[2019] EWHC 1098 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Case No: HQ16X04099

Courtroom No. 17

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 15th March 2019

Before:
HER HONOUR JUDGE EADY QC

B E T W E E N:

PAUL WRIGHT

Claimant

and

TROY LUCAS (A FIRM)

First Defendant

and

GEORGE RUSZ

Second Defendant

MR NUGENT appeared on behalf of the Claimant
THE FIRST DEFENDANT appeared by Mr George Rusz
THE SECOND DEFENDANT appeared in person

JUDGMENT
(Approved)

HHJ EADY QC:

Introduction

1. The claimant characterises this claim as a quasi-professional negligence action arising out of his relationship with the first and second defendants, whereby they are said to have assumed professional obligations to the claimant in relation to a clinical negligence case he was pursuing against the Basildon and Thurrock University Hospitals NHS Foundation Trust ("the Trust"). At a time when Legal Aid has been significantly reduced and there is a rise in the number of unregulated persons who seek to help individuals engaged in litigation without the assistance of a lawyer (including, but not limited to, those known as McKenzie Friends)[1], this claim raises a question of potentially wider interest in terms of the duty of care that might be said to arise from such a relationship. That said, the decision I have reached is inevitably fact-sensitive to this particular case.
2. The trial in this matter has taken place over four days of court time, starting on the afternoon of 11 March and with Judgment being given on the morning of 15 March 2019. The claimant was represented by counsel; the second defendant appeared in person also representing the first defendant, a firm of which he is the sole principal. The trial bundle comprised eight lever arch files, although most of the documents related to the underlying proceedings against the Trust and were not referenced during the hearing. For the claimant, oral factual evidence was adduced from the claimant himself and his wife and daughter and he relied on expert testimony from Mr Charnley FRCS, consultant surgeon in gastroenterology, and from Ms Charlwood, occupational therapist. The second defendant gave oral evidence on behalf of both defendants.
3. In giving my Judgment in this matter, I have divided my reasoning into the following sections:
   A. The issues.
   B. The parties.
   C. Findings of fact
      C.1 The relationship between the parties.
      C.2 The role of the defendants in underlying proceedings.
      C.3 How did the defendants carry out that role?
      C.4 The Trust's application to strike-out.
      C.5 Events after 17 June 2019.
   D. The evidence – an overview
      D.1 Evidence of fact.
      D.2 Expert evidence.
   E. Discussion and conclusions.

A. The Issues

4. The parties have agreed that the legal issues for the court to determine can be summarised as follows:
   (i) Is the claim, or any part, statute-barred?
   (ii) In the conduct of the underlying claim, what was the status of the defendants?
   (iii) Was there a contract between the claimant and the defendants and, if so, what were its terms?

[1] See "Reforming the Court's Approach to McKenzie Friends" the Consultation Response of the Lord Chief Justice of February 2019.

(iv) What legal duties did the defendants owe to the claimant as regards the claimant's claim against the Trust?
(v) If the defendants were obliged to advise the claimant did, they do so and, if so, in what terms?
(vi) If the defendants conducted the claim was their conduct negligent and/or in breach of contract?
(vii) In so far as it was, what is the consequential damage? and
(viii) To what extent was the claimant himself culpable for the manner in which the underlying claim was advanced, and, to the extent that he was, what would be the consequence?

B. The Parties

5. The claimant is now aged 60. He has various nursing qualifications and, prior to events in 2004, both worked for the prison service as an agency nurse and was also employed by a Mrs Khan as a residential care home manager, with managerial responsibilities or oversight for two care homes.
6. On 25 July 2004 the claimant was admitted to Basildon Hospital with severe acute pancreatitis. He underwent an operation on 10 August 2004 and was discharged on 24 September 2004. Subsequently he issued proceedings in relation to his treatment. It was his case that he had been caused ongoing pain, suffering and loss of amenity and consequential damage, arising from what he alleged amounted to clinical negligence.
7. The first defendant is a firm based in Essex. It holds itself out as providing legal services. The second defendant - who has told me that he obtained an LLB from the Open University in 2006 but has no professional qualification - is the sole principal of the first defendant. They are effectively one and the same and, for convenience, I shall simply refer to "the defendants" save where it is helpful to distinguish between them.
8. Relevantly the defendants agreed to provide legal services to the claimant in relation to his proceedings against the Trust. I explore the precise nature of those services below, but it is at least uncontentious that the second defendant was permitted to act as a McKenzie Friend for the claimant at various court hearings in those proceedings.

C. Findings of fact

C.1 The relationship between the parties

9. Following his treatment by the Trust in 2004 the claimant had continued to suffer difficulties and in 2008 he commenced proceedings against the Trust in the Basildon County Court, claiming damages of up to £250,000 albeit he had no medical report to support that claim. Those proceedings were issued on 2 September 2008. At that stage the claimant was acting in person.
10. Not long after commencing his proceedings against the Trust the claimant saw a sign advertising the first defendant as a provider of legal services. Feeling he needed help with his case the claimant visited the defendants' office and met the second defendant. He explained his situation and there was a discussion about involving a solicitor based in Yorkshire in the case, with the second defendant advising the claimant to investigate whether his household insurance would cover the legal fees involved. Those possibilities were recorded in a letter from the defendants to the claimant of 5 November 2008.
11. It is the defendants' case that the second defendant made it clear from the outset that he was not a solicitor and his initial involvement was largely focused on finding a solicitor who would take on the claimant's case, arranging for the claimant to attend a number of free preliminary interviews. The claimant accepts there was some discussion about finding a

solicitor to take on his case but only recalls mention of the lawyer in Yorkshire, as referenced in the defendants' letter of 5 November 2008. He denies that any appointments were set up for him to visit other solicitors. More particularly, the claimant says the second defendant led him to believe he was an experienced legal professional.

12. In any event, the claimant's application to his household insurance company was declined and that meant the Yorkshire solicitor would no longer be interested in his case. On 24 November 2008, he attended a further meeting at the defendants' office and a way forward was agreed, as is apparent from the defendants' letter to the claimant of 1 December 2008, which was signed off by the second defendant and provided, relevantly, as follows:

> 'Dear Mr Wright,
>
> **CLINICAL NEGLIGENCE CLAIM**
>
> I refer to the above matter and to the appointment you had with me on Monday 24 November.
>
> I am pleased that you have instructed me to assist you with your representation. To this extent please accept this letter as my terms and conditions which I would be most grateful if you would kindly sign one copy and return it to me as acknowledgement of the terms stated therein.
>
> **FEE AND EXPENSES AGREEMENT ON A PRIVATE BASIS**
>
> This is to provide details of the arrangements for costs that will apply if you would like to proceed on a private basis.
>
> If you would rather enter a conditional fee agreement you need only refer to details of how charges are calculated as these apply equally to work done under a conditional fee agreement but subject to the terms of such agreement.
>
> **1. CHARGING RATES**
>
> I need to explain the basis and calculation of charges for which if you instruct my firm to proceed on the private basis you will become responsible irrespective of whether or not those costs can be recovered from the Opponent.
>
> The firm's charges are based on time spent dealing with the case.
>
> That charge will be £150 per hour for all time calculated in units of one-tenth of an hour that we are engaged on the case …
>
> …
>
> The amount of costs which you will have to pay may well be greater than the amount you can recover from the Opponent.
>
> …
>
> I have agreed with you that you will pay all the disbursements in this matter, court costs, counsels fee, outside solicitors costs and experts report fee, in retune [*sic*] I will not ask you to pay my due fee until the conclusion of the matter when you have been successful in your claim and you accept compensation.
>
> If you are successful and obtain compensation between £225.000.00 and £250.000.00 or any amount over that sum you agree to uplift my fee by 50% meaning that my hourly rate charges will not be less than £225.00 per hour for working on your case.
>
> …
>
> **TERMINATION**
>
> …

> If you decide that we will no longer act for you, you agree to pay us or cause us to be paid for our loss of profit in the sum of £10,000.00. Or you will pay us all our hourly charge-out fee incurred by us up to the relevant time of termination. Whichever being the greatest you will pay to us or cause us to be paid.
>
> **CONCLUSION**
>
> Unless otherwise agreed these terms of business applies to any future instruction that you give this firm. Your continuing instructions in this matter will amount to your acceptance of these terms and conditions of business …
>
> …
>
> Yours sincerely,
> George Rusz
> Troy Lucas & Co'.

13. The letter of 1 December 2008 was written on the defendants' headed paper (as was the earlier letter of 5 November 2008), which described the first defendant in the following terms:

> '**THE LITIGATION COMPANY Claims – Investigation – Management'**

At the bottom of the headed paper the following statement appeared:

> 'This firm is authorised by the Ministry of Justice and regulated by the Solicitors' Regulation Authority.
> We do not accept service of documents by electronic mail or fax.
> Principle [*sic*] George Rusz LLB (Hons)
> A full list of partners and consultants is available on request'.

14. Before turning to the body of the letter, I note that in cross-examination the second defendant confirmed that: (i) the defendants were never regulated by the Solicitors' Regulation Authority, that was said to have been a printer's error and (ii) at no time have there been any other partners or consultants. It was denied, however, that this information was intended to be misleading, the defendants asserting that they would always clarify their position at the outset.

15. In determining whether or not to accept that evidence, I note that a subsequent version of the defendants' headed paper contained within the header section a description of work undertaken, which included:

> 'Personal Injury – Clinical Negligence'

And at the bottom of the page, it stated:

> '**Claims – Investigations – Management**
> This Firm is Regulated and Authorised by the Ministry of Justice Registration No. CRM5742 and also Adheres to the Solicitors Regulatory Authority Code of Conduct
> Principal George Rusz LLB (Hons) Litigator and member of the Association of Personal Injury Lawyers (APIL)
> A full list of consultants and partners is available for inspection at our offices'.

16. Subsequently a line was put through the reference to 'APIL membership', because the second defendant was not qualified to meet any of the membership categories. That is relevant because it had, of course, equally been open to the defendants to simply strike through the earlier reference to being regulated by the Solicitors' Regulation Authority.

The second defendant was unable to provide a convincing explanation as to why that correction was not made.

17. As for the later references to the defendants having experience in clinical negligence, the second defendant's evidence was that the claimant's claim was the only such case he, and therefore the first defendant, had ever undertaken. The second defendant sought to explain this reference on the headed paper as referring to his ability to refer cases to solicitors, but I do not consider that was the impression the defendants intended to convey and I am satisfied that this description, especially when taken in the context of the other information provided, was intended to suggest experience that the defendants did not have.

18. Returning to the letter of 1 December 2008, notwithstanding the second defendant's denials, I am satisfied that the headed paper was intended to mislead recipients into thinking that the defendants had some professional legal qualification (they did not) and were more than one man (they were not). That, in turn, assists me in deciding who to believe in terms of the impression given to the claimant when he first met the second defendant. Although I would accept that the second defendant was careful not to state that he actually was a solicitor, I also accept the claimant's evidence that he was given the impression that the second defendant was an experienced legal professional who said he had extensive experience of '*these types of claims*' and was '*as good as, if not better, than any solicitor or barrister*' and suggested there were other lawyers connected to the first defendant who were similarly very experienced.

19. Notwithstanding the fact that he had only obtained his LLB a couple of years previously and had no experience of conducting clinical negligence litigation, I find that the second defendant held himself and the first defendant out as possessing a degree of professional skill and expertise in clinical negligence claims.

20. Turning then to the content of the 1 December 2008 letter, the defendants have been at pains to deny that this constituted or evidenced the terms of a contract with the claimant. Rather the defendants claim this was intended to explain the terms that would apply to a proposed third-party agreement involving another solicitor, a Mr Muswali, who was said to have approached the defendants to express an interest in working on the claimant's case. For the claimant, on the other hand, it is contended that the letter of 1 December 2008 recorded the contractual terms offered to him by the defendants, which he accepted. On this issue I again have no hesitation in preferring the account provided by the claimant.

21. The main point taken by the defendants was that there was no signed copy of the 1 December 2008 letter, albeit the last page was plainly intended to be signed. The fact that the claimant retained an unsigned copy of the letter would, however, be consistent with the instruction within the letter: he was to return the signed copy to the defendants (something the claimant said he had done). As for the absence of the signed copy, that is not especially remarkable. When the claimant retrieved his papers from the defendants it apparently took more than one attempt and it would be unsurprising if the defendants had focused on ensuring that the claimant had the papers he needed for the ongoing claim against the Trust and might not have included the signed copy of the 1 December 2008 letter. In any event the terms contained within that letter were stated to apply to any future instruction from the claimant with his continuing instruction constituting acceptance regardless of whether or not he signed the document.

22. As to the defendants' case, that is just not credible. First, the account given by the second defendant as to the approach made by Mr Muswali - an account given for the first time in cross-examination - was simply not plausible. Mr Muswali was said to have been a solicitor, with no previous dealings with the defendants, who had heard of the claimant's case from a '*friend of a friend'* - someone in a solicitor's firm the claimant had earlier

approached - and who apparently expressed no requirement to actually speak with the claimant or see any of the papers before taking on his case. Second, it would make no sense for a document supposedly recording the terms of a three-way agreement with a third party (Mr Muswali) to make no reference to that other person. In this regard I note that when the defendants did seek to create a document that would represent the terms of a possible agreement between the claimant and another party that was made clear, as was apparent from the letter of 5 November 2008. In contrast, the letter of 1 December 2008 makes no suggestion that there will be any further agreement between the claimant and another lawyer but clearly states that the agreement is between the claimant and the defendants and that it sets out the terms of that agreement. There is simply no other way of reading this document.

23. More generally, I reject the defendants' case as to what was said to be the contractual arrangements between the parties. The second defendant's testimony was inconsistent on this issue and was contradicted by the documentary evidence.

24. In the amended defence it was contended that, after Mr Muswali dropped out of the picture, on 15 December 2008 the parties entered into an oral agreement whereby the defendants would voluntarily assist the claimant to advance his claim '*on a step by step basis'* '*without any recourse for legal responsibility*'. Specifically, it was said that the claimant agreed he '*would not sue the defendants if things did not work out for him in the end'*. It was claimed that this agreement came into effect on or about 19 December 2008, when the second defendant drafted the claimant's particulars of claim.

25. In the defendants' joint witness statement that position changed with it then being said, for the first time, that, after judgment on liability was entered on the claimant's claim against the Trust in October 2009, the parties entered into a new oral agreement whereby the claimant would now pay the second defendant an hourly rate for his time charged at the same rate as that of the solicitor for the Trust, to be paid out of his compensation. It was said that this arrangement was then notified to the Trust's solicitors and to the court. Later, however, when evidence emerged that suggested the claimant's case had been weakened, the defendants said that the arrangements were again varied with it now being agreed they would work for no fee and would waive any earlier fees due.

26. Upon this new case being investigated in cross-examination, however, the second defendant's evidence shifted such that the first revision to the contract (that is, that fees would be due upon the claimant winning compensation) was said to have been agreed first in December 2009, then October 2009 (prior to judgment on liability being entered), then June 2009 and ultimately back to January 2009 or late December 2009, just after the Christmas break.

27. The truth is that the written documentation is entirely consistent with the claimant's case that the letter of 1 December 2008 represented the contractual agreement between the parties. That is why, in June 2009, in draft directions for the court, the defendants included provision for their reasonable costs. It is why, by letter of 21 August 2009, the defendants wrote to the Trust's solicitors referring to their behaviour '*unjustifiably increasing our client's costs*', and it is just not plausible that this was referring (as the second defendant suggested in evidence) to the claimant's emotional costs. It is also why, in a letter from the claimant to the court of 5 October 2009, he referred to his understanding with the second defendant that '*after the case is won, I would pay him for his assistance*'. And it is why, in his statement for the court of 30 June 2010, the second defendant referred to the fact that all his time would be paid for by the claimant, and why, in a letter of 28 February 2011 from the second defendant to the claimant's medical expert, he explained, '*my financial arrangement with Paul is that he will pay for my time but only if he wins his case*'.

28. On the evidence, I am thus clear that the claimant and the defendants understood their relationship to be governed by the terms contained within the letter of 1 December 2008. This represented the contract between them. That agreement did not include any promise by the claimant not to sue the defendants. The assertion made by the second defendant in this regard is simply too vague to amount to a legally binding commitment and, had any such promise been made, I am satisfied it would have been included in the written terms. What is clear, however, is that in working for the claimant the second defendant's time was to be charged at the rate of £150 per hour, with a potential 50% uplift depending on the level of any compensation awarded to the claimant. This was based, as the second defendant explained in evidence, on '*the going rate for solicitors in the area*', albeit payment was only due to be made once the claimant had succeeded in winning compensation on his claim.

C.2 The role of the defendants in the proceedings against the Trust

29. There is no real dispute but that, as at 2008, the claimant had an arguable claim against the Trust arising out of his treatment in 2004. He had been left with foreign material - a piece or pieces of plastic bag, legitimately used in his post-operative care - inside his body, following inappropriate operative treatment (albeit there might have been some dispute as to *how* inappropriate his treatment had been). Although he had commenced proceedings claiming damages up to £250,000 it is also common ground that when the claimant first arrived at the defendants' office, he had little idea how his claim was to proceed or as to its potential value.
30. The contract that the defendants then entered into with the claimant is troubling in a number of respects. The agreement suggests that it was for the provision of legal services in the conduct of the claimant's litigation against the Trust but those would be services that the defendants would not be permitted to provide, still less charge for (how litigation may be conducted being regulated by the Legal Services Act 2007). As for the arrangements made for payment, it is unclear whether this was intended to be a damages-based agreement (unlawful in contentious work) or a conditional fee agreement entered into without after the event insurance. In either case, it is apparent that the basis for payment was never notified to the Trust's solicitors. What is clear, however, is that the defendants took on the role as legal advisor to the claimant in the conduct of his case against the Trust. As they explained in their letter to the Trust's solicitors of 13 March 2009: '*we would like to keep the questions of law for us to advise our client*'.
31. More generally, the evidence makes plain that the defendants advised the claimant on his litigation strategy, drafted court documents - including particulars of claim, schedules of loss, witness statements, applications and draft orders - and instructed a medical expert on his behalf. They also engaged in settlement negotiations and entered into correspondence as the claimant's representatives, and ghost-drafted letters for the claimant to sign.
32. Moreover, regardless of the dispute about the contractual agreement between the parties, the defendants have accepted - both in their amended defence and in the second defendant's testimony to the court - that the nature of their relationship with the claimant was such that they owed him a duty of care akin to that of a legal professional. Specifically, at paragraph 10.1 of the amended defence, it is stated:

> '… the defendants held themselves out as having the skill and experience likened to an experienced mid-litigation executive in a firm of solicitors'.

33. As to whether they complied with that duty, at paragraph 13 of the amended defence, the defendants assert:

> '… the defendants submit they took all reasonable steps as would be

> expected of a competent legal service professional to advise the claimant in doing so they exercised reasonable skill and care, did not fall below the acceptable standard and did not breach their duty …'.

C.3 How did the defendants carry out that role?

34. Given the context I have just explained, it is striking that amongst the documents in this case - which include all the documentation available from the underlying proceedings against the Trust - there are no attendance notes and little other record of advice given to the claimant. The second defendant has told me that he did make handwritten notes of his conversations with the claimant and typed up the more important records on his office computer but that he then only printed off those notes and did not save any soft copies. It is the second defendant's case that he handed all his files - including his attendance notes recording his dealings with the claimant, the Trust solicitors and the court - to the claimant in 2011. He contends that the blame must lie elsewhere if those documents have been omitted from the trial bundle.

35. I do not accept that evidence. First, because the second defendant's testimony in other respects in this case was simply not credible and that, inevitably, impacts upon my ability to accept what he says at face value. Second, because I cannot understand why someone exercising the reasonable skill and care of a competent legal service professional would not save typed attendance notes if those existed on a computer. More generally, I note the absence of correspondence recording advice given to the claimant. Even if the defendant did not save copies of attendance notes, it would not be exercising the skill and care of a competent legal professional to fail to keep back-up copies of letters of advice given to a client in these circumstances and it is notable that such correspondence that does exist makes no reference to any advice having been given on the merits of the claim.

36. Having found that the claimant had been given a misleading impression of the defendant's qualifications and experience before he accepted the terms of the 1 December 2008 letter, I am equally satisfied that he was not advised of the problems arising from those terms. Although the second defendant said that he talked to the claimant about after the event insurance he suggested this was in the context of discussions about insurance policies more generally - specifically, whether the claimant's household insurance might cover the litigation costs - and I am clear that no advice was given about this or about conditional fee agreements. Similarly, I am satisfied that the claimant was not advised as to the limitations of the defendants' ability to act for him in his claim not least, because the defendants demonstrated no proper understanding of those limitations themselves. Nor was the Claimant advised as to the fact that, even if he succeeded in his claim, he would not be able to recover any costs paid to the defendants from the Trust.

37. Turning then to the steps that *were* undertaken by the defendants, it was apparent that, on taking on the claimant as a client, the second defendant was alive to the need to file a particulars of claim and to obtain expert medical evidence to support that claim. On 10 December 2008, the defendants wrote to the claimant with a draft particulars of claim explaining,

> '… you will see I need your help to finish it so could you and the family get together and work out some figures and correct dates and make any amendments you think would be appropriate …'.

38. It is also apparent that the defendants sought instructions from the claimant regarding future loss of earnings and that he provided some past wage slips relating to his prison service work and a letter from Mrs Khan suggesting that she would have been prepared to offer him a salary working within her residential home business at a rate of £35-45,000 per annum.

There was also some evidence from the claimant's wife to the effect that she now provided care to her husband for around three hours a day.

39. On the basis of the limited information thus available, the second defendant drafted, and subsequently lodged with the court, particulars of claim seeking over £1 million in damages. This pleading included a statement of truth signed by the claimant on 29 December 2009. Subsequently, on 7 January 2010 the second defendant served an amended particulars of claim, accompanied by an amended schedule of loss that he had again drafted. This time the damages claimed were increased to just under £3 million. Both the amended particulars of claim and schedule of loss were again accompanied by a statement of truth signed by the claimant.

40. Although the claimant accepted he had seen and signed off the first particulars of claim prepared by the second defendant, he told me that he did not believe he had seen the amended particulars of claim and schedule of loss and explained that at an earlier stage the second defendant had asked him to sign a number of blank pieces of A4 so these could be used in future without the need to trouble the claimant.

41. Although it may be correct that the defendants obtained the claimant's signature in this way, I am not persuaded that this explains how the amended particulars of claim and amended schedule came to be signed. I note that the signatures on each of those documents are in different places and that the signature on the amended particulars of claim comes beneath the summary claim for interest. Whilst perhaps not impossible, I consider it would have been difficult to create these documents using pre-signed sheets of A4. Although I can understand why the claimant might wish to distance himself from these documents, on balance, I am satisfied he saw and signed off both the amended particulars of claim and the amended schedule of loss.

42. There are a number of problems with the particulars of claim and the amended particulars and schedule drafted by the second defendant. Most obviously, however, they included claims for which there was simply no evidential foundation. In cross-examination, the second defendant described how he came to calculate the losses claimed, explaining that he had initially estimated the sums involved - for example, for loss of earnings and transport costs - from the limited information available and had asked the claimant to say what he was claiming for other items - for example, for the adaptation of the family home - and, absent any evidence regarding future treatment, he had asked the claimant to telephone friends within the medical profession to obtain estimates.

> 'Generally', the second defendant explained to me, 'I asked him [the claimant] what he wanted and that's what I wrote down'.

43. As for the increased claims made within the amended particulars and schedule of loss the second defendant explained that:

> '[the claimant] had become poorer and poorer and we consulted this book and we could see what he could claim for - for holiday, for assistance - and I said "whatever you want to claim we can use this as a template and put that in"'.

44. Although the second defendant said he advised the claimant he would need to back up any claim with evidence and suggested that some documents had been produced to support the claims made, he accepted that no such documentation was included within the disclosure list he had himself drawn up in the underlying proceedings.

45. I am satisfied that there was little, if any, evidential basis for the various heads of loss claimed. I find the truth is, as the second defendant volunteered in evidence, that he and the claimant used the book the second defendant referred to as something like a catalogue from which potential heads of claim could be derived.

46. As well as drafting his particulars of claim and schedule of loss, the second defendant had been assisting the claimant at various court hearings as from early 2009, having been given the court's permission to do so on a McKenzie Friend basis. In assisting the claimant with the court proceedings, however, it is apparent the second defendant made applications that were misconceived - for example, to obtain disclosure of the Trust's '*instructions to expert witnesses or witnesses*' - and those inevitably resulted in adverse costs orders against the claimant. It is also apparent that the second defendant failed to ensure compliance with the court's directions, for example, by securing the attendance of the claimant's medical expert at the joint meeting of experts. More generally, no attempt was made to instruct a suitably experienced counsel or solicitor to advise on the claim. The second defendant says he did advise the claimant they should consider seeking counsel's opinion, saying he gave this advice at an early stage before drafting the particulars of claim. If that was the case, however, it would have been reasonable to expect some reference to this in the letters sent to the claimant about this time (not least, as it might have been thought helpful to instruct counsel to draft the particulars of claim). Again, given the unreliability of the defendants' evidence and the lack of any corroboration of the second defendant's testimony, I am satisfied that the claimant was never advised as to the desirability of instructing counsel with relevant experience.

47. In May 2010 the court had extended time for the service of expert reports and had ordered that the parties consider whether it might be possible to resolve the case by alternative dispute resolution ("ADR"). Again, there is no documentation suggesting that the defendants advised the claimant as to the role of ADR and how it might benefit him. Indeed, on the contrary, the evidence makes clear that the defendants adopted an entirely obstructive approach to the question of settlement. Thus, when an offer was made for payment of £5,000 in June 2009 the defendants' response was to suggest the Trust solicitors, '*add quite a few zeros at the end of the sum*'.

48. To the extent that it is possible to see any advice to the claimant on the question of settlement, there is a copy of a letter faxed to him on 9 April 2010 in which the second defendant refers to the need to finalise witness statements for later that month, observing, '*if our statements are menacing enough they have no other options but to try and settle the claim. If they don't attempt a settlement the trial judge will criticise them and probably make them pay extra damages*'. Otherwise, there seems to have been no consideration of potential settlement terms until May 2011 when the defendants made what was said to have been a Part 36 offer to settle the claimant's claim for £1½ million plus costs.

49. The defendants' failure to properly consider and advise on settlement or ADR is all the more surprising given the way in which the claimant's claim against the Trust had progressed. Although, by order of 16 October 2009, Judgment had been entered for the claimant on liability, that was on the limited basis that:

> 'the defendant admits there was a breach of duty in failing to remove a one-two inch piece of Bogota bag causing the claimant to suffer a sinus wound discharge between 24 March 2005 and 5 September 2005'.

50. That admission might have been seen as practically inevitable given that it was obvious that pieces of the plastic bag had been left in the claimant when that should not have occurred. The defendants' admission did not, however, extend to the claimant's broader case, that he had undergone an unnecessary operative procedure that had been undertaken in an entirely inappropriate manner and had thus resulted in his ongoing difficulties. On those broader questions there was a conflict between the parties' respective medical experts, Professor Neoptolemos for the claimant and Mr Thomas for the Trust, and the Judgement that had been entered on liability had not resolved that dispute, as the court recorded:

> 'for the avoidance of doubt, insofar as breach of duty alleged by the claimant goes beyond the above admission, breach of duty and causation remain an issue.'

51. As for the May 2011 offer to settle at £1½ million, that was made by the defendants in response to the Trust's application to strike-out various paragraphs of the claimant's amended particulars of claim and schedule of loss on the basis that they had no real prospect of success. It is the defendants' case, in these proceedings, that the events that had led to the strike-out application were such that the claimant's claim against the Trust was bound to fail; regardless of the defendants' conduct, it is said that the claimant has lost nothing given his own dishonesty. If that genuinely represented the defendants' view of the position in May 2011, the offer to settle at £1½ million is remarkable.

52. What is clear, however, is that before making this offer the defendants had not fully discussed this with the claimant. The second defendant has said that the claimant had himself identified this as the lowest sum for which he would settle. If that is right - and I accept that claimants can have over-inflated ideas as to the real value of their claims - then it can only have represented an ill-advised view of the case. In any event, whatever figures the claimant may have mentioned, the second defendant has not suggested that he advised the claimant of the implications of making such an offer to the Trust.

53. Before turning to the Trust's strike-out application, I should deal with one further part of the evidence relating to a possible settlement of the underlying claim. It is the defendants' case that in mid-May 2010 the Trust's solicitor telephoned the second defendant and said she had been instructed to settle the claim but could not go beyond £570,000. The second defendant says he responded, '*can we call it £570,000?*' and, when this was confirmed, he said he would put it to his client. It is the defendants' case that this offer was made by the experienced solicitor for the Trust without any additional terms, for example, as to how costs would be dealt with, or as to the time period for acceptance. The second defendant says he then put this to the claimant who, '*was furious. He said I am not taking less than £1½ million*'. On that basis, the second defendant says he never went back to the Trust's solicitor on this offer, not even to see whether it might still be open when it became apparent that questions were being raised as to the *bona fides* of the claimant's claim.

54. I am satisfied that the defendants' account in this regard is simply untrue. It is inconceivable that an experienced solicitor would have made an offer in the terms suggested. First, in relation to the amount suggested, there would have been no basis for an offer in that sum at that stage of the litigation. Even if I am wrong about that, however, and the Trust had considered that such a sum should be offered, it is entirely inconsistent with the way in which its solicitor conducted the litigation to suggest she would simply make that offer over the telephone with no subsequent confirmation in correspondence. The previous offer made by the Trust in June 2009 had, in contrast, been carefully set out in writing, clearly breaking down how it had been calculated and making plain that it was time-limited. I have no hesitation in finding that no offer to settle at £570,000 was ever made. The second defendant's testimony to me in this respect was simply false.

C.4 The Trust's application to strike-out

55. Returning then to the progress of the claimant's case against the Trust, it is apparent that, in June 2010, the Trust had received information from Mrs Khan to the effect that the claimant had continued to work, on a self-employed but full-time basis, and to be paid from her until 18 January 2010. The information thus received from Mrs Khan suggested that the claimant had not been truthful in his claim for lost earnings and had exaggerated what he said was the continuing impairment he had suffered. That suggestion of exaggeration was

also supported by other evidence the Trust had obtained and this formed the basis for its application to strike out the claimant's case. In making that application the Trust contended that the claims made by the claimant were unsupported by evidence, were exaggerated and it was said that in some respects his case was positively misleading (specifically, it was noted that the claimant's daughter had provided a witness statement that gave her address as that of her parents, which seemed intended to support the claimant's case that she had moved back home to help provide care for her father).

56. Considering the Trust's strike-out application, in giving judgment in June 2011, Master Yoxall recorded the claimant's statement in response, in which he stated as follows:

> 'I regret not telling Mr Rusz about my income, my greatest regret is he had to find out about it from Ms Charlton [the Trust solicitor]. I really wanted to be the one to tell him, but I did not know where to begin (para 64)'
>
> 'I've informed Mr Rusz of my reasons for not telling him that I have been receiving a secret income and can confirm my reason has nothing to do with deceiving the defendant Trust for more money than I am entitled to. That was the very last thing on my mind (para 66)'.
>
> 'It is unfortunate the way Mr Rusz's calculation for my losses could be incorrect and if not, that is the case I am willing to give the defendant Trust full credit for the amount I earned between August 2004 and January 2010 the sums amount to £200,000 (para 69)'

57. In giving evidence before me the clamant contended that Mrs Khan had, in fact, misled the Trust in what she had said, and he had told the second defendant that her statement was, '*untrue and written out of malice*'. If that was the case, however, I do not understand why the claimant did not make his position clear before Master Yoxall. I appreciate that the statement the claimant provided in response to the strike-out application might be seen as overly-focused on protecting the position of the second defendant, and I note that he went on to talk about the continuing losses he would suffer from not being able to return to his work with the prison service, but his witness statement was again accompanied by a statement of truth that was signed by the claimant and he has not suggested there was anything untoward about this.

58. For completeness, I should say that I also heard evidence from Ms Wright, the claimant's daughter, who emphasised that she at no time sought to mislead the court. I accept her evidence that, when she realised her statement had recorded she was living at her parents' address, she had sought to correct this. In Ms Wright's case I am persuaded that her statement must have been amended by the second defendant after she had signed and returned it. I cannot say whether the second defendant made that amendment with the intention of misleading the court or whether it was a genuine error on his part, but I accept Ms Wright's evidence that she would not have signed-off a statement that gave an address for her that was incorrect and, in any event, gave the wrong postcode.

59. Returning to the court's decision on the Trust's application Master Yoxall ordered that the following parts of the claimant's claim should be struck-out:

> '1. The loss of earnings claim …;
>
> 2. Loss of pension …;
>
> 3. The care claim … (but the claimant may apply to re-plead this ahead of loss see paragraph 9 below);
>
> 4. The claim for case management;
>
> 5. The claim for a computer;
>
> 6. Out of Pocket expenses;
>
> 7. the PTSD claim'.

60. In respect of the care claim, the order provided (at paragraph 9) that:

> 'the Claimant do serve a draft Re-Amended Schedule of Loss (… to include if so advised a re-pleaded care claim and to advise or update the loss claim as necessary) …'.

C.5 Events after 17 June 2011

61. Although Master Yoxall's order of 17 June 2011 was fairly devastating for the claimant's claim - not least, as it included an order for costs to be paid on an indemnity basis and required any future evidence from the claimant to be produced by affidavit - it was accepted that his expert's report did support certain elements of his claim. Specifically, reference was made to Professor Neoptolemus' report where it was stated:

> 'as a consequence of the operation and subsequent management Mr Wright has been left significantly physically disabled … Mr Wright's mobility has been significantly affected by the whole situation and this has led him to putting on additional weight further exacerbating his problems with mobility'.

62. Unhappily, in March 2011, Professor Neoptolemus had confirmed to the court that he was no longer prepared to give evidence for the claimant. It is unclear as to why he had decided to take that course. For the claimant it is speculated that it may not have been entirely unrelated to an inappropriate letter written to the Professor by the second defendant on 28 February 2011. The letter in question is indeed wholly inappropriate but I do not feel able to make any finding as to why Professor Neoptolemus had decided to withdraw from the case.

63. What is apparent is that Master Yoxall gave further directions in respect of the expert evidence in the order of 17 June 2011, with a direction that the case be listed for a trial, with a five-day time estimate, within a window from 10 December 2012 to 28 February 2013. For their part, the defendants took no further steps in the proceedings but ceased to act for the claimant on 21 June 2011, '*for professional reasons*'. That left the claimant with no witness evidence of fact (prepared or served), with no schedule of loss he could properly rely on, with no expert evidence and no disclosure of any documentary evidence that would support his special damages claim. Moreover, other than the defendants' offer of £1.5 million the claimant had no Part 36 protection.

64. Acting in person, the claimant sought to make contact with Professor Neoptolemus, but he would not agree to act for the claimant without legal representation. On 14 October 2011, the claimant instructed a firm of solicitors, Obaseki Solicitors, to act on his behalf. They also tried to make contact with Professor Neoptolemus, with a view to his acting as the claimant's medical expert for the trial that was then due to start on 12 December 2011. Although the Professor initially agreed to act, within a day he withdrew that agreement on the basis that he would be away for three weeks and unable to commit to attending the claimant's trial. After further attempts to contact him on 15 November 2011, the claimant's solicitors sought the permission of the court to instruct a new expert. That was refused.

65. At this stage the solicitors for the Trust made applications for summary Judgment on the remaining parts of the claimant's claim. For their part, the claimant's solicitors applied to vacate the trial and for permission to change experts. On 7 December 2011 the parties' applications were determined by the court. Those made on behalf of the claimant were refused and summary Judgment was entered against the claimant on the outstanding aspects of his claim. It was in those circumstances that the claimant accepted the Trust's Part 36 offer in the sum of £20,000, which left him facing costs of something over £70,000.

The evidence – an overview

D.1 Evidence of fact

66. I have set out my view of the evidence relevant to the specific factual issues on which I have made findings above. In general terms, I found the second defendant to be an entirely unreliable witness. His testimony was generally unsupported, and was frequently contradicted by the documents, and many of his answers in cross-examination appeared to be simply glib attempts to get out of the problems arising from an earlier part of his evidence that had been shown to be patently untrue. The documentary evidence presents a very troubling picture of the defendants' involvement in the claimant's litigation against the Trust. Unhappily the second defendant's testimony did not mitigate that impression in any way.

67. That said, I also found some aspects of the claimant's evidence to be unsatisfactory. In my judgement, he was not prepared to take responsibility for his own actions in the litigation against the Trust and his account of the matters that had led to the strike-out order of 17 June 2011 was not consistent with the statement he provided to the court at that time. I accept that claimants are entitled to rely on the advice of those who purport to be qualified to advise them, but they also bear a personal responsibility to ensure the court is not misled and I am not convinced that the claimant always acted in accordance with that obligation in his claim against the Trust.

68. As for the testimony of the claimant's wife and daughter, they both came across as honest witnesses who were doing their best to assist the court. I accept their evidence.

D.2 Expert evidence

69. As I have already recorded, I also received expert medical evidence from Mr Charnley, consultant surgeon gastroenterology, and care evidence from Ms Charlwood, occupational therapist. Both had been instructed on behalf of the claimant and had produced reports to assist the court. The defendants did not adduce any expert evidence themselves but sought to challenge the reports of both expert witnesses for the claimant who therefore attended to give oral evidence.

70. In his report Mr Charnley summarised the history relevant to the claimant's claim as follows:

> 'Mr Paul Wright was admitted to Basildon Hospital on 25 July 2008 with severe acute pancreatitis and transferred to ITU on 29 July. On 10 August 2004 a laparostomy was done, the indication for which was unclear. The abdomen was 'drained' with four tube drains and the abdomen was left open as a laparostomy [a method of leaving the abdomen open to allow drainage of infection with the option for repeat procedures]. On 12 August 2004 a re-look procedure was done and on this occasion a plastic bag was sutured to the wound to contain the loops of bowel. I have noted the second operation the abdomen was 'clean' with no further necrosis. On 20 August 2004 the plastic bag was 'mended' by suturing another bag to it. Mr Wright recovered and was discharged home on 24 September 2004 with an open abdominal wound which was starting to heal.
>
> On 10 March 2005, skin grafting to the abdominal wound was carried out. A wound discharge, most likely originating deeply, developed after surgery. On 3 September 2005 a foreign body became visible in the wound and plastic material was removed from the wound. On 3 November 2005 Mr Wright complained of low back pain present for six months. CT on

24 November 2005 showed a further foreign body.
Over the ensuing seven years Mr Wright was seen by various clinicians including the original general surgeon, local gastroenterologist and a plastic surgeon. No decisions were made apart for them to wait for Mr Wright to lose weight. He was also seen, in 2011, by a specialist gastroenterologist. A CT at this stage showed foreign material in his wound. A year later in December 2012, a further abscess was drained'.

71. He then set out his opinion on the claimant's treatment by the Trust as follows:

'1. There was no clear indication for the first laparostomy on 10 August 2004. Surgery for pancreatitis is very rarely necessary in the first 4 weeks after onset of the illness. Such a laparostomy is only indicated when there has been infecting necrosis. There was no evidence of this clinically or radiologically. A surgeon should have contacted the specialist regional pancreatic team at this stage to ask for advice as indicated in the UK Guidelines for Management of Acute Pancreatitis published in 1998 (which was the version of the guidelines available at that time).

2. The operative treatment employed by the surgeon was inappropriate. The cruciate incision is used for organ retrieval of a cadaver. It is not an appropriate incision for access to the pancreas. It is known to be associated with unacceptable morbidity. In addition, it is unlikely at such a short time after the onset of acute pancreatitis that necrosectomy was actually done since the necrosis takes time (usually at least 4 weeks) to separate from viable pancreas and be amenable to removal. The operation notes suggest drainage was done and it was called a "necrosectomy".

3. The use of plastic bags to contain the bowl following an open abdomen is a recognised technique but the method employed was careless and did not allow for any checking of retained material in the wound so the surgical team did not know what was in the wound. For instance, there was no sign of a documented handover of the plastic sheets in the handover between ITU and the ward or in handover between the ward and the district nurse. Neither was there a satisfactory handover between the general surgeons and plastic surgeons and the plastic material does not appear to have been mentioned.

4. The surgeon had plenty of opportunity to involve other specialist teams and this should have been done early on in the illness. Once it was clear there was a problem with retained material (November 2005) the care of the patient should have been handed over to a specialist pancreatic team. This lack of engagement has also been a clear breach of duty. Lack of communication was also apparent at all stages of Mr Wright's illness. The clinicians never appeared to talk to each other about him. It was all done by letter which took a long time. When weight loss was an important issue he does not appear to have been offered any specific advice'.

72. He then proceeded to explain his opinion on the question of causation in the following terms:

'1. Had the patient been referred to a specialist unit it would have been unlikely (less than 50% chance) that surgery, which was unnecessary, would have been carried out.

2. Had the patient been treated conservatively rather than by over-aggressive surgery it is highly unlikely (less than 50% chance) that

surgery for pancreatitis (i.e. for necrosis) would ever have been necessary.
3. If surgery was inevitable (which I do not believe it was) and the patient had undergone a more conventional operation (a lesser procedure without such a mutilating incision), the abdomen would not need (more than 50% certainty) to have been left open as a laparostomy.
4. If surgery was inevitable (which it was not), failure to manage the plastic sheets appropriately resulted in continued sepsis, failure to be able to close the abdomen adequately and indecision on behalf of the teams of general surgery, plastic surgery and gastroenterology. This is likely to have been a direct cause of the patient's back pain and mobility problems'.

73. I bear in mind that whilst I have had the benefit of hearing from Mr Charnley I have not been able to hear from Mr Thomas and I duly exercise caution in seeking to assess the view that would have been taken on the evidence had the claimant's claim against the Trust proceeded to trial.

74. As for Ms Charlwood's evidence, as she made clear, her report was focused on her assessment of the claimant's levels of performance in daily life activities as they would have been around late 2010 and early 2011 (see paragraph 1.1.2 of her report). To the extent that the defendants have suggested that Ms Charlwood lost sight of her requirement to limit her assessment to that period I am satisfied that is not correct. Indeed, it is apparent that Ms Charlwood took great care to reference the medical evidence available at the relevant time (that is: both the claimant's report from Professor Neoptolemus and the Trust's report from Mr Thomas) and also the psychiatric evidence obtained for the claimant (not counted by any report from the Trust), which spoke of the anxiety and depression which the claimant suffered as a result of his treatment and the continuing consequences he claimed had followed.

75. I found Ms Charlwood to be an impressive witness, who took great care to adopt a very balanced approach to her task. Specifically, she was careful to note the alternative outcomes depending on whether the court accepted the evidence adduced by the claimant or that adduced by the Trust. Parking that question at this stage, I entirely accept Ms Charlwood's report, subject to the specific corrections she made when giving her oral testimony.

E. Discussion and conclusion on the issues

1. Is any part of the claim statute barred?

76. The claim in these proceedings was issued on 28 November 2016. By virtue of sections 2, 5 and 14A of the Limitation Act 1980, the relevant limitation period for a claim in negligence or contract is six years, from the date the cause of action accrued or the date of knowledge, whichever is the later. The defendants contend that as time started to run in 2010 any breach that occurred before then must be out of time. As to the applicability of section 14A, as I understand the defendants' position, they say that the claimant should not be permitted to rely on that provision but should be faced with a time limit commencing on the date he first misstated his case, because it is said (or, at least, I infer that this is the defendants' case) that it is this that led to the Trust's application to strike-out the claim.

77. It is right to note that the claim includes complaints about breaches (whether as arising from the duty of care or from contract) occurring prior to November 2010. It is the claimant's case that the relevant breaches started in January 2009, with the service of the defective particulars of claim; he argues that the defendants' negligent conduct then continued throughout the course of their retainer until they ceased to act in June 2011. The claimant's cause of action in negligence will only have accrued, however, when he suffered damage as

a result of a breach on the part of the defendants. Thus, to the extent that the claimant sought to recover specific sums ordered against him in costs prior to November 2010, the defendants might have a point, but the claimant contends that would not have put him on notice that the case as a whole was being conducted negligently and he observes that the first adverse costs order (made in December 2009, in relation to the amended particulars of claim) was a standard order given the claimant wished to amend his case, something that might have been unremarkable given the paucity of material available when the earlier particulars were drafted.

78. In my judgement, the first time it might be said that the claimant would have been put on notice that the defendants' conduct in his case was negligent was when the Trust made its application to strike-out parts of his claim in February 2011. If the cause of action is seen to have accrued only when the claimant's loss crystallised (adopting the approach laid down in *Hopkins v MacKenzie* [1995] PIQR 43 CA), then that would then have been with Master Yoxall's order of 17 June 2011. If, however, the cause of action is seen to have accrued at the time when the claim became significantly vulnerable to being struck-out (following, instead, the approach in *Khan v Falvey* [2002] EWCA Civ 400), then the limitation period could be said to run from the Trust's application of 8 February 2011. On either approach, however, the claim is not statute-barred.

2. In the conduct of the underlying claim, what was the status of the defendants?

79. The answer to this question is apparent from my findings of fact. The defendants entered into an agreement with the claimant whereby they would provide him with legal services in the conduct of his litigation against the Trust. They acted as his legal advisor, determined the litigation strategy, drafted court documents and instructed a medical expert on the claimant's behalf and entered into correspondence as his representatives and conducted settlement discussions on his behalf. The defendants were thus doing more than simply providing paid McKenzie Friend services to the claimant; they were advising him in the conduct of his claim against the Trust and providing him with other assistance in the conduct of that claim.

3. Was there a contract as between the claimant and the defendants and, if so, what were its terms?

80. Given my findings of fact the answer to this question must be: yes, there was a contract between the claimant and the defendants, the terms of which were contained within the defendants' letter of 1 December 2008.

4. What legal duties did the defendants owe to the claimant as regards the claimant's claim?

81. As the defendants accepted in their pleaded case, in their dealings with the claimant they held themselves out as having the skill and experience of an experienced litigation executive in a firm of solicitors. I have found that the defendants had agreed to provide legal services to the claimant for reward. Even if I was wrong about that, however, the duty of care owed by the defendants would have been the same: that duty would not be contingent upon any expectation of, or demand for, payment (see *Chaudhry v Prabhakar* [1989] 1 WLR 29 CA).

82. The claimant has submitted that I should go further and lay down guidance as to the duty of care owed by fee-paying McKenzie Friends in the services they provide. The difficulty with that submission is that the complaints in this case are not really about the provision of paid for McKenzie Friend services. As I have found, the services provided by the defendants went beyond those that may be properly carried out by any McKenzie Friend purely acting as such. On the facts of this case, I have no hesitation in finding that the defendants should be held to the duty and standard of care that they had chosen to assume when holding themselves out as competent to carry out legal services for the claimant in his clinical negligence litigation (see, by analogy, *Freeman v Marshall & Co* [1966] EGD 695).

5. If the claimants were obliged to advise the claimant did they do so and, if so, in what terms?

83. Given the duty of care owed to the claimant the obligation on the defendants was to ensure that he was properly advised as to the conduct of his case against the Trust. As I have found - whether considering the funding of the case, the pleadings, any applications to the court, the question of settlement or the desirability of obtaining counsel's advice - there is little evidence of any advice having been given. Moreover, to the extent that any advice can be discerned from the documentation, it can only be described as positively harmful: the second defendant apparently advising the claimant that he could include anything he wanted in his schedule of loss, although he would have to provide some evidence before it before trial, or that menacing witness statements would help in obtaining a settlement offer from the Trust.

6. If the defendants conducted the claim was their conduct negligent and/or in breach of contract?

84. Again, given my findings of fact the answer to this question must be yes. On the most charitable view, the defendants were out of their depth and simply had no idea how to carry out the work they had undertaken to provide. Another way of reading the documentation is to see the defendants as set on obtaining the maximum amount of money out of the claimant's case as was possible. Whatever the motivation, however, it is apparent that the defendants acted in breach of the duty of care arising from the relationship they had assumed.

7. Insofar as it was, what is the consequential damage? and
8. To what extent was the claimant, himself, culpable for the manner in which the underlying claim was advanced and, to the extent that he was, what would be the consequence?

85. The claim advanced by the claimant is for the loss of chance. He contends that (i) had he been properly advised, he would have acted to obtain the benefit or avoid the risk of the litigation failing; (ii) the chance that he lost was real and not speculative or fanciful; and (iii) that he has lost something of value.

86. I note the guidance provided by the Supreme Court in *Perry v Raleys Solicitors* [2019] UKSC 5 to the assessment of causation and loss in professional negligence cases, see per Lord Briggs at paragraphs 15-24, specifically, at paragraph 20, where it is explained:

> 'For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question of the client would have been better off depends on what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation'.

87. The objection taken by the defendants in the present case is focused on their argument that the claimant's own culpability must be taken into account. It is said that this provides a complete answer to the claim for loss in this case. Specifically, the defendants contend that the claimant himself chose not to disclose relevant information about his earnings and to exaggerate his impairment; they argue that the view taken by Master Yoxall as to the claimant's credibility must mean that nothing of value has been lost. In this regard, they draw my attention to the warning given in *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin) in which it was made clear that those who make false and lying claims should expect to go to prison. The defendants say the *South Wales* case,

decided in July 2011, would have '*slam dunked*' the claimant's claim against the Trust and that I can be satisfied that his losses can be assessed at zero.

88. Although I do not discount the claimant's own culpability in weakening his claim, that does not lead me to conclude that, if properly advised, he would not have acted to avoid litigation failing. On the contrary, the evidence demonstrates that whenever advised to take a step in the proceedings the claimant did so. The fact that he went along with the defendants' exaggeration of his claim does not mean that, with proper advice, he would not have taken steps to correct the position. As for the view that would have been taken by the court, there is no need for me to speculate. The issue regarding the credibility of the claimant's claim arose in 2011, a year before the Supreme Court gave its ruling in *Fairclough Homes Limited v Summers* [2012] UKSC 26 allowing for the striking-out of the entirety of a fraudulent claim for abuse of process. Whilst understandably taking a dim view of the exaggeration of the claimant's case, Master Yoxall did not strike-out his claim in its entirety but allowed that the claimant might still be able to make good his assessment of loss in a number of respects. More generally, this was not a case where there was no valid claim (in contrast to that in *Perry v Raleys*) and it would have been possible to discount those elements of the claim that were unproven or found to have been exaggerated.

89. The question as to how I am to take account of the issues raised in respect of the claimant's own culpability remains, however, at large in this case. For the claimant, Mr Nugent submits that this is a factor that should be taken into account when determining the percentage discount that should be given for the loss of a chance in this case.

90. Before considering that question, however, it is necessary for me to determine the value of the chance that was lost. In assessing this I consider the following assumptions - as set out in the claimant's updated Schedule of Loss, to end June 2018 - to be valid:

> '1. That the claimant would have had medico-legal evidence broadly in line with that of Mr Charnley.
>
> 2. That the defendant would have relied on medico-legal evidence along the lines of that served on the action (from Mr Thomas).
>
> 3. That the claimant would have succeeded in establishing primary liability/breach of duty as against the Trust regarding his treatment and/or following joint reports, that issue would have been conceded.
>
> 4. That causation for the claimant's long-term symptoms would have remained in dispute.
>
> 5. That the claimant and defendant would both have obtained care expert evidence.
>
> 6. That the care experts would have deferred to the medico-legal experts regarding the necessity for care arising out of the treatment provided.
>
> 7. That the parties would have engaged in active ADR including mediation.
>
> 8. That the claim would probably have been resolved by mediation and/or gone to trial on the question of causation alone (and quantum having been agreed).
>
> 9. That the parties would have compromised care needs at or about the figures set out in the report of Katie Charlwood and/or a Judge would have found this level of care reasonable, subject to issues of causation.
>
> 10. That the parties would have served competing schedule of loss'.

91. The claimant's Schedule also makes, however, some assumptions that would depend on a somewhat more benign view of the claimant's credibility than I have formed. Specifically, the claimant continues:

> '11. That the claimant would have claimed heads of loss/special damages

> for which he had documentary evidence and/or expert evidence in support and would have been advised that losses for which he did not have evidence would not be recoverable.
> 12. That the claimant would have given disclosure of his HMRC records concerning his loss of income.
> 13. That the claimant's witness evidence would have been reflective of his losses.
> 14. That the evidence of Mrs Khan would not have been adduced at trial and/or served because no claim relevant to the claimant's employment by the care home would have been made'.

92. Of course, my focus at this stage has to be on what the claimant would have done had he received competent advice but that is a question on which the claimant bears the burden of proof and, as I have already recorded, I have some misgivings about the claimant's ability to accept his own responsibilities in the underlying litigation. In particular, I was troubled by the evidence he gave before Master Yoxall as to why he did not disclose his earnings from working for Mrs Khan and I consider that he was prone to exaggerate his symptoms.

93. That said, had the claimant been properly advised as to the need to make full disclosure of his earnings on the balance of probabilities I consider he would ultimately have done so. There may have been some question going to his credibility if, as I consider likely, he had delayed in disclosing this information, but, ultimately, I find that (i) he would have been prone to exaggeration but would not have been fundamentally dishonest in his claim; (ii) he would have provided information relevant to his claims; and (iii) following competent legal advice, he would not have advanced/would have withdrawn claims for which there was no proper evidential foundation. Thus, although I consider it more likely than not, that a court would have found the claimant was not an entirely reliable witness in respect of his impairments, in my judgement, that would not have been fatal to his case. Specifically, I consider that a reasonably competent advisor would have ensured that the heads of loss and the claim for special damages were supported by documentary and/or expert evidence. On that basis, I consider Mr Nugent is correct in his submission that in this case the issue of the claimant's own culpability is properly to be taken into account in the assessment of the overall loss of a chance.

94. Turning then to the specific heads of claim. In terms of general damages and having regard to the 10th Edition of the JSB guidelines, in force at the relevant time, had the evidence adduced for the claimant been accepted, I consider that the most appropriate comparable awards would have been those for damage to internal organs and digestive system, where the range for severe damage resulting from traumatic injury and with continuing pain and discomfort is given as between £28,250-£40,650. In the claimant's case, regard would also have been given to his depression and anxiety, claimed to have arisen as a result of his treatment and the symptoms suffered in consequence. There are limited comparable cases from the relevant time to assist me in assessing the correct level of award but, doing the best I can, and having regard to the medical evidence that I consider would have been available, I consider the appropriate level of award under this head, taking a global view of the claimant's injuries would have been in the sum of £35,000.

95. As to the other heads of loss, had the claimant's evidence been accepted, I consider that the sums allowed for care would have been in line with the report provided by Ms Charlwood, as corrected by her in testimony before the court. In his updated Schedule of Loss, the claimant says that this report represents an assessment of the range of figures that would have been available to the court and the parties rather the sums that might have been claimed if Ms Charlwood was solely representing the claimant's case. Of course, it is

difficult for me to form a final view in this regard given that this is the only care evidence available to me. In any event, however, as I have already indicated I consider that it is most likely that had the claimant's case not been negligently conducted he would have been compromised some time before trial and I am prepared to accept that the parties would have proceeded on the basis of the figures for care in line with those given by Ms Charwood. Similarly, on the basis of the claimant's medical evidence, I accept that the parties would have proceeded on the basis of the figures for loss of earnings as set out in the claimant's updated schedule.

96. On the basis that, as I find most likely, the parties would have settled this clam I further accept that the settlement would have led to the Trust paying the claimant's costs on a standard basis and absorbing its own costs, including those previously awarded against the claimant by the court. There is a potential complication in this respect arising from the fact - for the reasons I have already outlined - the defendants' costs would not have been recoverable from the Trust. Had, however, the claimant not been negligently advised, I am satisfied that he would have entered into funding arrangements for his claim that would have avoided this consequence.

97. Having thus assessed the value of the claimant's claim I turn to the assessment of the chance. This assessment needs to take into account the vagaries of litigation and the fact that medical causation remained an issue, albeit even Mr Thomas acknowledged that the claimant's operation had been '*somewhat unusual*'. It also needs to take into account the questions that I have found were likely still to have arisen regarding the claimant's credibility and the possibility that there was an element of exaggeration of his symptoms, factors that would have played into any settlement discussions as much as in any trial. Taking all those factors into account my assessment of the loss of the chance in this case is that there should be a 35% deduction.

End of Judgment

Transcript from a recording by Ubiqus
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiqus.com

This transcript has been approved by the judge.