Neutral Citation Number: [2023] EWHC 811 (KB)

Case No: QA-2022-BHM-000023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM BIRMINGHAM CIVIL JUSTICE CENTRE

Birmingham Civil Justice Centre
The Priory Courts, 33 Bull Street
Birmingham, B4 6DS

Date: 05/04/2023

Before :

MR JUSTICE FREEDMAN

- -

Between :

JULIE TIERNAN-SPRATT
(Personal representative of the
Estate of Dominic Spratt, deceased)

First Claimant/
Respondent

JULIE TIERNAN-SPRATT
(on her own behalf and on behalf of the
Dependants of the Estate of Dominic Spratt
deceased)

Second Claimant/
Respondent

- and -

CITY OF WOLVERHAMPTON COUNCIL

Defendant/
Appellant

Mr Andrew P McLaughlin (instructed by **Browne Jacobson**) for the **Defendant/Appellant**
Mr Winston Hunter KC (instructed by **Simpson Millar LLP**) for the
Claimants/Respondents

Hearing date: 30 January 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 5 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE FREEDMAN:

I Introduction

1. This is an appeal against a refusal of District Judge Dickinson ("the Judge") to give relief from sanctions in respect of the service of three additional witness statements about a year after the time provided for exchange of witness statements. The appeal comes to the Court with the permission of Mr Justice Martin Spencer, to whose decision I shall return. There is no appeal against the decision that the breach of the court order was serious or significant (the first of the three *Denton* criteria). The two grounds are that the Judge was wrong (a) to find that there was no good reason for the breach (the second of the *Denton* criteria), and/or (b) to decide in the circumstances of the case in order to deal with the case justly to refuse to give relief against sanctions (the third of the *Denton* criteria).

2. The deceased, Mr Dominic Spratt ("the deceased") was injured in an accident at work on 1st July 2014 when the tip of the ring finger of his left non dominant hand suffered a traumatic amputation whilst dealing with a wheelchair on a ramp. Liability for the accident was agreed 90/10. Mr Spratt started seeing a counsellor, Cathy Slade, on 15 August 2014.

3. Over the course of 93 sessions lasting until July 2016, he informed the counsellor that he had been subject to sexual and physical abuse as a child. He said that he had been removed from the family home when he was six years of age after his father had assaulted him and broken his ribs. He alleged over the course of the rest of his childhood that he was sexually and physically abused by a number of foster carers, some of whom were women and some of whom, he alleged, were in positions of power or authority.

4. The deceased saw Dr Haynes for the purposes of a psychiatric report in connection with this claim in January 2017. Dr Haynes says that the childhood abuse meant that the deceased was vulnerable to developing PTSD, and he developed PTSD not only in relation to the accident itself, but also in relation to the abuse and but for this accident this would not have happened.

5. Proceedings were issued on 6th April 2017 for damages limited to £50,000. The Defendant obtained a report from a Professor Maden which challenged the deceased's veracity in relation to his claims of childhood abuse and the validity of his alleged memories, flashbacks and nightmares. His report was disclosed on or about 18 September 2018.

6. The deceased committed suicide on 20 September 2018 within a day or two of reading the report. In about August 2019, the proceedings were amended so that the widow of the deceased ("the Claimant") continued the proceedings in two ways. First, as administratrix of the deceased, she continued his claim for personal injuries, stepping into the shoes of his claim. Second, she made a claim under the Fatal Accidents Act on behalf of herself and the deceased's dependants arising out of the death of the deceased which was in turn attributed to the original negligence. By an updated schedule of loss of 22 August 2019, the Claimant sought damages of in excess of £1,000,000.

7. The basis of the claim is that the accident caused the deceased to develop a severe and chronic psychological/psychiatric response, characterised by memories and flashbacks of trauma and abuse he had suffered as a child, which otherwise would not have occurred. That led him to commit suicide. Liability for his death is denied. The re-amended defence dated 24 March 2020 alleged that the deceased's account of having suffered severe childhood abuse and his claims of memories and flashbacks of it were untrue. He had pretended to be a victim of abuse and he killed himself because Professor Maden exposed him as being untruthful in his claim.

8. On 4 March 2021, the parties exchanged witness statements pursuant to an agreed extension of time. Further directions were given in relation to expert evidence. A CMC was listed for 14 February 2022, at which the case was to be reviewed generally and the court was to consider an application by the Claimant for permission to rely on a care report. That hearing was adjourned.

9. Leading counsel for the Claimant stated that she had developed disabling spinal symptoms, namely cauda equina syndrome, which it was said would be highly relevant to the Claimant's application for permission to rely on a report from a care expert. The case was re-listed for 30 May 2022.

10. In March 2022, the Defendant's solicitors visited the deceased's mother Mary Spratt ("Mrs Spratt"), at her home. Another of her sons, a brother of the deceased, Sean Spratt, was present. Their witness statements stated that the deceased lived in the family home throughout his childhood until he was 17 years of age. Mrs Spratt and Sean Spratt provided details of the addresses where the family lived. They also identified the schools which the deceased attended. Mrs Spratt stated that after she and her late husband moved to a new home near Tettenhall Wood School, where the deceased was working in 1995, he was a frequent visitor. She said that before her husband died in 2009, she and her husband would often look after the deceased's son Ethan. She disputed that the deceased was ever in care or foster care or that he had an unhappy childhood.

11. Mrs Spratt has photographs of the deceased in her home in his early teenage years and at other times which, it was said, could not exist if in fact the deceased had been removed from the family home when he was six because his father had broken his ribs. These were referred to in a witness statement of Bridget Anne Tatham, a partner in the Defendant's solicitors Browne Jacobson LLP. She viewed the photographs but was not allowed to take copies, and subsequently Mrs Spratt has refused access to the photographs. The Defendant served the various witness statements with the application at the beginning of March 22. It wishes to rely on the additional witness evidence of Mrs Spratt, Sean Spratt and Bridget Ann Tatham.

II Application for relief against sanctions

12. It is common ground that the Defendant has to apply for relief from sanctions in order to admit such evidence out of time. The relevant provision is CPR 3.9(1) which reads as follows:

"(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders."

13. The test that has to be satisfied in *Denton v TH White* [2014] EWCA Civ 906; [2014] 1 WLR 3296 *("Denton")* is in the following terms, namely:

(i) The first stage is to identify and assess the seriousness and significance of the *"failure to comply with any rule, practice direction or court order"* which engages CPR r.3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages.

(ii) The second stage is to consider why the default occurred. If there is some good reason for the default, the court will usually grant relief from any sanction imposed.

(iii) The third stage is to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application including the need:-

(a) for litigation to be conducted efficiently and at proportionate cost; and
(b) to enforce compliance with rules, practice directions and orders.

14. As regards the third of those criteria, the relevant factors include the following:

(i) The two factors referred to above in (a) and (b) may not be of paramount importance, but they should be given particular weight when all the circumstances of the case are considered, per the majority of the Court of Appeal in Denton (Lord Dyson MR and Vos LJ);

(ii) Other factors or circumstances mentioned in *Denton* are the need to consider whether the sanction imposed is proportionate to the breach in question.

15. As regards an appeal, this was a case management decision, and there is a high threshold test before a court can interfere. In *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537*,* Lord Dyson MR at para. 52 said: *"We start by reiterating a point that has been made before, namely that this court will not lightly interfere with a case management decision. In Mannion v Ginty [2012] EWCA Civ 1667 at [18] Lewison LJ said: "it has been said more than once in this court, it is vital for the Court of Appeal to uphold robust fair case management decisions made by first instance judges.""*

16. In *Abdulle v Commissioner of Police of the Metropolis (Practice Note) [2015] EWCA Civ 1260; [2016] 1 W.L.R. 898, CA*, the Court of Appeal re-affirmed that it would not lightly interfere with case management decisions of lower courts, and stressed that that approach applied to decisions to grant or refuse relief from sanctions under r.3.9 and to decisions on whether to strike out under r.3.4(2)(c): see Lewison LJ at paras. 24-28.

17. In *Wolf Rock (Cornwall) Limited v Langhelle* [2020] EWHC 2500 (Ch) HHJ Paul Matthews summarised the principles as follows:

> *"I remind myself of certain relevant rules concerning appeals. By virtue of CPR rule 52.21(1), an appeal is limited to a review of the decision of the court below, unless the court considers that in the circumstances of a particular appeal it would be in the interests of justice to rehear the case: Auberon v La Baguette Ltd [2002] EWCA Civ 10, [83]. There being no need for a rehearing in this case, this appeal is a review. A second point is that rule 52.21(3) provides that the appeal court will allow the appeal where the decision was (a) wrong, or (b) unjust, because of serious procedural or other irregularity in the proceedings below. Here wrong means wrong in law, wrong in fact, or wrong in the exercise of discretion. But the test is different for each of these. The court must distinguish between a finding of primary fact on oral evidence where credibility is in issue, the evaluation of facts by a judge, and the exercise of discretion by the judge. Thirdly, the court below must give reasons for its decisions: Bassano v Battista [2007] EWCA Civ 370. But these must be read on the assumption that the judge knew how to perform the judicial functions and the matters which had to be taken into account: Piglowska v Piglowska [1999] 1 WLR 1360, 1372."*

18. The appellate court should therefore be slow to interfere with the decision of the District Judge even if this court would have come to a different conclusion were it being asked to grant relief from sanction. The principles applied on appeal from the exercise of discretion were stated by Saini J in *Azam v University Hospital Birmingham NHS Foundation Trust* [2020] EWHC 3384 (QB) as follows:

> *"50. An appellate court will only interfere with a discretionary evaluation where an appellant can identify one or more of the follows errors:*
>
> *(i) a misdirection in law;*
>
> *(ii) some procedural unfairness or irregularity;*
>
> *(iii) that the Judge took into account irrelevant matters;*

> *(iv) that the Judge failed to take account of relevant matters; or*
>
> *(v) that the Judge made a decision which was "plainly wrong"".*

19. This summary (with paras. 51-52 of Saini J's judgment, amplifying the fifth of the above matters) was referred to by Birss LJ in *ABP Technology Ltd v Voyetra Turtle Beach Inc and another* [2022] EWCA Civ 594 as a *"useful recent summary"* of the principles.

III The decision of the Judge

20. The 12-month delay in respect of the witness statements was characterised by the Judge as serious or significant. At para. 9, the Judge said that the delay was very serious because a delay of 12 months in the production of witness statements was a huge delay which was very serious even where no trial date was prejudiced as was the case here. There is no appeal in respect of the finding that the breach was serious.

21. The Judge found that there was no good excuse for the delay. I shall consider this further in connection with the first ground which challenges this finding, and thus the refusal to give relief against sanctions.

22. The Judge then went on to consider what she believed to be the relevant circumstances. I shall consider this further in connection with the second ground which contends that relief should have been given against sanctions.

IV The first ground of the Appellant: the Judge erred in finding that there was no good excuse

23. The time for the exchange of witness statements was fixed for 4 March 2021. The Defendant served witness statements, but did not seek a witness statement from the mother of the deceased. Such explanation as there was is contained in the fourth witness statement of Joanne Mary Mulvenna in support of the application for relief from sanctions dated 29 March 2022. She said the following at para. 6:

> *"I had been aware of the Claimant's mother (sic) address when discussing the witness statements with members of staff at Tettenhall Wood School in April 2020. Given the likely age of the Claimant's mother and the tragic circumstances of Dominic Spratt's death and that it had only been just over 18 months since his suicide, the decision was made not to approach her at that…time as it would have been unnecessarily cruel. We also had to consider the Claimant's solicitors' allegations that…Dominic Spratt had taken his own life following receipt of the medical report obtained from*

> *Professor Maden, the Defendant's medical expert and the response that we were likely to receive."*

24. When the statements were exchanged, the Defendant relied on the absence of records obtained of the deceased being in care as per a statement of Mr William Kidd dated 4 March 2021 of the Defendant. The Claimant, the widow of the deceased, said that it was possible that the records had been lost or that assistance was obtained from the local Catholic Church. Ms Mulvenna then related that an application was made for third party disclosure from the Archdiocese of Birmingham which confirmed that there were no documents for the deceased. Nor were there such documents from Father Hudson's Care, an agency for the Archdiocese.

25. Ms Mulvenna then referred to the illness of the Claimant and to the adjournment of the case and costs management hearing in February 2022 as above. She then stated the following at para. 13:

> *"Following the adjournment of this hearing further discussions were had with Counsel as to the potential increase in the value of the claim and matters generally. Counsel was of the view that given that we had explored all other avenues in relation to proving that…Dominic Spratt had not been in care as a child, we should now visit his mother in order to establish whether… Dominic Spratt had been in foster care as a child. This decision was not taken lightly. This was a very difficult decision to make given the likely age of…Dominic Spratt's mother and the difficult circumstances of his death. This was further compounded by the Second Claimant's allegations that the index accident led to the death of Dominic Spratt, allegations which have been vehemently denied by the Defendant."*

The result of that visit has been set out above.

26. The submission of the Defendant was that there was a good excuse for not visiting the mother of the deceased in that the concern was that it would have a very deleterious effect on her because of her bereavement and her age. Those concerns were particularly acute because of the allegation that the Defendant's evidence through Professor Maden had led to the death of the deceased. However, when the matter was re-appraised at a later stage in the light of the way in which the absence of records about care were being assessed, the Defendant adopted a different and very tentative approach, acting on the advice of Counsel.

27. The Judge's assessment of the position was as follows at paras. 12-14:

> *"12 I consider this to be a poor reason. The Defendant could and should have approached these witnesses sooner. It is undoubtedly going to be a very distressing and sensitive matter for Mrs Spratt. And I can well understand how, in the*

> *aftermath of Mr Spratt's death, the Defendant may have thought it would not be possible to approach her. However, this difficulty would have abated over time, and I simply do not accept that it remained impossible for the Defendant to speak to Mr Spratt all the way until March 2022. In particular, I cannot see why it would not have been possible to make the approach in good time for the Court's deadline of March 2021 to be met, it being by then around two and a half years following Mr Spratt's very sad death.*
>
> *13. The Defendant says that they were exploring other avenues to prove the abuse did not occur. I am not impressed by that explanation. The court gave a date of 4th March 2021 to exchange witness statements. Court orders must be complied with and therefore all avenues regarding witness evidence needed to have been explored by that date. It is not open to the Defendant to decide not to approach a particular witness, but seek to reserve the right to change its mind at a later date, although there was a delay of getting the third party disclosure which was outside of the Defendant's control. The Defendant did not have and had not sought permission from the court to await the outcome of this disclose before approaching further witnesses. I also note that the disclosure obtained was supportive of the Defendant's case in this regard as it revealed no record of Mr Spratt in care.*
>
> *14. Further, if it is the case that this evidence is "pivotal" - and "pivotal" is the word the Defendant has used – then if anything that makes it all the more inexplicable that no attempt to obtain it was made within the court's timetable."*

V Discussion on the first ground

28. In his decision giving permission to appeal, Mr Justice Martin Spencer, having reminded himself of the high hurdle required to interfere with a case management decision, said the following:

> *"I consider that the Appellant should have the right to seek to persuade a High Court Judge that the decision of the court below was wrong. I have also taken into account that another judge could take a significantly different view as to the justification for the delay in seeking the evidence from the deceased's mother, the fact that to have admitted the evidence would not have jeopardised a trial date and the fact that the District Judge acknowledged that the decision was borderline."*

29. I remind myself that it is not sufficient for an appeal that the appellate court might have taken a different view of the evidence from the Judge whose decision is being appealed. There are a number of concerns which I entertain about the reasoning in this case, namely:

(i) if the decision not to call the evidence was justified in 2020, it is a heavy burden that the Defendant would have had to review the decision before March 2021 and again thereafter long before March 2022. It is not a question as to whether it was impossible to go to Mrs Spratt, rather whether it was a reasonable decision to take in the circumstances;

(ii) the problem abating over time may have been the case if it were limited to bereavement, but in the instant case, it was even more sensitive than that because of the belief (whether with or without any justification) of relatives of the deceased that the suicide had been caused or contributed to by the defence of the case through the service of the report of Professor Maden; and

(iii) it is not suggested that the Defendant was reserving the right to come back at a later stage. The trigger to go to Mrs Spratt was Counsel's subsequent advice following the state of the evidence at the later stage.

30. Although there is scope for a different judge to have formed the view that there was a good excuse in the peculiar circumstances, I conclude that the Judge was still entitled to conclude that there was no good reason for the delay. For the purpose of an appeal, I am unable to conclude that the Judge was wrong to reach the conclusion that the excuse was not a good excuse such as to excuse the serious or significant breach of the rules. She was able reasonably to come to the views that:

(i) before March 2022, the Defendant ought to have made an approach to the mother of the deceased;

(ii) although the problem may not have abated due to the concern about the impact of the forensic report served just before the suicide, the approach should still have taken place, albeit sensitively done, as was no doubt the case when it happened in March 2022; and

(iii) the advice of Counsel could have been obtained at a much earlier stage, and nothing substantial had changed in the year from the time when the statement should have been served until the time when the statement was sought.

31. Whilst the finding that there was no good excuse was not wrong, the reason for the breach, even falling short of a good reason, was still capable of being a relevant circumstances at the third stage of the *Denton*. I shall consider whether the Judge failed to take into account or characterise properly the reason.

VI The second ground of appeal

32. The findings that there has been a serious or significant breach for which there is no excuse is not the end of the matter. It is still necessary to consider the third stage of *Denton*. That is why the Judge went on to consider relevant circumstances. She recognised that it was not the end of the matter that the Defendant had failed on the first and second stages of the *Denton* test. In particular, the Judge found:

(i) There were no instances of previous delays which were relevant to the application.

(ii) There was no trial date which was lost due to the late service of the witness statements because no trial had been listed.

(iii) She recognised that the evidence was relevant to the fundamental dishonesty issue in the estate claim and the evidence could be relevant to the claim of the dependants because it might inform as to the cause of the suicide.

33. On the other hand, the Judge found the following:

(i) Although a trial was not lost, there was inefficiency in the conduct of the litigation because the Claimant would want to respond to the new evidence (perhaps by new witnesses) and the joint statements of the psychiatrists might require to be revisited: see Judgment paras. 16-17. This would be disruptive to the litigation.

(ii) The problem occurred because *"the Defendant chose not to pursue this evidence at the time it was due and now wants to change its mind about that decision, which is completely contrary to the need to enforce compliance with court orders"*: see Judgment para. 18. This was completely unacceptable in circumstances where *"the position regarding the witnesses had not materially changed. A year is a very significant delay, and it will be disruptive to the proceedings to allow this evidence in now"*: see Judgment para. 21

(iii) The Defendant may be able to establish that the deceased was dishonest about the abuse having regard to the absence of record of the deceased being in care and Professor Maden providing a helpful commentary. The Defendant would be disadvantaged in running this defence, but any prejudice would be at its own door: see Judgment para. 22.

(iv) The Judge was satisfied that *"the sanction of not being allowed to rely on these statements was proportionate to the seriousness of this delay,*

especially as the Defendant can still run its argument that the abuse is fabricated based on other factors": see Judgment para. 23.

(v) In terms of the need to enforce compliance with Court orders, there was a need for court orders to be enforced in the absence of a good reason for the breach..

34. The Judge considered the matter was *"finely balanced"* but *"having considered all the circumstances of the case and the factors at CPR 3.9"* refused to grant relief against sanctions. That, says the Claimant, is the right approach, and particularly where matters are finely balanced, it is not for the appellate court to say without more that it would have resolved the balance the other way.

35. I have considered very carefully the arguments presented by Mr Hunter KC so thoroughly and persuasively. In addition to taking into account what he has said, I have considered again the reminders that the threshold to interfere with an exercise of discretion of a first instance judge in such a case is set very high. I have also been impressed by the way in which the Judge assimilated such a large amount of material so quickly and reached an ex tempore judgment which reads so well and considers so much of the relevant matters. Having had the opportunity for more extensive consideration of this case and having received more extensive and more researched submissions than were before the Judge, I have reached the conclusion that the decision was wrong in the evaluation of the circumstances.

36. There are two primary issues which the Judge failed to take into account adequately or at all, namely:

(i) Whilst the Judge was entitled to find that there was no excuse for an earlier approach to the mother of the deceased, she failed to consider that this was not a defiant breach, but the exercise of a conscientious judgment, or she erred her in characterisation of the breach by not finding this ("the First Matter").

(ii) The refusal to grant relief from sanctions would cause prejudice to the Court and the administration of justice in depriving the Court of direct evidence and to force the Court to try the matter by reference to inferior indirect evidence based on inferences ("the Second Matter").

37. In amplification of the First Matter, the failure of the Defendant to seek the evidence of the mother of the deceased at an earlier stage was not because of a defiance of a court order, rather a well-intentioned and understandable decision not to make an approach to the mother of the deceased. It is apparent from the notes in the White Book at para. 3.9.6 that the Court will consider how serious or significant the breach is: the more or less it is serious or significant may be relevant either way at the third stage. Likewise, if there is no good excuse, but there is some excuse of mitigation falling short of good excuse, this might be a a relevant criterion at the third stage of *Denton.* At the third stage of the *Denton* analysis, the Judge returned to the 'choice' of the Defendant not to approach the mother of the deceased until a year after the time provided for the exchange of witness statements, but she did not reflect or accept the

reason for the decision as set out in Ms Mulvenna's witness statement as set out above.

38. There is scope to calibrate the quality of the excuse even if it falls short of a 'good excuse'. That calibration will have different ends of the scale of excuses which were not good excuses from ones which amounted to deliberate defiance of a court order to an understandable judgment call that the Court on balance regards as wrong. Between that, there is a spectrum of possible situations. An instance of deliberate breach of a court order is the case of *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd [2014] UKSC 64; [2014] 1 W.L.R. 4495* in which a member of the royal family of Saudi Arabia had been ordered to *"file and serve a statement, certified by a statement of truth signed by them personally"*. The prince refused to sign the statement personally, on the grounds of Saudi Arabian protocol relating to members of the royal family. He maintained this refusal in the face of an unless order. He was refused relief from sanctions by reference to his deliberate disobedience of a court order.

39. In my judgment, this case was at the opposite end of the spectrum. There was no deliberate flouting of a court order. There was no consideration not to seek a witness statement and to reserve the right to come back at a later stage with a witness statement from the mother. On the contrary, it was a conscientious belief that it would be too gross an intrusion into the mother's life to seek a statement. This was perceived not simply to be the case of a bereaved mother. It was a family who believed (whether rightly or wrongly does not matter for this purpose) that the suicide of the deceased was brought upon by the litigation conduct of the Defendant in serving an expert psychiatric report from Professor Maden a couple of days before the suicide. A request of the mother or other members of the family against that background was "a very difficult decision". The passage of two years from the first consideration to approach the mother without reconsideration was because that conscientious view was maintained until Counsel's advice led to the Defendant reconsidering their position in early 2022.

40. The Judge did not reflect this in her approach to the third stage, but by her references to the Defendant choosing not to obtain this evidence, she did not properly characterise the nature of the dilemma of the Defendant or calibrate the conduct correctly or at all. By not taking that into account, a highly relevant circumstance was not taken into account. The point here is that on the premise that this was not a good excuse, the decision of the Defendant was still understandable and conscientious. To recognise this does not contradict that ultimately the Judge's conclusion that it was not a good excuse, but it does recognise the character of the decision which the Defendant had to make. If the Defendant had a 'choice', it was a very difficult one to exercise, and there is considerable mitigation which explains why the Defendant acted as it did. The Judge was wrong not to take that into account.

41. In amplification of the Second Matter is a further point which is independent of the First Matter or to be seen in conjunction with it. It concerns the prejudice to the court and to the administration of justice in failing to give relief from sanctions. The problem for the Court in this case is that, as the Judge recognised, without the additional evidence, the Court would still have to consider the issue as to whether the evidence of the deceased being abused as a child and being in care was made up fraudulently to inflate his claim. Without the additional evidence, the case would be

based on indirect evidence comprising the absence of documentary evidence about the deceased being in care as a child and the assessment of Professor Maden in his expert's report. Whilst that may suffice to discharge the burden, as the Judge found, a relevant consideration at the third stage of *Denton* is how unsatisfactory it is for the Court to have to consider such an important issue, particularly one involving fraud or dishonesty, when there was in fact direct evidence available to consider the matter.

42. The Judge regarded as decisive the fact that the Defendant has chosen not to adduce the evidence of the mother and the other two witnesses at the time fixed for witness statements. Any prejudice was held by the Judge to have been caused by the Defendant. The question is whether the Court erred in failing to give any or any adequate attention to the prejudice to the Court and the administration of justice in not being able to try the case with the evidence available to it. This is particularly acute in the case of an allegation of fundamental dishonesty under Section 57 of the Criminal Justice and Courts Act 2015 ("Section 57").

43. Section 57 states as follows:

> *"(1)This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim")—*
>
> *(a)the court finds that the claimant is entitled to damages in respect of the claim, but*
>
> *(b)on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.*
>
> *(2)The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed."*

44. The effect of Section 57 is that a claimant would lose their entire claim even where they had only been found to be fundamentally dishonest in relation to a part of it e.g. the cost of a gardener, unless the court was satisfied that the claimant would suffer a substantial injustice if the claim were dismissed. Section 57 is aimed to address a public concern about claimants using personal injury claims to gain compensation through dishonest exaggeration. If proven, this may lead to a claimant being deprived even of compensation to which a claimant was otherwise entitled.

45. In the course of the argument, I enquired of the parties as to whether the prejudice to the Court and to the administration of justice is a matter which has been considered by the courts in the context of relief from sanctions. It was submitted on behalf of the Claimant that this was not a factor. The Court had to try the case on the basis of the evidence adduced by the parties, and if one party did not adduce the relevant evidence at the relevant time, then there were no special dispensations because the Court would like to have had further evidence. This was particularly the case where a party

brought about the problem. In the instant case, the Defendant had only itself to blame for any resulting prejudice.

46. Mr McLaughlin for the Defendant relied on as *Soderberg v Essex Partnership NHS Trust* [2022] - QB- 003381 which was only reported as a case summary. With the assistance of the judge in that case, the transcript of that case has been obtained. In an application for relief from sanctions, Mr Justice Soole made the following observations:

> *"9. The focus of Ms Mualadad's submissions are on Denton stage 3, whether in all the circumstances of the case it would be just to grant relief from sanctions. She submits, and I accept, that there has been no deliberate flouting of the rules; that the application was made promptly; that the late service of the statements will not disrupt the progress of the action; that the trial date is not jeopardised; that the defendant does not have a poor record of compliance with court orders; and also that the court will be very much assisted by that evidence, in particular on issues of both breach and causation.*
>
> *10. In my judgment, while accepting all those other features that she has identified, the fact that weighs most significantly with me is the position of the court. This is a complex and difficult case and the court will want to have all the potentially relevant information before it. As Ms Mualadad points out, in any event the records and documents which underpin the new statements will be before the court. They have been supplied in February 2022 in accordance with the defendant's continuing obligation of disclosure. It must assist the court to have those witnesses who can also speak to those notes."*

It is apparent from the above that the Court considered that a factor, indeed the one that weighed most heavily in that case, was for the Court in a complex and difficult matter to have potentially relevant information before the Court.

47. I asked the parties for other instances where the Courts have had regard on an application for relief from sanctions to the prejudice to the Court in not having relevant information before it. Four cases were cited by Mr McLaughlin. It is not particularly productive to consider each of those cases. A case in which this issue has been stated more clearly, and which merits consideration is a case of *Razaq v Zafar* [2020] EWHC 1236 QB. of Yip J. At para. 38 of the judgment, on an appeal Yip J considered that the Judge had *"erred in the exercise of his discretion because he:*

> *(i) misdirected himself on the assessment of seriousness at the first stage;*
> *(ii) made material errors of fact in the factors he put into the balance against granting relief;*
> (iii) *did not stand back and look at the consequences of the breach or consider the impact of the sanction."*

48. It is not helpful to go into the facts of the case. The case involved a less serious or significant breach than the instant case. However, it is valuable in respect of the criticism of failing to stand back and look at the consequences of the reach or the impact of the sanction.

49. At para. 46, Yip J developed this point as follows:

> *"I consider also the impact of not granting relief. As I have already said, arguably the Claimant could rely on his witness statement which had been filed and served in August 2018. However, as Mr Harmel put it in submissions, he would have been "significantly hamstrung" in the conduct of his case. If not allowed even to rely on his August 2018 statement, he could not proceed at all. The fundamental issue in the case is which of the parties is being dishonest. Either this is a fraudulent claim or the Defendant has sought to defraud the Claimant of £60,000. The Claimant seeks to call witnesses who are said to have directly witnessed the relevant events. Without their evidence, the Court will not have a full picture. The Claimant may still be able to have a trial, but he will be at a very significant disadvantage. In my view, this claim ought to be tried with the benefit of all the available evidence so that the Court can reach a fair decision, particularly as a finding of dishonesty on one side or the other is likely to be made. Of course, this is not a decisive factor but it is a factor to be weighed in the balance along with all the other circumstances."*

50. This was a case where the Court was considering the impact of the sanction on the trial not solely by reference to the parties, but to the ability of the Court to reach a fair decision. In my judgment, this has particular application in a case, as here, where the indirect evidence may not suffice, and where the more probative evidence to be considered and tested may be the direct evidence about the childhood of the deceased by immediate family. Given the strong public interest in the exposure of dishonesty within the litigation, these factors are particularly resonant in the instant case. These are not decisive factors, but they are ones which the Court should take into account and give them such weight as is appropriate in the circumstances of each case.

51. In the instant case, the Court erred by simply saying that the Defendant will not be denied an ability to run the argument that the deceased was not in care by reference to the absence of records and Professor Maden's evidence. The Court has failed to stand back adequately or at all and look at the impact of the sanction and how it affects the ability to do justice without direct evidence. In my judgment, in this case, this is a very important factor. In finding that any prejudice was caused by the Defendant's decision not to pursue this evidence, the Court was in error in regarding the prejudice to the Defendant as the only relevant prejudice. There was also the prejudice to the administration of justice in reaching a fair decision. Some of this is embodied within

the words of CPR 3.9 itself *"all the circumstances of the case, so as to enable it to deal justly with the application."*

52. The Court's consideration about proportionality is a good way of demonstrating what happens when there is a failure to consider the impact of the administration of justice. The Judge found that *"the sanction of not being allowed to rely on these statements was proportionate to the seriousness of this delay, especially as the Defendant can still run its argument that the abuse is fabricated based on other factors"*: see Judgment para. 23. In my judgment, the Judge was right to refer to proportionality, but it was wrong not to consider the disadvantage to the Court and the administration of justice which was going to have to grapple with the dishonesty issues through indirect evidence when direct evidence was available. Put this way, the proportionality assumes a different perspective, and admits of a different conclusion.

53. In my judgment, it was wrong not to take into account the First Matter and/or the Second Matter. This entitles the Court to exercise its discretion afresh. In so doing, I take into account the following:

(i) There was no relevant previous default on the part of the Defendant.

(ii) The breach did not affect the trial date.

(iii) On the contrary, the case has some way to go towards trial. The trial date has in any event been affected in any event by the Claimant's applications to rely on fresh expert evidence (a spinal expert and a care expert) and a further witness statement in relation to the Claimant's back condition.

(iv) In the event that the evidence had been introduced at the correct time, it would still have been necessary for the Claimant to have considered what evidence, if any, it would have required in order to answer the new evidence and to reconsider expert evidence in the light of the new evidence. The prejudice in excluding the evidence is considerably greater than the prejudice in admitting the evidence.

(v) An application for relief from sanctions was issued promptly

(vi) Whilst the Judge was entitled to conclude that the excuse was not a good excuse, it was the product of a conscientious decision in very sensitive circumstances with regard to the mother of the deceased. It was not a case of a decision to ignore or defy a court order, and the revisiting of the decision came due to the subsequent advice of Counsel.

(vii) Having obtained the evidence which the Defendant procured, this was highly relevant to the proceedings: if the indirect evidence is not as probative as might be hoped, it is possible that the evidence would be pivotal. On the facts of this case, there is a public interest factor in admitting such evidence as needs to be admitted for the benefit of the administration of justice.

(viii) This is particularly so in the context of the allegations of dishonesty and the public interest in the exposure of dishonesty within litigation. The issue of

dishonesty arises not only in respect of the claim on behalf of the estate where the Section 57 defence arises, but also in respect of the FAA claim where the issue of the childhood of the deceased affects the other aspects of the negligence claim, not least causation and loss.

(ix) In the circumstances of this case, the prejudice to the Court and the administration of justice of determining the dishonesty and credibility issues by reference to inferences from documents and excluding the direct evidence available is such as to point strongly in favour of giving relief from sanctions.

(x) The need to consider the administration of justice and the position of the Court is even more acute in the light of the way in which the FAA claim has risen to in excess of £1,000,000 consequent upon the new factual and expert evidence which the Claimant has adduced or is seeking to adduce.

(xi) Even if the points about the First Matter do not support the Defendant's case as regards the third stage of *Denton*, I should still come to the conclusion that the points raised in respect of the Second Matter comprise prejudice to the Court and to the administration of justice which outweigh any prejudice to the Claimant and are such that relief from sanctions should be granted.

(xii) In this context, a lesser sanction such as the costs of the application for relief from sanctions is a more proportionate sanction than the refusal to admit the evidence, and the costs of getting further statements and report. The costs terms require consideration in the form of the draft order, but the Court will consider submissions as to the costs which should be borne by the Defendant. There are the following costs to consider (i) the costs of the application before the Judge, (ii) the costs of responsive factual evidence to the new witness statements, (iii) the costs of further expert evidence consequential upon the new witness statements, (iv) such further or other costs as may be considered to arise. In identifying these costs, I am identifying various areas for consideration rather than expressing any view as to what costs ought to be borne by the Defendant or otherwise.

54. In my judgment, exercising the discretion afresh, I conclude that relief from sanctions should be granted. The result of the decision is that the difficult position for the Court at trial will be avoided of having to decide such important issues as the dishonesty in the case based on indirect evidence despite the fact that direct evidence was available. The Court can and should ensure that this does not occur by giving relief so that the evidence sought to be adduced may be admitted. This does not open up any floodgates for other cases or indicate that there will be laxity in the operation of relief from sanctions: still less that appeals will be readily allowed in such cases. It is a response to the very peculiar circumstances of this case.

55. The parties are asked to consider the question of sanctions about costs and may serve brief submissions about costs to the extent that there is no agreement along with a draft order to the extent that matters are agreed. It will be necessary to consider the consequential directions either before me or in a consequential CMC before the District Judge.

56. It follows that the appeal is allowed.