Neutral Citation Number: [2021] EWHC 340 (QB)

Case No: QB-2018-001000

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18th February 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

LOUISE JANET NAYLOR	**Claimant**
- and -	
UNIVERSITY HOSPITALS OF LEICESTER NHS TRUST	**Defendant**

- -
- -

Laura Johnson (instructed by Shoosmiths Solicitors) for the **Claimant**
Martin Forde QC (instructed by Browne Jacobson LLP) for the **Defendant**

Hearing date: 18.2.21

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM :

1. By this application dated 15 January 2021 the claimant seeks orders for: (i) permission to rely on supplementary report of experts in the fields of accommodation (Mr Cumbers) and care/occupational therapy (Ms Way); (ii) an extension of time for service of the parties' updated schedule and counter schedule of loss; and (iii) adjournment of the trial. At the conclusion of the hearing I communicated to the parties the order which I have decided to make. The application to adjourn the trial is refused. The claimant has permission to rely on the supplementary expert reports (Mr Cumbers and Ms Way) served yesterday evening. The following steps are to take place by the following dates: claimant's updated schedule of loss by 25 February 2021; defendant's updating evidence including supplementary expert reports in the fields of accommodation and care/occupational therapy and updated counter-schedule of loss by 4 March 2021; agendas in relation to expert evidence in all other fields by 1 March 2021 (and – I will say – in the fields of accommodation and care/occupational therapy as soon as possible after 4 March 2021); expert meetings to have taken place by 8 March 2021 (in the fields of accommodation and care/occupational therapy I will say as soon as possible after 4 March 2021); and joint expert statements (in all fields) by 19 March 2021. I decided to give my reasons in the form of this written ruling rather than as an ex tempore judgment, which neither party opposed, in circumstances where I wanted the claimant's legal representatives to be able to make maximum use of the rest of the working day today, in working on the updated schedule of loss. I also heard submissions in relation to costs, on which I reserved judgment with a view to incorporating that matter within this written ruling.

2. The mode of hearing was by Microsoft teams. Both counsel were satisfied, as am I, that that mode of hearing involved no prejudice to the interests of their clients. Open justice was secured through the publication in the cause list of the hearing and its start time, together with an email address usable by any member of the press or public who wished to observe. A remote hearing eliminated any risk to any person from having to travel to a court room or be present in one. I am satisfied that the mode of hearing was justified and appropriate.

3. This is a clinical negligence case arising out of treatment in 2012. The trial window was fixed for 19 April 2021 at a listing appointment on 15 August 2019. The dispute is as to quantum of damages only, liability and causation having been admitted in December 2019. Judgment was entered on 6 March 2020, an interim payment of £500,000 having been made on 20 February 2020. Expert evidence relating to condition, prognosis and quantum was permitted by an order dated 3 July 2019 in 9 fields of expertise: neurosurgery; neurology; colorectal surgery; urological surgery; pain management; care/occupational therapy; accommodation; physiotherapy; and orthotics. Directions were subsequently made by an order dated 2 March 2020 and another order dated 15 October 2020. The claimant's schedule of loss and expert evidence was served on 11 and 22 September 2020. The defendant's counter schedule of loss and expert evidence was served on 9 December 2020. The deadline for experts' discussions in all disciplines was 5 February 2021.

4. In two of the areas of expert evidence – namely care/occupational therapy and accommodation – issues arise relating to accommodation needs, adaptations and future live-in care. The existing expert reports, and the existing schedule and counter schedule of loss, discuss these matters. On 18 September 2020 the claimant moved

into a bungalow which she purchased having come into funds by reason of the interim payment. The property purchase was completed on 20 September 2020. Prior to purchase the claimant had communication with her own accommodation expert Mr Cumbers. After moving in she had a video visit (6 October 2020) from the defendant's accommodation expert (Mr Fisher), whose subsequent December 2020 report addressed the new accommodation.

5. Ms Johnson, for the claimant, emphasises the serious and life changing events which her client experienced in 2012, aged 37. She emphasises the difficulties which the claimant currently faces arising out of her medical condition and increased pain, and the harsh realities caused by the Covid 19 pandemic. She emphasises the realities so far as concerns a team of lawyers and experts seeking to support a claimant with disabilities, and especially in the current climate. She urges the Court not to look back at the chronology of this case with 'hindsight'. She submits that it must always be remembered that this is the claimant's claim, that the hearing of the trial on quantum is of fundamental importance to the claimant and her future welfare, and that she has done nothing wrong in the way in which she has conducted herself. Those submissions, in my judgment, were properly made and provide an appropriate contextual prism through which to consider the case-management issues before the Court.

6. It is appropriate, in my judgment, to deal first with a question relating to counsel's availability. The point arises out of a development subsequent to the issuing of this application on 15 January 2021. During the second half of January 2021 Ms Johnson, being counsel who has acted for the claimant throughout the history of these proceedings, became unavailable for the trial window (19 April 2021 onwards) by reason of Covid-related changes in the timetable for a public enquiry in which she acts for a core participant. The implications of that are dealt with in a second witness statement of the claimant's solicitor Mr Tubb dated 14 February 2021. That witness statement describes as 'very unlikely' the prospects of securing alternative counsel with commensurate skills and experience and the availability to deal with the preparation of expert evidence, attendance at settlement meetings and representation at trial. Ms Johnson informed me, candidly, that the position today is that a senior junior barrister with appropriate skill and experience, and 'well able' to represent the claimant, including covering the necessary steps from today, has been identified, secured and booked. I was told, and I accept, that the claimant's preference is to retain Ms Johnson with whom she has developed a rapport and in whom she has great confidence.

7. In my judgment, Ms Johnson's diary conflict and unavailability, and the claimant's understandable preference to retain her, come nowhere near providing a basis for adjourning the trial. The observations of Fraser J in Bates v Post Office Ltd [2017] EWHC 2844 (QB) at paragraphs 15 to 20 cogently analyse the powerful reasons why Courts are so reluctant to adjourn trials where a barrister's diary conflict has arisen, and I adopt them. They were made in the context of complex litigation (see paragraph 10). As Fraser J said at paragraph 19 – and as applies equally in the present case – "Whilst it may be regrettable that one party might be deprived of their counsel of choice because of listing, that is a not unusual situation. Where there is reasonable notice of the diary conflict, which there undoubtedly is in this instance, arrangements for a suitable replacement can invariably be made by the disappointed party, if a

replacement is necessary". Rightly, that has happened here. Adjournment of a trial is a "last resort" (see the White Book at paragraph 29.5.1). Having said that, the relevance in the present case of the change of Counsel is that it is one of the factors which the Court needs to have in mind, as I do, in considering whether a workable timetable through to trial is achievable, fair and consistent with the interests of justice having regard to the overriding objective.

8. I turn to the original basis on which the application sought to adjourn the trial. That concerned whether what Mr Tubb described as the "quickest realistic timetable" for the various steps now needing to take place was consistent with retaining the existing trial window, were the court to grant permission for the supplementary expert reports. Mr Tubb emphasised, and Ms Johnson emphasises, the need for a timetable to have within it sufficient room to promote the opportunities for settlement and the avoidance of unnecessary cost. I will return to that topic when I have first addressed the question of what the 'quickest realistic timetable' in this case would be.

9. There is no difficulty with the claimant adducing her own updated witness statement served yesterday evening. That is well within the deadline of 22 February 2021 set for updating witness evidence in the order of 3 July 2019.

10. What about the supplementary expert reports in the two disciplines, in light of the purchase of the new accommodation? It is obvious, in my judgment, that the Court at the hearing of any quantum trial in this case, and the experts in the fields of accommodation and care/occupational therapy, do need – at least insofar as achievable consistently with the overriding objective – to be put in a position to consider the practical realities arising from the claimant's property purchase and move in September 2020. Realistically, Mr Forde QC for the defendant does not oppose permission for the claimant to rely on the supplementary expert reports filed yesterday evening. He does not say they should be excluded, nor that their being adduced is inconsistent with the overriding objective. I agree. Mr Forde QC makes a number of criticisms about the way in which the evidence has been approached in the past chronology of these proceedings. I will come back to make some points of my own about the chronology, remembering to guard against hindsight. But I am satisfied that in the present case and the present circumstances the critical question concerns the timetable by which remaining steps can properly, realistically and fairly be expected to be achieved. I heard careful (and ultimately date-focused) reasoned submissions by both Ms Johnson and Mr Forde QC, in relation to all appropriate steps. Fairly and candidly, Ms Johnson accepted – rightly in my judgment – that a timetable "can" be achieved, consistent with retaining the existing trial time window. She distinguish between what was "possible" on the one hand and what was appropriate, and what "should" happen, "appropriately", in the interests of justice on the other hand.

11. I will not repeat what I said at the outset of this judgment, when I explained what I am ordering, with dates for appropriate steps. My reason for arriving at those dates is that I am quite satisfied, having heard competing submissions with alternative date ranges, that the deadline dates which I have identified are necessary and proportionate, achievable and realistic, viewed in terms of the proper conduct of the proceedings and the overriding objective, including in circumstances where there is to be a transition involving Ms Johnson and her replacement counsel. I am also satisfied that the timetable to which I have referred is consistent with the proper promotion of

alternative dispute resolution and settlement, a duty to consider which has at all times needed to be at the forefront, as indeed is embodied in the court order of 23 July 2019. I do not accept that the implications of the timetable will put the claimant herself in a position of being unduly pressurised, or unable to make properly informed and reflective decisions. Nor do I accept that the timetable will stand to produce a position involving unnecessary and avoidable cost to the public purse. I am satisfied that this case has and needs to keep its discipline and focus, as the evidence and schedules are now finalised. Maintaining the trial date will, in my judgment, promote the interests of justice. There is, in my judgment, no justification for the last resort of adjourning the trial. Nor is there justification, having regard to the overriding objective, for the adverse knock-on consequences that will inevitably arise in the efficient administration of justice and allocation of court time for other cases scheduled for their own hearings. The application to adjourn the trial is therefore refused. The application for permission to adduce the supplementary expert reports is granted, and I make the directions for the timetable which I have described.

12. There are four aspects of the time-line on which I think it appropriate to touch. First, Ms Johnson has persuaded me that the steps taken by the claimant's legal representatives in July and September 2020 to press on with the preparation and service of the claimant's witness statement evidence, schedule of loss and expert reports, were an appropriate course of conduct notwithstanding that the claimant had made an offer in June 2020 on the new property into which she subsequently moved on 18 September 2020. I accept that it could not be known or assumed that the transaction would proceed to fruition and valuable time could have been lost, threatening the timetable and ultimately the trial window had steps to prepare materials been placed on hold.

13. Secondly, I am concerned to have seen that a court order was made on 15 October 2020 – by consent – making directions relating to expert evidence and timetable, with no direct consideration being given at that stage to the implications of the claimant's move into the new accommodation. That was, in my judgment, a missed opportunity. I repeat: the claimant had moved into her new property on 18 September 2020 with completion 2 days later on 20 September 2020. The court order of 15 October 2020 giving directions was made a full month later. Her latest witness statement records that, before moving to the new property, she had had contact with her accommodation expert Mr Cumbers whose August 2020 report had dealt with future accommodation needs, and who expressed a view as to the appropriateness of the property being purchased. I repeat: the defendant's own accommodation expert scheduled and undertook a video visit with the claimant at her new property on 6 October 2020. The decision of the Court of Appeal in Swift v Carpenter [2020] EWCA Civ 1295 had been said to be awaited by the claimant's representatives in the context of the schedule of loss. But that Court of Appeal judgment was itself handed down on 9 October 2020. In my judgment, it is in no way an exercise of hindsight to observe that – when the court was making its directions by order on 15 October 2020 – consideration could and should have been given by the parties to the question of ensuring that the expert evidence would promptly address the implications of the new property purchase. I am not making factual findings, nor levelling a criticism at any party or person. I am confident that I do not need to do so. I am, however, expressing a concern.

14. Thirdly, in circumstances where that court order of 15 October 2020 laid down a deadline for experts' discussions to have taken place by 5 February 2021, it is regrettable that agendas and meetings in relation to all of the other areas of expert evidence – each of them entirely unaffected by the new property purchase – did not proceed. Mr Forde QC tells me that the defendant's solicitors wrote to suggest this, but only on 2 February 2021. Again, I am not making findings or levelling specific criticisms – nor do I need to do so – but I am expressing another concern.

15. Fourthly, I asked Miss Johnson why the supplementary expert evidence had been produced only yesterday evening on 17 February 2021, in circumstances where Mr Tubb's first witness statement had stated that Mr Cumbers had anticipated his supplemental report being available by the end of January 2021. Ms Johnson assured me that there had been no 'holding back' of reports, that the claimant's team in fact have been working hard on the production of both supplementary reports, but that they had done so in parallel with accelerating the production of a full updating witness statement of the claimant herself ahead of the court ordered deadline of 22 February 2021. I accept that explanation.

16. I turn to the question of costs. In a rather untidy, but forgivable, sequence of oral submissions and counter-submissions on costs, the position in essence – as I saw it – came to this. Mr Forde QC submits that the defendant should be awarded the costs of today's hearing. He submits that the central element necessitating this hearing was the application to adjourn the trial, which has squarely failed. He says that the issues relating to evidence and deadlines could and would all have been dealt with by way of sensible suggestions and that – even had all those matters been agreed – it is obvious that today's hearing would have been necessitated by the claimant's representatives' unshakeable resolve to seek adjournment of the trial. He says that the position on this application has involved a fluidity evidenced by the very late provision, yesterday evening, of the addendum reports and witness statement and of his own skeleton argument. He accepted that the schedule of costs supplied by the defendant yesterday evening was late, and includes within it far more than the cost relating to today's hearing, but says that is not in principle a reason of itself to decline a costs order (White Book paragraph 44.6.5), which can be made on the basis that the costs are 'to be the subject of detailed assessment if not agreed'. Ms Johnson submits that costs should be costs in the case. She says this hearing involved an unavoidably necessary series of case-management matters, on many of which the courts resolution of timetabling issues did not involve the adoption of deadline dates put forward at this hearing by the defendant. She submits that the application to adjourn the trial arose out of legitimate concerns and was reasonably pursued. She says that the defendant made no effort to put forward any substantive response in relation to the various applications, beyond indicating its resistance to the adjournment of the trial. She submits that it is a relevant factor against the grant of a costs order that the defendant's costs schedule was submitted late and did not constitute a fair vehicle for any summary assessment.

17. I am going to order 'costs in the case'. My reasons are as follows. The defendant would have been in an irresistible position in relation to costs if it had communicated, in response to the application, that it would accede to permission to rely on addendum expert reports together with an extension of time and a timetable – or if it had sent a draft order to which it was willing to consent – and if the Court order today had then

vindicated that communicated position. There was every opportunity to communicate such a position, in the context of an application made on 15 January 2021. The defendant did not do so. The claimant was in the dark as to what the defendant's position on the various other matters was and was going to be. So was the Court. Indeed, Mr Forde QC's skeleton argument, provided yesterday evening, describes 'the application' with all its composite parts and in some places appeared to invite the Court simply to 'dismiss' it, while in other parts the skeleton argument indicates that addendum expert reports were appropriate as was a timetable for response, but with the trial date window being preserved. In any event, by the time the skeleton argument arrived yesterday evening the claimant was committed to the hearing. Moreover, on issues relating to timetable I did not adopt the dates put forward by Mr Forde QC in his skeleton argument or orally, which (for example) included a date of 19 February 2021 for the claimant's updated schedule of loss, strikingly given that the existing court order (3 July 2019) would already have allowed for a deadline of 22 February 2021. In all the circumstances, I am satisfied that the just and appropriate order in relation to the costs of the application and today's hearing is costs in the case.

18.2.21