 days before they file them.*
>
> *(3) The court, when it gives directions, may also direct that a party be served with a copy of the directions."*

35. An example when this power might be invoked, provided by Zuckerman on Civil Procedure 4th Ed. At [21.31] is where the expert feels that the timetable imposed by the court is unrealistic. In such circumstances, it is incumbent on the expert to give prior notice to the parties before filing such a request.

36. Mr Doyle's case is that there ought to have been an opportunity to file evidence to deal with the email, and that he has been prejudiced by not being able to do so. To this end, there has been filed post-hearing evidence, as to which there is no objection to its admission in this appeal. This is summarised in the skeleton argument in support of the appeal. The following is to be noted:

   (i) Mr Doyle's solicitors and ABC were not able to come to a final agreement on ABC's terms. ABC agreed that he would continue to work on various cases where his report had been filed and the claims were subject to court deadlines for joint statements. This matter was one of those cases: see Flynn at paras. 23-47 and Bower at [8].

   (ii) As regards payment to ABC, the arrangements as between Mr Doyle's solicitors, Pearl and ABC were that Pearl would undertake and ensure payment of the fees. The precise arrangements in respect of ABC's fees to date were between Pearl and ABC. Mr Doyle's solicitors did not have knowledge of this. Any default in payment was down to Pearl and not Mr Doyle's solicitors.

   (iii) In respect of an allegation that ABC was named as an expert without his consent or knowledge, Mr Doyle's solicitors have only ever named ABC as an expert where his name has been provided by Pearl, and they have no knowledge of the process by which Pearl confirms the expert's availability.

   (iv) In respect of an allegation that Mr Doyle's solicitors had submitted expert reports which had not been signed by ABC, the reports were provided to them through Pearl with his signature already applied by electronic signature. Pearl confirmed to Mr Doyle's solicitors that they did not issue an expert's report that had not been completed by ABC.

   (v) In respect of an allegation that ABC did not have the resources to continue as an expert, the negotiations led to a belief that ABC did have those resources.

37. In the skeleton argument in support of the appeal by Mr Theo Pangraz on behalf of Mr Doyle at [29], it was stated as follows:

> *"It may be said that at the hearing on 19 August 2022, the Claimant offered to try to obtain an email or letter from ABC confirming that he would continue as expert in this matter by 22 August 2022, and contrary to said offer, the Claimant has not produced such written confirmation in the time, or at all.*
>
> *(i) However, given the misleading information ABC has provided to the court, as set out above, and the fact that ABC did not provide the Claimant's Solicitors with sight of his email to the Court and effectively the Claimant's Solicitors were ambushed by his allegations of his email, ABC's credibility has now been called into question.*
>
> *(ii) Under the circumstances, ABC's actions have made any further work relationship between the Claimant's Solicitors and ABC untenable, paragraphs 140 to 143 of the witness statement of Lucy Helen Flynn.*
>
> *(iii) This is compounded by the fact that for the reasons set out at paragraphs 10 to 14 of the witness statement of Wesley Bower, the Claim."*

(d) The Respondent's Grounds

38. Reliance is placed upon numerous different or additional grounds seeking to uphold the order. The first ground is that Mr Doyle withdrew or did not pursue his application to stay proceedings or for permission to rely upon the oral evidence of ABC and so the Judge ought to have dismissed Mr Doyle's application on that basis. This is said to be based on some implied acceptance of Counsel that he was unable to demonstrate that ABC would comply with his obligations, which they had been unable to procure. There would be required a clear and unequivocal withdrawal if one was to be made out. There was no express withdrawal, and I treat the implied withdrawal referred to in the Respondent's skeleton argument at [36] as being not sufficiently clearly made out and even artificial and not a natural implication.

39. The second ground was that in deciding to dismiss the application to adjourn the trial or state proceedings the Judge ought to have taken into account the following facts and matters:

    (i) the failure to provide cogent reasons as to why ABC failed to comply with the deadlines;

    (ii) any adjournment of the trial or stay of proceedings would result in a loss of three days of Circuit Judge hearing time and delay to the resolution of the claim to at least mid-2023 in respect of a claim that was already stale. This would be the consequence of acceding to a 6 month adjournment or a 3 month adjournment, bearing in mind that there would have to be a new fixture for 3 days;

(iii)Mr Doyle should have addressed his difficulties with ABC about his ability to continue to act in similar cases when those difficulties first surfaced.

40. The third ground is that in the event that Mr Doyle had been given the opportunity to put before the court the results of his solicitors' investigation into the allegations made by ABC in his e-mail of 3 August 2022 there is no reason to conclude that the outcome of the application would have been different. HDI rely upon a judgment of HH Judge Khan in the *Rowe* matter based on the post-hearing witness statements now relied upon. It therefore follows that there is no basis that reliance on the witness statements would have altered the outcome of Mr Doyle's application. This will be considered first in the context of the application for permission to appeal in the *Rowe* matter.

(e) Submissions on behalf of Mr Doyle

41. In the course of oral submissions, it was submitted that the overarching point was that HH Judge Carter failed to give a proper opportunity to Mr Doyle's legal advisers to deal with the email. It had been sent on 3 August 2022 (not 8 August 2022, as the Judge said in error), and yet the only opportunity provided for consideration of it was 25 minutes before the Judgment was given. This was procedurally unfair.

42. It was submitted that the email should have been treated as an application on the part of the expert under CPR 35.14, quoted above. The submission is then that having received such a request, it was incumbent on the Court to give the parties notice of the matter so that they could make a meaningful submission as to what was required. Even if it was not a request for directions, it was particularly incumbent on the Court to give to the parties the opportunity to make submissions, particularly in face of applications for an adjournment of the trial and also for the debarring of evidence on the part of ABC. It was also wrong to assume that the trial could go ahead without expert evidence being adduced on behalf of Mr Doyle.

43. Further, and in any event, the Court should have treated the hearing as an application for relief from sanctions. In that context, it was the more incumbent on the Court to give a proper opportunity for Mr Doyle to make effective submissions. This was added to by the concern of HH Judge Carter that SSB had not been frank with the Court, making it more important still that a proper opportunity was given for SSB to explain the position. As regards the possibility of ABC giving evidence, a much longer period than half an hour was required to explain the position in circumstances when it was known that ABC was away and that SSB had been unable to contact him in that short period. To that end, the applications ought to have been adjourned on 19 August 2022 to enable evidence to be adduced as regards the email of 3 August 2022 and for submissions to be made in the light of that evidence.

44. In any event, it was submitted that the Judge failed to consider adequately or at all the 'overriding factor' that Mr Doyle had been let down by his unwilling expert. Thus, more time ought to have been allowed to find a replacement expert and to have vacated the trial in the interests of justice and fairness. To this end, permission should have been granted to substitute the existing expert.

45. It was also submitted on behalf of Mr Doyle that the case could have been presented on the basis of the factual evidence and the Court reading the written report of ABC and having oral evidence from Mr Mancini's evidence for HDI who owed his duty to the Court. This approach, it is said was supported by the judgment of Judge Humphrey Lloyd QC in *Royal Brompton Hospital NHS Trust v Hammond (No.9)* [2002] EWHC 2037 (TCC) as summarised in *Jackson & Powell on Professional Liability* 9th Ed.at [9-116]. This was wrongly blocked both by HH Judge Carter and by HH Judge Khan.

46. Another submission was that the Court ought to have considered making Mr Mancini a joint expert.

47. It was also submitted that the Court ought to have made an order in similar terms to that made by HH Judge Gosnell in *Badar Din and Fozir Bashir v Aran Services Limited* (Leeds County Court 9 September 2022). That was said to be the correct order, and the Court was asked to approve it as being correct. This would be an order that the orders of HH Judge Carter of 19 August 2022 and of HH Judge Khan of 21 September 2022 be set aside. There would then be a period of 8 weeks to appoint a replacement expert to prepare a report on the damage at the property.

48. It was submitted on behalf of Mr Doyle by way of preliminary points by Ms Sabben-Clare KC in oral argument that:

(i) The case was dependent on expert evidence, and therefore an order preventing ABC from giving oral evidence had draconian consequences, of which the Judge had lost sight. The expert evidence was fundamental to proving the lack of fitness for purpose, defective installation, causation of damp to the property and the cost of remedial work.

(ii) The relationship which had broken down was between the agency Pearl and ABC, but not the relationship between Mr Doyle and his solicitor of the one part and ABC of the other part. This was not apparent to HH Judge Carter without the additional evidence.

(iii) Whilst it is accepted that the opportunity to present evidence must have had some prospect of making a difference, it sufficed if it might well have done. That it might have done is evidenced by the case of HH Judge Gosnell who permitted an adjournment of the trial: see *Badar Din*. This shows that another Judge could reach a different conclusion as to what was just. This case occurred between the judgments in the respective cases of Mr Doyle and Mrs Rowe.

(f) The law

49. This being an appeal against a case management decision, the bar is set high. In *Global Torch Limited v. Apex Global Management Limited* [2014] 1 WLR 4495, Lord Neuberger PSC said at [13]:

> *"The essential question is whether it was a direction which Vos J could properly have given. 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" as Lewison LJ expressed it in Broughton v Kop Football (Cayman) Ltd [2012] EWCA Civ 1743, para 51:

> *"Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."*

50. Consistent with the foregoing are the principles as regards an appeal against an exercise of discretion set out in case law in respect of decisions which are more substantive than case management decisions. They were usefully set out by Mr Justice Saini in an appeal against a decision in respect of section 33 of the Limitation Act 1980 in a clinical negligence claim, *Azam v University Hospital Birmingham NHS Foundation Trust* [2020] EWHC 3384 (QB) emphasising the limited circumstances in which the Court will entertain an appeal against an exercise of discretion. Saini J said the following:

"V. Appealing discretion

48. At this stage it is important to restate some basic principles concerning appellate challenges to the exercise of a discretion at first instance.

49. I base my summary on a number of well-known cases including G v G [1985] 1 WLR 647 (HL), Tanfern Ltd v Cameron-MacDonald [2000] 1 WLR 1311 (CA), Chief Constable of Greater Manchester Police v Carroll [2018] 4 WLR 32 (CA), and Kimathi & Ors v Foreign and Commonwealth Office [2018] EWCA Civ 2213 (the latter two cases being concerned specifically with section 33 of the LA 1980).

50. An appellate court will only interfere with a discretionary evaluation where an appellant can identify one or more of the follows errors:

> *(i) a misdirection in law;*

> *(ii) some procedural unfairness or irregularity;*
>
> *(iii) that the Judge took into account irrelevant matters;*
>
> *(iv) that the Judge failed to take account of relevant matters; or*
>
> *(v) that the Judge made a decision which was "plainly wrong".*
>
> *51. Error type (v) requires some elaboration. This means a decision which has exceeded the generous ambit within which reasonable disagreement is possible.*
>
> *52. So, even if the appeal court would have preferred a different answer, unless the judge's decision was plainly wrong, it will be left undisturbed. Using terms such as "perversity" or "irrationality" are merely likely to cause confusion. What is clear is that the hurdle for an appellant is a high one whenever a challenge is made to the outcome of a discretionary balancing exercise. The appellate court's role is to police a very wide perimeter and it will be rare that a judge who has exercised a discretion having regard to relevant considerations will have come to a conclusion outside that other perimeter. I would add that an appellate court is unlikely to be assisted in such challenges by a simple re-argument of the points made to the judge below. It needs to be underlined that an appellate court in an appeal such as the present is exercising a CPR 52.21(1) "review" power. It is also well-established that the weight to be given to specific factors is a matter for the trial judge and absent some wholly unjustifiable attribution of weight, an appellate court must defer to the trial judge."*

(g) Discussion in Doyle

51. In my judgment, the email of ABC was not an application under CPR 35.14. It was not a request for directions for the purpose of assisting him in carrying out his work. Neither was it expressed as such, nor was there any reason to construe it as such. It was a statement to the Court that he had no intention of remaining an expert, and so there were no directions being sought.

52. A possibility is that it could have been returned to ABC pursuant to CPR 39.8. That is not directly in point: that is what is to happen when a party to the proceedings communicates with the court without copying the document to other parties. The Court then is directed to return it to the sender without considering it and with a brief explanation of why it is being returned, unless the Court directs otherwise: see CPR 39.8(5). This is not the same because the communication came from an expert witness and apparently for himself and not on behalf of the parties.

53. It might be said that a greater opportunity was required in order for instructions to be taken as to whether ABC would appear as a witness. The Judge only allowed a very brief time. This was not a serious procedural irregularity, and the failure to do so, did not give rise to any injustice. The reason for this is that it made no difference. What were the possibilities? One was that ABC would confirm that he would not act. The other was that by the time the discussion had come to an end, it would have become apparent that there was no possibility of ABC acting. This might have been due to the absence of satisfactory answers to the difficulties about false reports in his name or the difficulties relating to finance. If it was neither of these difficulties, by the time of the additional evidence in early September 2022, SSB experienced alleged concerns about the mental health of ABC: see the Pangraz skeleton argument at [29]. It is to be inferred in one way or another that the difficulties involving SSB would not have been overcome. It should be emphasised that the Court is simply reporting the concerns to the Court of SSB as part of the narrative; in no sense is it finding that the concerns were well founded or that there was a basis for the concerns. That is mentioned because ABC was not before the Court to comment on this and there is no medical evidence to substantiate this.

54. In respect of the ground that there was no adequate opportunity to respond to the allegations in the email of 3 August 2022, this ground does not go anywhere. On one formulation, it was accepted on behalf of Mr Doyle that there was no application for directions under CPR 35.14. The consequence, it was submitted, was that the evidence ought to have been excluded by the Court. On this basis, the real criticism is not the absence of opportunity to answer, but the putting of the email in evidence. It is understandable that the Judge felt that he ought to draw the communication to the attention of the parties. It might have been preferable if the document had been drawn to the attention of the Judge at an earlier stage, but the question is whether the failure to do so or to give an opportunity to the parties to respond to it over a period of days rather than minutes was a serious procedural or other irregularity which gave rise to injustice: see CPR 52.21(1).

55. I accept the submission that even if there was an irregularity, it had no effect and therefore was not serious and/or did not cause any injustice. If the email had been returned without more, it is unlikely that it would have been acted upon by ABC. If the Judge had given time to respond, nothing different would have occurred. It is unlikely that there would have been any action on behalf of Mr Doyle: SSB's activity was provoked by the decision of 19 August 2022. If they had responded, the most that could be expected was the evidence now relied upon in support of the appeal (being the same evidence relied upon in support of the Rowe application).

56. That evidence has now been considered in detail in and for the purpose of the application in the case of *Rowe.* In my judgment, that evidence does not affect the outcome of *Doyle* for the same or substantially the same reasons as set out in detail in the application in the case of *Rowe*. On the premise that it is allowed in evidence for the purpose of the *Doyle* appeal, which it has been without objection, it does not affect matters because it shows:

   (i) how deep set the problems were in that for many months the crisis of confidence between Pearl and ABC had been known about to Pearl, and then to SSB;

(ii) how inadequate were the inquiries which were made and the steps taken to bring this crisis to the attention of the Court in advance of the hearing of 19 August 2022;

(iii) how a misleading state of affairs was relayed to the Court on 19 August 2022, failing to highlight the crisis, the nature and extent of the delay and the inadequacy of explanations for the situation which had arisen;

(iv) how even when the further evidence was adduced subsequently, there was no adequate evidence of steps taken to replace ABC and a way forward to give confidence to the Court that the problem would be resolved with a new named expert with any or any detailed proposals for dealing with it.

57. In fact, there was no reasonable excuse for not making an application by the end of May 2022 to provide a substitute report of a different expert with concrete proposals for rectifying the problem. Had this been done, the trial date could have been saved and the obligation to have a joint statement could have been observed. Even if extensions of time had to be granted, that could have been on the basis of proper and reliable information provided to the Court. Instead, there was total disarray, not only giving rise to the trial date being lost, but all happening at the last minute without any concrete proposals how to deal with the case.

58. Further, it does not appear from the judgment that the Judge approached the case in a significantly different manner than he would have acted if the 3 August email had not been produced. The reasons for this are as follows:

(i) The Judge took on board the fact that ABC had not been paid, and would not act. He did not refer to the other criticisms including ABC being named in cases without his knowledge and submitting reports where he not seen or participated in the creation of the report. If he had taken into account the other matters in the email, it would be expected that he would have referred expressly to this in his judgment.

(ii) In any event, it was already apparent without the email of 3 August 2022 and from information before the lawyers for Mr Doyle that they knew not only that ABC was complaining that he had not been paid, but that Pearl was accused of putting forward reports in ABC's name without his approval. This was information which ought to have been drawn to the attention of the Court in any event. Further, it was information to which there was no good answer.

59. On the basis of the above, there is no reason to interfere with the reasoning of HH Judge Carter who had the relevant matters before him without the additional evidence. The conclusion which he reached was available to him and there is no reason to interfere with his exercise of discretion.

60. If it was necessary for Mr Doyle to answer the email of 3 August 2022, this has been done with the evidence adduced in the case of *Rowe* and relied upon by Mr Doyle for

the purpose of the appeal. As is analysed in great detail in the judgment of HH Judge Khan in the case of *Rowe*, an analysis of the evidence subsequently adduced does not provide answers to the obvious issues. HH Judge Khan concluded for the reasons set out in the analysis in respect of the Rowe case that (a) the full picture was not disclosed, (b) it was misleading not to disclose it, (c) an application ought to have made been many months earlier, (d) there was no reasonable excuse for the delay, and (e) there was no information before the Court to the effect that any adjournment could or would have been used to obtain a new expert within a reasonable period of time.

61. For the reasons given by HH Judge Khan in *Rowe*, none of that made any difference to the outcome of the *Rowe* application. For the same reasons, the SSB witness evidence would not have made any difference in the case of *Doyle*.

62. If and insofar as there has to be a fresh exercise of discretion in the *Doyle* appeal, it is submitted on behalf of Mr Doyle that the Court ought to exercise its discretion as per the analysis of HH Judge Gosnell in the case of *Badar Din*. That is to say, it is submitted that the overriding matter was the fact that the client was innocent and that trumped everything.

63. Exercising my discretion afresh on the particular facts of this case, in my judgment, the numerous factors identified by HH Judge Khan outweigh the alleged overriding factor of an innocent client who has done nothing to contribute to the situation and who has lost the opportunity to present the case. In the end, I have been impressed by the detailed reasoning of the judgment of HH Judge Khan and his balancing exercise between the various factors which he identified on the one part and the alleged overriding factor on the other part. It follows that if this were a case which required a fresh exercise of discretion, I should have exercised it in the same way as did HH Judge Khan. Exercising the discretion afresh, I prefer that detailed analysis to the more broad-brush approach of HH Judge Gosnell, and I would adopt the approach and reasoning of HH Judge Khan. It is said that in the interests of comity that the Court ought to follow the decision of HH Judge Gosnell. The parties have agreed to the cases being considered separately, and the effect of this is that it is possible that different judges will come to different conclusions, and so either there is no notion of comity in this context, or, if there is, I do not find that this is a reason in the circumstances of this case to reach or apply the same conclusion as in *Badar Din*.

64. It therefore follows that in my judgment, the decision of HH Judge Carter was not wrong, and nor, if there was a procedural irregularity, was it serious or unjust. If it was, I would have exercised the discretion in such a way as would have given rise to the same result as that of HH Judge Carter. I reject the submission that the approach of HH Judge Gosnell was the "correct" approach, as if there was only one correct approach. It is not for this Court to decide the matter as if this case is an appeal from the decision of HH Judge Gosnell. This Court is only considering whether there are any grounds to interfere with the discretion of the first instance court and to the extent that grounds exist and the discretion has to be exercised afresh, how this appeal court would have exercised its discretion on the material before it. I have indicated in the preceding paragraph how I would exercise my discretion afresh.

65. It was submitted by Ms Sabben-Clare KC that there was an error in not treating the application as one for relief from sanctions. Whilst HH Judge Carter may not have expressed every aspect of his decision as being about relief from sanctions, it is apparent

that the Judge treated it as such: if he did not do so expressly, then on his reasoning, it is apparent that he would have come to the same conclusion. He considered in effect the three elements of the *Denton* test, namely whether the failure to comply with the directions as regards the provision of a joint statement comprised first a breach which was serious and significant, second that there was no reasonable excuse for it, and third that the justice of the matter was not to allow relief sought arising out of the breach, namely the stay of the action to enable Mr Doyle to address it and the vacation of the trial. As regards the third element, it is apparent from the reasoning at paras. 12 – 14 that he refused to vacate the trial date and to allow further time to resolve matters with the expert because of the following factors, namely:

(i) Mr Howe's knowledge of the concerns of ABC about payment, and the matters being advanced to the Court in support of additional time not being accurate (the Judgment at [12]),

(ii) he considered "*whether it is in furtherance of the overriding objective and fairness to the claimant and the ability to rely upon expert evidence that the matter should be vacated in any event*", and he considered that "*it would be wrong and not in furtherance of the overriding objective to vacate the trial for the reasons identified in the judgment*" (the Judgment at [13]), and

(iii)he considered that there was a lack of openness in the reasons for the failure to attend the joint meeting and to prepare the joint statement (the Judgment at [14]).

66. Although not expressed explicitly, a reading of the entirety of the judgment shows that the Judge had in mind the appropriate Denton test for relief from sanctions including the words of CPR 3.9:

> *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."*

67. If and to the extent that this Court is required to exercise the discretion afresh, this is to be done with the benefit of all the further evidence which was before the Court in the case of Mrs Rowe and which is admitted without objection for the appeal in the Doyle case. Taking into account that evidence and having regard to all the submissions which have been advanced on this appeal, the Court would reach the conclusion that the trial should not be vacated for the reasons set out by HH Judge Carter, but in the light of the bigger picture presented in the subsequent evidence, for the same or substantially the same reasons which were given in the judgment of HH Judge Khan in the case of Rowe case.

68. If it is necessary in a reconsideration to reason the matter as an application for relief from sanctions, this Court would find that the default was serious and significant and

that there was no reasonable excuse for the same. On the third limb, it would be found that although Mr Doyle was not at fault, the combination of the numerous matters which HH Judge Khan took into account in the case of Rowe in the end weighed more heavily. The application was in effect a late application to break a three-day fixture with no information as to how and when the case could be restored, and in circumstances where the problems which had given rise to the need for further directions had been known about to Pearl and SSB for months before the matter was brought to the attention of the Court. When the matter was brought to the attention of the Court so proximately to trial, the information provided to the Court was at best unsatisfactory. In all the circumstances, and doing justice between the parties and taking into account among other things the factors referred to in CPR 3.9(2) and the lack of fault on the part of Mr Doyle and proportionality, the Court would not give relief from sanctions and would not have found that a vacation of the trial date and a stay was appropriate.

69. In the light of the foregoing, HH Judge Carter did not err in deciding not to vacate the trial in the light of the issues in respect of ABC. He did not need to have permitted Mr Doyle an opportunity to respond to allegations contained in the email of ABC dated 3 August 2022.

70. That deals with the unamended grounds of appeal. As regards the additional grounds, I find the following:

> *"The claim should not have been dismissed at the trial on 20 September 2022 without hearing oral testimony from Mr Doyle and the expert for HDI, namely Mr Mancini. The written report of ABC ought to have been allowed in evidence."*

71. The claim was dismissed without hearing oral testimony and without argument from the parties. At the trial HH Judge Khan heard Mr Doyle's application dated 2 September 2022 to vacate the trial and stay the claim pending the appeal. Upon the parties agreeing that without oral expert evidence from ABC, Mr Doyle would not succeed in his claim the court ordered by consent to dismiss the claim with costs orders pending the appeal.

72. The reason for this consent was that it was fanciful on the basis of the facts of this case to assume that there was a real prospect of Mr Doyle succeeding without an expert or to rely on Mr Mancini as an expert. There was no real prospect that he would suddenly recognise that the truth or the true opinion was in favour of Mr Doyle's case, and contrary to his previously held views.

73. It therefore followed that the reference to the case of *MS v Lincolnshire County Council* [2011] EWHC 1032 (Edwards-Stuart J) had no direct application. In that case, the Judge contemplated the possibility of extracts of the expert's report who was not being called being put to the expert on the other side at trial rather than have summary judgment. In the instant case, there was nothing wrong with the Judge relying on Counsel's concession, nor was there anything wrong with Counsel's concession in that it faced up to the inevitable that without live evidence from a reliable expert for Mr Doyle, his case was doomed. There were other reasons. Mr Muir's evidence had been overtaken and replaced by the order for ABC to replace him. The result is that any

cross-examination in a trial would have been without any live expert evidence for Mr Doyle on which to cross-examine, and where such fundamental concerns about ABC had been expressed by SSB to the Court. This submission therefore does not assist: it is based on a course of action not advanced to the Judge, one which contradicted the express concession and with materially different facts between the precedent now relied upon and the instant case.

74. In respect of the submission that the email of 3 August 2022 of ABC should have been treated in accordance with CPR 35.14, and in the absence of an application ought not to have been allowed into evidence, this has been considered and rejected above.

75. Other ways of proceeding ought to have been considered given that ABC appeared to be unwilling to give evidence for Mr Doyle at trial. There were no other ways of proceeding without ABC. None were advanced, and the Judges cannot be criticised for not having explored any further way if there was one.

> *"HH Judge Khan was wrong not to follow the approach of HH Judge Gosnell in his judgment dated 9 September 2022 in Mr Badar Din and Ms Fozia Bashir v Aran Services Limited (Leeds County Court claim number: G67YJ577) by not allowing Mr Doyle further time to appoint a substitute expert, to vacate the trial and to set a new trial timetable."*

76. At the trial HH Judge Khan heard Mr Doyle's application dated 2 September 2022 to vacate the trial and stay the claim pending the appeal. Upon the parties agreeing that without oral expert evidence from ABC, Mr Doyle would not succeed in his claim the court ordered by consent to dismiss the claim with costs orders pending the appeal. The Judge was not obliged in the face of the above to maintain the claim. The Judge was entitled to act on that concession. The concession was well made as set out above. The matters set out above are repeated.

(h) Conclusion in Doyle

77. For all of the above reasons, the appeal in Doyle is dismissed. In addition or in the alternative, I have taken into account the information adduced in the Rowe case which is relied on in the case of Doyle. This reinforces the conclusions in Doyle. If HH Judge Carter should have given a further opportunity to Mr Doyle to deal with the email of 3 August 2022, events as they moved on showed that that was not a serious irregularity nor did it cause prejudice. That was because there was nothing in the email which, when taken into account, led towards a different conclusion. It therefore is the case that the analysis that follows in respect of the case of Mrs Rowe is to be taken into account in the analysis of Doyle too. The analysis is relevant because it is in respect of facts arising out of the same or substantially the same matters.

VII The Rowe appeal

(a) Procedural background

78. In the case of Mrs Rowe, the Judge heard an application of 14 September 2022 for an order in the following terms, namely:

    (i) that she be given permission to substitute ABC with another expert, due to the fact that the relationship between Mrs Rowe's solicitors and ABC had broken down;

    (ii) that the proceedings be stayed for 6 months to enable such other expert to be identified and for the expert to prepare a report;

    (iii) that the trial listed on 18 October 2022 with an estimated length of hearing of three days be vacated.

79. At the PTR on 16 September 2022, HH Judge Khan made an order that the permission given to Mrs Rowe to rely upon the written report dated 12 January 2022 and oral evidence of ABC was set aside: see para. 1 of the order dated 22 September 2022 (but arising from the hearing of 16 September 2022).

80. There was extensive evidence before the Court attached to a witness statement of Miss Crabtree of SSB dated 14 September 2022 comprising the witness statements of Lucy Helen Flynn, a solicitor and director of SSB, dated 6 September 2022, a generic statement of ABC dated 29 June 2022, Debra Jane Allen dated 5 September 2022, a solicitor and director of SSB, Wesley Bower, a director of SSB dated 14 September 2022 and Mr Jeremy Brooke, the CEO of SSB dated 14 September 2022. In a further witness statement of 20 September 2022, a generic statement of Mr Kevin Chellew a chartered surveyor was exhibited. There was further evidence of HDI referred to in the Judgment at [7].

81. The hearing of the PTR was adjourned to 29 September 2022 at the conclusion of which HH Judge Khan made an order which went beyond the terms of the applications before the Court. The Judge ordered not only that Mrs Rowe's application dated 14 September 2022 be dismissed, but that the trial date of 18-20 October 2022 be vacated, the claim was dismissed with costs and an order for an interim payment. There is shown an interchange when Mr Bowden on behalf of Mrs Rowe, whose submission had been that the case depended on expert evidence being adduced for Mrs Rowe, sought to contend that nonetheless the trial could proceed so as to see what would happen in cross-examination, to put the evidence of Mrs Rowe to the expert and to be allowed to adduce the evidence of ABC's report. The Judge rejected that in argument (at [632]-[634] of the transcript in the appeal bundle). This was because (a) there had been a concession that the case depended on expert evidence being adduced for Mrs Rowe, (b) the Court had already refused to admit the report of ABC, and by this stage, there were concerns expressed about the fitness of ABC to give evidence, (c) there had been no identification of how Mr Mancini's report was vulnerable to cross-examination without a positive case. This was touched on in the Judgment at [98]-[99]. There would be reasons to follow, with the costs orders stayed pending the handing down of a reserved judgment.

This is said to be an order made by the Court of its own initiative. It is said that this gave to HDI a windfall which was unjustified, unwarranted and/or undeserved.

82. The procedural chronology in the case was set out in some detail at paras. 11-19 of the judgment of HH Judge Khan. This sets out in particular as regards experts how ABC became an expert in lieu of Mr Muir and how his report was dated 12 January 2022. His report was served on 28 January 2022, and a report in response of Mr Mancini was served on 25 March 2022. There were agreed extensions of time for the filing of a joint statement, culminating in an extension to 10 June 2022 under a consent order of DJ Clarke dated 18 May 2022. By this stage, the case was at an advanced stage in that disclosure, lay witnesses, schedules of loss and exchanges of experts' reports had taken place. That which had not yet occurred were part 35 questions to experts, a without prejudice meeting of experts and drafting lists of issues between experts.

83. In the Judgment at [17], HH Judge Khan stated that on 23 June 2022 a further report of ABC dated 15 June 2022 was served, explaining that he wished to amend the costings set out in the report of January which had been served without his having the opportunity to review the evidence on site. He said that it was templated by a third party (apparently Pearl) and that he reduced the remediation costs to £32,204.92. The Judge then made reference to the email of ABC in the Doyle matter dated 3 August 2022, referred to above. On 30 August 2022, HDI made an application seeking that the evidence of ABC be struck out and the order permitting him to give evidence be revoked. The order made on the application is set out at paragraph 79 above.

(b) The Judgment of HH Judge Khan in Rowe

84. The Judgment then contained a detailed section at paras.20-45 about events off camera largely between Pearl, SSB and ABC. The section contains a lengthy summary of the evidence before the Court. It has not been the subject of grounds of appeal, and the substance of it has not been challenged. This judgment could have been made lengthier still by quoting it in full. It suffices to provide a summary of these paragraphs. The section starts with a surveyor Mr Muir being originally retained for a packaged claim and becoming unavailable following his relocation to Saudi Arabia. In late 2021, Pearl began negotiating terms with ABC, another surveyor, and he began to familiarise himself with the issues in relation to CWI cases. He inspected up to forty properties on what he described as the introduction by Pearl.

85. According to ABC, he only became aware in March 2022 that reports were required for "litigated cases" that he would be a "replacement name". According to Miss Crabtree, when SSB were required to nominate an expert in connection with the CWI claim, it would email Pearl to identify such expert and Pearl responded, providing the name of ABC. Various meetings took place on 22 February 2022 between SSB representatives and ABC. It was then that Miss Allen became aware that, without the knowledge of a director of SSB, ABC had been asked *"not to consider or amend the Costing Schedules that were included in the earlier reports of Mr Muir"*. According to Miss Flynn, the relationship between ABC and Pearl broke down in March 2022, but Pearl continued to nominate ABC as expert.

86. On 26 April 2022, ABC sent an email to Miss Flynn and Miss Allen of SSB, saying that he had terminated his involvement with Pearl on advice from RICS lawyers. He

referred to his clear instructions not to alter the costings prepared by Pearl's previous expert. He said that he had not measured the more than forty properties which he had seen and that he had not surveyed them. He said that having engaged with experts for the defendants, he could see that in most cases the costings were too high, and in some cases, more than double the true value of the property. He saw the costings after the event which had generally not been shared with him, so that he could not and did not add any verification to the costings when engaged in joint expert meetings or questions from the defendant. A possible solution was for him to liaise directly with SSB, to get enough information about each property to undertake a desk-based exercise and update the costings. This might take 2-3 hours per property at an hourly rate of £225 per hour. Pearl had advised him that they had no finance in place, and he had enough grounds in any event not to work for Pearl.

87. There was a discussion on 29 April 2022 between Miss Flynn, Miss Allen and ABC at which the same ground was gone over in which SSB was expecting Pearl to cover ABC's costs, and ABC said "No. Explain why". On 4 May 2022, ABC sent to SSB a letter of engagement with terms and conditions, but said that until this was signed and returned to him, "in line with RICS regulations", he would not be able to act. On 6 May 2022, he said that his attempts to review previous reports had met with silence.

88. There was an email from ABC to SSB dated 27 May 2022 which included the following, namely *"I consider the reports that I have seen to represent exaggerated opinion with regard to damage and condition of the property. This is evidenced where my notes are included in that they conflict with the opinion stated in the main body of the report I consider the costings to be exaggerated in almost all cases."* The email said more than this, but this is sufficient for the purpose of this judgment. Of this, HH Judge Khan in his judgment at [93] said that it must have been *"abundantly apparent"* that an application to court was needed because *"A competent solicitor conducting litigation efficiently would…have concluded that ABC needed to be replaced because he was unreliable [or] realised the impact which inaccurate and unjustified reports would have had on a client's claim for compensation."*. There is no appeal against this conclusion nor any challenge at all to it.

89. There were emails in June 2022 which evidenced that SSB was looking for other surveyors. On 28 July 2022, ABC sent an email to Mr Mancini to explain why he was not able to attend the joint discussion scheduled to take place on 2 August 2022 as follows:

> *"Unfortunately, SSB are now telling me they have no money to pay my long overdue invoices until the end of September. They will 'try' and pay in 2 weeks time. I've advise (sic) them that even though I have a duty to the tribunal/court I'm forced to withdraw my services as I simply cannot work for free as I don't have the resources. I've given them the RICS practise statement as well. It's really sad, but I've now got no choice. It's putting me through the ringer in these last few months."*

90. In his Judgment at [41], HH Judge Khan said the following:

> *"Mr Bower provides some evidence (without providing particulars) as to other events off camera. He refers to his knowledge of a dispute between ABC and Pearl but explains that this was not "a valid reason for SSB to pay him for the replacement report that Pearl agreed to swap out." He also claims knowledge of the fact "Pearl informed me that they had in fact paid ABC for all works completed despite ABC claiming this is incorrect". Mr Bower also explains why SSB was unable to agree any terms with ABC because ABC "continued to change as he sent revised versions through to us with significant cost increases and a reduction of liability cover.""*

91. Despite the above, according to the evidence of Mr Bower, it appeared that ABC had agreed to a more limited role. It was not explained whether this included the case of Mrs Rowe. He would continue to work on 26 cases where his report had been filed and claims were subject to court deadlines for joint statements etc. Mr Bower referred to an assumption without explaining whose assumption it was or why the assumption was made that the costs of the work would be included in the fee structure discussions. Mr Bower did speak to ABC to confirm that payment would be honoured if he were to continue to act as the expert. There was similar uncertainty in a different case in a statement of Margrave in a case called Brothers where there was an unspecific reference to discussions having taken place with senior managers and directors who had advised that ABC was on board and willing to carry out his duties on the claim. Here too, this is very unspecific, and there was no evidence to deal with those documents which indicated that ABC was not on board. Further, this evidence does not sit with evidence of Alexander Howe, a litigation executive of SSB who at [45] of his statement referred to ABC confirming to directors of SSB that he was unable to assist as he had insufficient capacity. At [56], it was stated that ABC could not cope with the volume of work and property management claims. At [81], there was reference to ABC being unwilling and unable to act as expert.

92. Mr Brooke referred in evidence to difficulties with experts, including ill health of two of them, the relocation of a third (presumably Mr Muir) and a breakdown of relations between a fourth expert and the agency instructing him (presumably ABC and Pearl). He said that SSB was looking for existing and new surveyor agencies with a view to identifying additional experts for 8,000 live claims. The negotiations for a new agency might not be completed until December 2022 at the earliest. A reasonable time was required to find an expert with capacity to act in their case *"unless the Court allowed a reasonable period of time for the solicitors to resolve these issues a vast swathe or claims would fail through no fault of the claimant or their legal representatives."* This would give rise to a windfall for the insurers of the installation companies.

93. Mr Chellew, a surveyor, also provided a witness statement stating that only a small number of surveyors would have the appropriate skill and training and a willingness to undertake the role of expert in such claims.

(c) Grounds of appeal in Rowe

94. Mrs Rowe's grounds were as follows:

(i) the Judge erred in summarily dismissing the claim in the absence of an application for summary judgment or strike out, without giving her prior notice or an opportunity to have the order set aside, varied or stayed and/or the decision to dismiss was draconian, disproportionate and unfair.

(ii) Having rejected the application for permission to have a new expert witness, the Judge was wrong to conclude that the claim was bound to fail in the absence of an admission or a concession to that effect. The Judge should have allowed the claim to proceed with Mr Mancini as a single expert and/or left it to the trial judge to decide whether and to what extent (a) Mr Muir's report could be relied on at trial and/or (b) cross-examination of Mr Mancini could proceed.

(iii) The decision to dismiss the application of Mrs Rowe for permission to substitute a new expert witness for ABC was flawed and unsafe.

(d) The submissions on behalf of Mrs Rowe

95. These submissions in large part are substantially the same or similar to those in the case of Doyle. They do not need to be rehearsed in their entirety, but they have all been considered.

96. It was submitted for Mrs Rowe that whilst the Court could at its own initiative dismiss the claim, there were procedural safeguards which were not followed. A short discussion with Counsel did not suffice. It is said that there ought to have been days of notice before proceeding to strike out or to give summary judgment pursuant to CPR 3.3(3)(b) or that there ought to have been liberty to apply to set aside the order pursuant to CPR 3.3(4). Therefore, the order was procedurally irregular, unfair, unsafe and should be set aside.

97. It was submitted that the Judge was wrong to conclude that the claim was bound to fail without an expert giving evidence for Mrs Rowe. That pre-empted the role of the Judge at trial. There were various cases which should have been followed. Consideration follows in the Discussion section below.

98. It was submitted that given the procedural irregularities, the matter ought to be remitted to a different judge or, if the appellate court exercises its discretion afresh, it should permit the substitution of an expert. It was also submitted that the Court ought to have followed the approach of HH Judge Gosnell in *Badar Din* referred to above and of DJ Bond in the Leeds County Court in *Hussain v QIC Europe Limited* [2022] 5 WLUK 240, who allowed time for a substitute expert and the sourcing of an alternative expert. The Judge should have followed other authorities in respect of the appointment of a substitute expert, notably *Adams v Allen & Overy* [2013] EWCHC 4735 (Ch) at [37], [38] and [41], and *Murray v Devenish* [2017] EWCA Civ 1016 at [16] and five other authorities.

(e) Discussion in Rowe

99. The case involves a combination of case management issues and the exercise of a discretion. It is particularly important because it concerns the ability of Ms Rowe to pursue her claim. There are different, but related, facets to this. First, if and on the basis that ABC was no longer a willing witness or having him was no longer a viable option, she required permission to substitute the evidence of a different expert for ABC. Second, on the basis that another witness was to give evidence, the trial date would have to be broken and an adjournment of months was required. Third, in order not to lose everything, if Mrs Rowe could not have her expert, she would have to have the opportunity to give evidence and through her counsel cross-examining the expert for HDI (Mr Mancini) rather than have the case struck out. Although these were case management decisions involving exercises of discretion, they were fundamental to the continuation of the trial and the ability of Mrs Rowe to present her case, who was found to be blameless: see the Judgment of HH Judge Khan at [97].

100. It is also to be borne in mind that the *Rowe* case is a rehearing of an application for permission to appeal. Mrs Justice Heather Williams refused the application on February 2023. It is not a review of her decision, but her considerations can be taken into account. She said the following among other things:

> *"3. It is logical to consider the three grounds of appeal in reverse order. Ground 3 relates to the refusal to permit the Appellant to instruct an alternative expert (with the proceedings stayed to enable this to take place). Grounds 2 concerns the decision that absent the expert evidence the claim was bound to fail and Ground 1 the consequential decision to dismiss the claim.*
>
> *4. I do not consider that the grounds of appeal disclose a real prospect of success and nor is there any other compelling reason for granting permission to appeal.*
>
> *5. Ground 3 asserts that the Judge's refusal to permit the Appellant to substitute her expert was flawed in principle or unsafe. The decision was a permissible exercise of the Judge's case management discretion. He identified a number of reasons why he arrived at his conclusion. However, the skeleton argument fails to engage with the majority of factors that the Judge relied upon, in particular that: insufficient detail was provided as to steps taken to find an alternative expert (paras 82 and 85); there was a potential lack of candour (paras 84, 86 –88); there had been unexplained delay in making the application (paras 91 – 94); and granting the application would significantly delay the progress of the claim (paras 95 – 96). The Judge did bear in mind that the Appellant herself was blameless but held that the other matters he had identified outweighed this feature (para 97). The Judge took into account relevant factors. He addressed the authorities relied upon by the Appellant at para 79. The authorities that the Appellant cites in the skeleton argument in relation to expert shopping are not on point. The*

> *judge did not find that this was an expert shopping case; rather he found that the combined effect of the factors he identified strongly favoured refusing the application.*
>
> *6. Ground 2 complains that the Judge then went on to find that, absent a new expert's report, the claim was bound to fail. However, this was the very submission that the Appellant's counsel had made to him (paras 47 and 53). It is said that the Judge should have considered appointing the Respondent's expert, Mr Mancini, as a joint expert and/or recognised that the Appellant could rely upon cross-examining Mr Mancini at the trial. I do not consider this is an arguable error when no such proposals were made to the Judge and para 53 records that the Appellant's counsel positively submitted that the evidential position could not be cured by putting questions to Mr Mancini.*
>
> *7. As the Judge legitimately came to the conclusion that absent a new expert, the claim was bound to fail, it is not arguable that his decision to dismiss the claim was unjust or contrary to the overriding objective (Ground 1)."*

101. Considering the matter afresh on the question of permission to appeal (and if granted considering the appeal against the decision of HH Judge Khan as an appellate tribunal), I have had regard to the matters in the detailed oral and written submissions. The judgment of HH Judge Khan was the product of detailed consideration and analysis.

102. It is submitted that the decision on 16 September 2022 at the first hearing of the PTR to revoke the permission to adduce the evidence of ABC was wrong. I am satisfied the Judge did not err in this regard. By this stage, the confidence had broken down between ABC and Pearl and between SSB and ABC. There was no reasonable basis upon which to continue to permit ABC to be used at this stage, and the Judge was entitled to make such an order which was in the face of all the evidence to this effect. The evidence provided about the discussions between SSB and ABC were not definitive about any basis for ABC continuing as an expert and did not refute the documents indicating that he would not continue to work. Against the background of the evidence that ABC had placed before the Court about how the special damages were included in his report without his consent, about the history of non-payment of his fees as described in the email of 28 July 2022 and in the email of 3 August 2022 and the concerns of SSB about the mental health of ABC (as particularly noted at [14] of a witness statement of Wesley Bower of SSB), there is no basis for challenge of the decision of 16 September 2022. What remained for adjudication was the possibility of affording to Mrs Rowe the opportunity to have an adjournment of the trial and instruct a substitute expert. That was decided at the second part of the PTR of 29 September 2022.

103. In respect of the decision of 29 September 2022, I am satisfied that HH Judge Khan balanced on the one hand the devastating consequence for Mrs Rowe if he were not to exercise his discretion in her favour: see the Judgment at [97]. He reached the decision that the other factors outweighed this.

104. The Judge took into account a number of factors in deciding to refuse an application for an adjournment and to give an opportunity for the instruction of another expert in the knowledge that this deprived Mrs Rowe of her ability to make the claim at trial. These factors outweighed in the judgment of the Judge, which was unexceptionable, the fact that Mrs Rowe had not brought this situation upon herself. The relevant factors included the following: First, there was no full explanation as to why the application was being made so close to the trial date. The chronological account was full of gaps and did not provide to the Court the detail that was required. It is right to say that there is now before the Court on the appeal a much fuller chronology than was placed before the Judge, but this does not excuse the nature and extent of the delay.

105. Second, the Judge considered in great detail such documents as were placed before him relevant to the chronology. It was apparent from the documents that the problems in respect of the evidence of ABC were in existence from early 2022. By way of the briefest summary:

(i) When ABC's written report was served on 28 January 2022, it was served without his having approved the amounts in respect of special damage. This was said to have been at the insistence of Pearl. This was known to Miss Allen of SSB (not a director) by 22 February 2022.

(ii) In March 2022, the relationship between ABC and Pearl had fallen apart, but Pearl continued to nominate him as an expert. This was known to SSB through Miss Flynn and Miss Allen as a result of an email of ABC of 26 April 2022, which stated that he had not costed out any of the properties which he inspected, and identifying that it would be an expensive exercise for this to take place. Communications continued to this effect throughout May 2022.

(iii) It therefore followed that by May 2022, ABC could not endorse his reports and that his relationship with Pearl had fractured irretrievably. It ought to have been apparent to SSB that ABC needed to be replaced: see paragraph 88 above. In June, SSB was looking for other experts, but without success.

106. It follows from the foregoing that the problems did not arise with the email of ABC to the Court of 3 August 2022. The problems had existed for months, and SSB did not bring to the attention of the Court in May 2022 or at any stage until after HDI issued its application in Doyle in August 2022 the nature and extent of the problems.

107. Third, far from addressing these problems fully and frankly, there was put before the Court evidence of Mr Pemberton which referred to attempts to locate and instruct alternative experts. Although experts were located, as the Judge pointed out at [82] of his judgment, there was no explanation of whether the experts located had capacity to prepare a report for Mrs Rowe, let alone if they were asked. There was no explanation as to why Mr Chellew had not been asked to prepare a report for Mrs Rowe. At [83] of the Judgment, there was summarised evidence of Mr Brooke looking for surveying agencies without giving evidence of the dates of his looking for agencies. Likewise, Mr Bower who referred to ABC continuing to work on a number of cases and on the joint statement did not condescend on any level of detail.

108. Fourth, the Judge accepted that SSB had shown a lack of candour with the Court. Bearing in mind that Miss Allen knew about the position from 22 February 2022, it was unlikely that SSB (through Miss Flynn) did not have knowledge until May 2022: see the Judgment at [86]. The Judge felt that he had to treat the evidence of SSB's representatives with utmost caution. An example was the statement of ABC informing the directors of SSB on 13 June 2022 that he had "insufficient capacity", but the events from 22 February 2022 indicated that the problems were much more deep-rooted: see the Judgment at [88]. There was no attempt to provide an account of when ABC had been instructed not to update Mr Muir's costs schedules: see the Judgment at [90].

109. Fifth, whilst there was a period of grace after 22 February 2022 that could be allowed before finding out if an alternative expert was required, by at latest, the end of May 2022, an application ought to have been made on behalf of Mrs Rowe to the Court. By that time, it was apparent that ABC did not intend to carry out further work and the reports were "*incorrect, misleading and contained financial claims that were overstated*": see the Judgment at [92]. At [93], the Judge said that if this was not apparent before then, the email of 27 May 2022 of ABC showed that an application was required, whether that which was related by ABC was true or not true. The Judge, as he was entitled to say, said that the delay until September 2022 by which time the trial date was jeopardised, was a matter that he was entitled to put into the balance.

110. In short, the Judge considered relevant factors and put them into the balance. On the one hand was the blamelessness of Mrs Rowe, but on the other side was the following, namely:

(i) delay of many months in making the application, which ought to have been made at least three months earlier than it was done;

(ii) the fact that the trial date was being lost and the potential waste of up to three days of judicial time;

(iii) a lack of candour in the way in which the application was presented;

(iv) the fact that even in September 2022, there was no apparent solution by the identification of a particular expert ready to assist;

(v) the application and the evidence in support did not give the Court any confidence that Mrs Rowe would be able to produce an expert's report within the periods identified: see the Judgment at [96].

111. On behalf of Mrs Rowe, there is reliance on the Court of Appeal case of *Bowden v Homerton University Hospital NHS Trust* [2012] EWCA Civ 245, in some cases, an overriding factor may be the dilemma of being let down by an expert. The Judge balanced that factor against other factors. He came to the decision that other factors cumulatively outweighed that consideration and led to the result in the instant case. This was not a decision based on previous defaults in the case, but upon a whole variety of factors which were identified in the Judgment and summarised above.

112. This was an exercise of discretion of the Judge. The Judge identified relevant matters, and did not fail to identify other relevant matters. He appropriately weighed them. He reached a decision which cannot be said to have exceeded the generous ambit of his

discretion in refusing to vacate the trial, grant a stay or in consequence permit Mrs Rowe to rely upon a new expert report. The Judge was not bound to follow the reasoning in the case of *Badar Din* and he was entitled for all the reasons which he gave to reach the conclusion which he did. As I indicated above, if I were to exercise the discretion afresh, I should follow that reasoning rather than that contained in *Badar Din*. There is no basis for the Court to interfere with the decision of HH Judge Khan, or to interfered with the exercise of discretion of the Judge.

113. On behalf of Mrs Rowe, various authorities were relied upon. They were considered by the Judge. Consideration of them does not identify any error of law. It is not necessary to go through this in great detail, because they all turn on their own facts.

114. The case of *Edwards-Tubb v JD Wetherspoon PLC* [2011] 1 WLR 1373 is not a case of particular relevance to the facts of this case. It refers to when there is good reason to instruct an expert, and whether the first expert's report must be disclosed. In that case, it was about the change of an expert occurring pre-action. This was a very different case from a change immediately prior to the trial, where the trial date would be lost, where there were no arrangements in place for the instruction of a different expert, where there was a stay sought of uncertain duration and where there was no reasonable excuse for the difficulties with the expert not to have been addressed and brought to the attention of the Court months earlier.

115. There were other cases about expert shopping. This was not a case about expert shopping. The Judgment cannot be faulted for not making findings about expert shopping. This was a case about the breakdown of a relationship between Pearl and the expert, and about the failure of the solicitors to address it many months earlier. It therefore follows that lengthy citation of authority about expert shopping does not advance the case: see the extracts from *Adams v Allen & Overy* [2013] EWHC 4735 (Ch) and *Murray v Devenish* [2017] EWCA Civ 1016 at [16].

116. There is even criticism of the Judge for failing to address five other authorities which were cited to him. These cases referred to at paras 53-59 of the skeleton argument on behalf of Mrs Rowe dated 6 January 2023 are *Vasiliou v Hajigeogiou* [2005] 1 WLR 2195; *BMG (Mansfield) Ltd v Galliford Try Construction Ltd.* [2014] CP Rep 3, [2017] TCLR 4 (TCC); *Beck v Ministry of Defence* [2005] 1 WLR 2206; *Condori Vilca v Xstrata Limited* [2017] BLR 460, 2017 Med LR 457 and *Allen Tod Architecture Ltd v Capita Property and Infrastructure Ltd* [2016] BLR 592, 168 Con LR 201. The Judge was criticised for not referring to these cases in his Judgment. There is no basis for this criticism. First, the cases do not advance the case, but concern the particular facts of the cases and/or are about the replacement of one expert for another, the dangers of expert shopping and when the report of the replaced expert must be disclosed. They do not reveal any particular principle of application to the instant case which the Judge failed to apply. Unsurprisingly, they do not involve the particular facts in this case and the combination of factors which have led to the Court's exercise of discretion and result. Second, the detailed nature of the judgment is such that there is no reason to believe that the Judge did not consider these cases, and come to the decision not to refer to them because it was unnecessary to do so in relation to the instant case.

117. On this basis, there is no reason for the Court to interfere with decision of the Judge. The question then arises as to whether the Court ought to refuse permission in the same way as Mrs Justice Heather Williams did. I have come to the conclusion that there

would be an artificiality because of the nature of the rolled-up hearing which was not contemplated at the time of the order of Heather Williams J. The reason why a rolled-up hearing was allowed was because there was a close relationship between the Rowe case and the Doyle case. That has given rise to detailed submissions to be able to consider the substantive appeal if permission is given. The correct analysis is that the close connection (with an appeal where permission had been granted by Mrs Justice Hill) is that there is some other compelling reason to grant permission to appeal in the Rowe case. That is that the full appeal has in effect been heard. It would be artificial in those circumstances in this case, where no short cut has been adopted, to refuse permission. Permission is not granted on the basis of a real prospect of success but for the above mentioned other compelling reason. In the event, the appeal is dismissed because there was nothing wrong about the decision of the Judge nor was there any serious procedural or other irregularity that causes injustice.

118. The evidence did not provide any detail as to the steps taken or the fact that in reality no alternative expert had been located who would take instructions. There was a statement of Mr Chellew who identified the difficulties of instructing alternative experts, but he did not explain why he would not give evidence. The unsatisfactory nature of the evidence was the subject of adverse comment from the Judge at [82] of his judgment.

119. For all these reasons, the Judge was entitled to find that the case should not be stayed and there should not be permission to substitute the expert at this stage that would lead to the vacation of the trial date.

120. I do not accept that the Judge was wrong in his decision to give judgment on a summary basis or strike out the claim as a consequence of not allowing Mrs Rowe to have substitute expert evidence. This followed from the following matters. Contrary to Ground 2, absent an expert's report, the claim was bound to fail. This was conceded on behalf of Mrs Rowe, and the concession was properly and correctly made. This submission of Mr Bowden on behalf of Mrs Rowe is recorded in the Judgment of HH Judge Khan at [47]. Further, at [53] of the Judgment, the Judge went on to say that without expert evidence, the lacuna could not be cured by putting questions to Mr Mancini. There was no reason to believe that there was a basis for cross-examination which might lead to the evidence of Mr Mancini being undermined. The Judge was entitled to reach the view that it would be hopeless as well as contrary to the basis on which Mrs Rowe's case had been properly and sensibly put to allow the case to continue once Mrs Rowe no longer had a positive case of her own expert to put to Mr Mancini. It follows that in these circumstances, the Judge was correct to bring the case to an end, and nothing advanced by Mr Bowden or on this appeal indicates any error on the Judge's part in acting as he did at [81] above of this Judgment.

> *"Counsel for Mrs Rowe adopted expressly the conclusion of DJ Bond in the case of Hussain v WIC Europe that "it is plainly not a case where the deficiency could be remedied by counsel putting questions to the defendants expert based on Mr Muir's preliminary report". It was therefore accepted expressly that the approach now contended for would not be satisfactory. There is no basis to complain that the Judge should have gone behind this and rejected the submission of Counsel as being unfair to his client."*

121. The suggestion that the Judge erred in acting upon the concession of Counsel is not well made. It is said that there ought to have been days of notice before proceeding to strike out or to give summary judgment pursuant to CPR 3.3(3)(b) or that there ought to have been liberty to apply to set aside the order pursuant to CPR 3.3(4). This does not assist Mrs Rowe in that the provision of notice or an application to set aside would not have led to a different order. Further, this was not an order where notice was required because it occurred in the course of a hearing where the parties were represented before the Judge. If there was a basis to set aside the order, it could have been exercised, but it would not have made any difference to the order.

122. It is fanciful on the basis of the facts of this case to assume that there was a real prospect of Mrs Rowe succeeding without an expert or to rely on Mr Mancini as an expert. There was no real prospect that he would suddenly recognise that the truth or the true opinion was in favour of Mrs Rowe's case, and contrary to his previously held views. It is because of this that Mr Bowden was right to emphasise how important it was to Mrs Rowe's case that the Court exercised its discretion in favour of postponing the trial and giving an opportunity to find a new expert. The decision not to give that opportunity despite the consequences for Mrs Rowe lies at the heart of this case. This consequence gave rise to such a detailed thought process on the part of the Judge in order to justify a decision of this magnitude. Contrary to the argument on behalf of Mrs Rowe, the Judge did not usurp the role of the trial judge, but followed through the consequences of not staying the case or permitting the evidence of ABC to be deployed to the conclusion that there was no reason to allow the case to go to trial. The basis of the submissions on behalf of Mrs Rowe that her case depended on having a positive case through her own expert could not be turned on its head when she had not been permitted to rely on the evidence before the Court and to have an adjournment to seek new evidence. In any event, the submission that in a speculative way the case could be allowed to go to trial was pointless in the sense that there was no reason to believe that HDI's case and Mr Mancini's evidence could be undermined. The Judge was therefore right to deal in accordance with the overriding objective to give judgment at that stage.

123. It therefore followed that the reference to the case of *MS v Lincolnshire County Council* [2011] EWHC 1032 (Edwards-Stuart J) had no direct application. In that case, the Judge contemplated the possibility of extracts of the expert's report who was not being called being put to the expert on the other side at trial rather than have summary judgment. In the instant case, there was nothing wrong with the Judge relying on Counsel's concession, nor was there anything wrong with Counsel's concession in that it faced up to the inevitable that without live evidence from a reliable expert for Mrs Rowe, her case was doomed.

124. There were other reasons. Mr Muir's evidence had been overtaken and replaced by the order for ABC to replace him. The order in respect of ABC's evidence had been revoked. The result is that any cross-examination in a trial would have been without any expert evidence for Mrs Rowe on which to cross-examine. This submission therefore does not assist: it is based on a course of action not advanced to the Judge, one which contradicted the express concession. Reliance was placed on a case of *ES v Chesterfield and North Derbyshire Royal Hospital NHS Trust* [2004] CP Rep 9. This case does not assist the analysis. It was about the circumstances in a clinical negligence claim when it was appropriate to permit a claimant to have a second expert. It does not provide assistance in respect of the very different facts of the instant case.

(f) Conclusion in Rowe

125. It therefore follows for all these reasons, for the reasons set out above, none of the grounds and formulations on behalf Mrs Rowe are accepted. The Court has also relied on the reasons set out in the decision of Mrs Justice Heather Williams, most of which is relied at [95] above. The Court has also relied on the detailed reasoning in the reserved Judgment of HH Judge Khan and has rejected the criticisms of the same. Although the appeals have been considered separately, matters in each appeal inform as to the other appeal. Despite giving permission to appeal for the other compelling reason identified in [112] above of this Judgment, the appeal is dismissed.

VIII Overall conclusion

126. It follows that both appeals are dismissed. The Court requests that the parties draw up orders to reflect the result. The Court is grateful for the great assistance from Counsel and for the very thorough and able presentation of the written and oral arguments.