



Neutral Citation Number: [2020] EWHC 2635 (QB)

Case No: QA-2020-000036

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/10/2020

Before :

MR JUSTICE FREEDMAN

Between :

DOCTOR ANDRE OBERHOLSTER

Appellant/Eighth Defendant

- and -

MS JAYNE LITTLE

First Respondent/Claimant

OPTICAL EXPRESS LIMITED

Second Respondent / Second Defendant

Mr Robin Dunne Counsel on behalf of the **Appellant/Eighth Defendant** (instructed by
Browne Jacobson LLP)

Mr Hugh Rimmer Counsel on behalf of the **Claimant/First Respondent** (instructed by
Devonshires Solicitors LLP)

Miss Isabel McArdle Counsel on behalf of the **Second Defendant** (instructed by **Keoghs
LLP**)

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Tuesday 6 October 2020 at 10.30am.

MR JUSTICE FREEDMAN:

I Introduction

1. This is an appeal against an order made on 14 January 2020 by HH Judge Roberts (“the Judge”) in the Central London County Court.
2. The underlying claim relates to elective ophthalmic surgery (refractive lens exchange). The Claimant (“C”) contracted with the optometrist Optical Express (“D2”) to undertake the surgery. The surgery was carried out by the Eighth Defendant (“D8”), an ophthalmic surgeon, engaged by D2.
3. D2 was sued with related Optical Express companies who were included due to uncertainty as to which company had contracted with C. They were all jointly represented and, following D2’s settlement of the claim, the claims against the other Optical Express companies were discontinued without any orders for costs.
4. C alleged not that the operation had been performed negligently, but that prior to the operation there was a negligent failure to obtain informed consent for the ophthalmic surgery due to a failure to discuss risks/adverse outcomes and misrepresenting risks. The process for consent involved initial consultations with optometrists and sales’ people and provision of a consent form by D2 for C to read, the claimant alleged. It was also alleged that at the hospital before she had the operation, she was asked to initial a consent form. Further, it was alleged that 10 minutes before surgery was performed, C met D8 who told her that everything would be fine and she was not to worry: see Particulars of Claim para. 7. The Defence of D8 was that he reviewed C’s records before he saw her to ensure that she had been properly assessed and counselled. He does not recall any issue about her consent form. He does not recall any questions being asked by C: see D8 Defence para. 4a.
5. D2 and D8 both denied liability:
 - (i) D2 denied liability on the basis that the material risks had been discussed by Optometrists and other staff with C prior to surgery or were contained in the consent form: see Defence of D2 paras. 7-9. It also pleaded that it was D8 who carried out the surgery and that he was a self-employed ophthalmic surgeon. D2 stated that it was the duty of D8 to ensure that C had fully consented prior to surgery commencing including that she understood the meaning of the technical terms in the consent form, the nature and purpose of the procedure and the risks and complications described in the form: see Defence of D2 para. 43, 44, 45, 48, 51 and 52.

- (ii) D8 denied liability on the basis that he was aware of the patient pathway adopted by D2, he had reviewed C's records which indicated she had consented. D8's case was that he had satisfied himself that C understood the consent form and had been appropriately counselled before signing it.
6. Trial was due to commence on 26 July 2019. An offer was made by C on 20 June 2019 which was "*an offer to all defendants in the sum of £105,000 in full and final settlement of our clients claim net of any payments due to the CRU; plus payment of her legal costs, to be assessed if not agreed*" (original emphasis). That offer was accepted by D2 alone on 1 July 2019.
7. Following settlement, by agreement, the claims against the other "Optical Express" defendant companies were discontinued without any order as to costs. No such agreement was reached between C and D8, and a number of applications related to this issue came before the court on 14 January 2020:
- (i) C's application 24 May 2019:
To amend her budget. Made while proceedings were ongoing, to be heard on the first day of trial (had it not been superseded by settlement).
- (ii) C's application 22 July 2019:
For the costs between C and D8 to be determined by the court.
- (iii) D8's application 24 July 2019:
For D8's costs of defending the claim to be paid by C or D2.
- (iv) D8's application 05 December 2019:
To strike out the claim against D8 and for C to pay D8's costs of the action.
8. Although there was no settlement between C and D8, C did not intend to seek further damages against D8, and the only outstanding issue was costs. The strike out applications were on the basis of D8's submission that it was an abuse of process to continue the claim against D8, and that C ought to have discontinued her claim against D8. Had C discontinued, she would have had to persuade the Court of a good reason to depart from the presumption that D8 should recover its costs: see CPR 38.6 and Judgment paras.11-12. C said that there was no duty to discontinue, and indeed C was entitled to resolve the question of costs before having the claim dismissed. The Judge ruled that there was no abuse of process in C seeking to resolve costs against D8. She was not obliged to discontinue.

II The Order Being Appealed

9. The refusal of the Judge to strike out C's claim against D8 is not appealed. Applications (ii) and (iii) were determined against D8, who was ordered to pay C's costs of proceeding against them, and application (i) was ordered to be determined at the time of the assessment of those costs.

10. D8 appeals the outcome of (ii) and (iii) and the order that he pay the costs of C proceeding against him. D8 seeks that this order be substituted with an order that C pay D8's costs of defending the action and then seeks to recover them from D2 as part of C's costs (a Bullock order); alternatively, an order requiring D2 to pay D8's costs (a Sanderson order); alternatively no order for costs between C and D8.

11. The appeal came before the Court with permission on paper by a Judge who said among other things that the matter had been settled between C and the other Defendants without D8's consent and where D8 continued to deny liability, and that it was arguable that this was an unjust result in circumstances where D8 had not had the opportunity to contest the claim at trial.

III The judgment of the Judge

12. In concluding his judgment against D8, the Judge said the following:

“[18(3)] The claims against the Second Defendant and the Eighth Defendant were inextricably bound up. In my judgment the claim could not succeed against the Second Defendant unless it succeeded against the Eighth Defendant. The Eighth Defendant was responsible for the consent process. As Mr Rimmer succinctly put the matter at paragraph 15 b of his skeleton argument,

“The claims are inextricably linked. Indeed, it is difficult to see how the two could not stand or fall together. The expert evidence confirms that ultimate responsibility for consent lies with the surgeon, D8. The majority of that process was delegated to staff of Optical Express or its associated companies. D8's defence makes clear his reliance on the delegated process, the forms and the records of the same. If that process was negligent, however, D8 is equally responsible; Even if the activity can be delegated the responsibility cannot.”

[19] In my judgment, having regard to the overriding objective in Part 1 and the Court's discretion as to costs in Part 44, I find that it is just and proportionate that the Eighth Defendant pays the Claimant's reasonable costs. The Claimant has succeeded on her claim, which was justifiably brought jointly against Defendants 1 to 7 and the Eighth Defendant. As was cogently pointed out by Miss McArdle on behalf of Defendants 1 to 7, that leaves the Eighth Defendant with the option of pursuing Part 20 proceedings (there is still a year of the limitation period remaining) against the Second Defendant if it

is its case that it should only pay either none of the costs or a percentage of the costs. So the Eighth Defendant is not left without a remedy in respect of costs if it so chooses.”

13. It is important to understand the process that was before the Judge. First, D8 contended that the claim should be struck out because it had no real prospect of success and/or it was an abuse of process. As noted above, the Judge rejected the strike-out application, and there is no appeal against that. It did not follow from the fact that C had achieved satisfaction in respect of his claim that C had no continuing claim for costs against D8. The costs which D2 had agreed to pay were the costs incurred as between C and D2. Leaving aside complications about common costs of D2 and D8, there were costs as between C and D8 which were separate from the costs between C and D2.
14. A question which was explored on appeal was whether the acceptance by D2 of the Part 36 offer meant that D2 accepted a liability to pay C’s costs of suing D8. However, this did not take matters further. First, the point had not been relied on before the Judge by D8. Second, it did not form a part of the extensive grounds of appeal. Thirdly, it did not exclude a finding that D8 was liable to a costs order in favour of C whether the order against D2 would or would not include the costs against D8. Fourthly, without deciding the matter, there was reason to doubt a proposition that the costs order against D2 would include all of the costs against all defendants whether common costs or not: see *Haynes v Department for Business, Innovation and Skills* [2014] EWHC 643 (QB) at para. 21-23.
15. Absent an adjudication of these costs between C and D8, those costs still stood to be dealt with. It was wrong to say that once C had received satisfaction in respect of the damages claimed that she no longer had a possible claim against D8 for those costs. Since the parties did not agree the position as regards costs, C still had a continuing claim for those costs. Likewise, D8 was able to contend that he ought to have those costs, and so he had a continuing claim to those costs. The Court could deal with that matter by giving directions for a trial of the issue of costs, no doubt involving trying the respective merits of the case, perhaps with live evidence. Alternatively, if the parties would agree to the Court so doing, and if the Judge would agree to proceed in this way, the Court could determine the question of costs summarily. The Judge invited the parties to consider whether they would want directions for the trial of the issue of costs or whether they would agree to a summary determination of the costs. C and D8 agreed to the matter being dealt with summarily, and the Judge agreed to do so.
16. The question on an appeal is whether the Judge was wrong to determine the matter in the way in which he did and specifically, on a summary determination, to conclude that D8 should pay C’s costs as between C and D8.

IV Legal principles on summary determination of costs

17. It is important to have in mind the principles for the summary determination of costs between parties following a compromise of the substantive claim. In his judgment, the Judge expressed the matter as follows (paragraph 17):

“There are numerous authorities relating to situations where substantive issue between the parties has fallen away but costs remain in issue, with different approaches taken. In *Hanspaul and another v Ward and others* [2016] EWHC 1358 (Ch) the Court considered various authorities on the point, including *Brawley v Marczynski* which approved the principles laid down in *R. (on the application of Boxall) v Waltham Forest LBC* regarding the determination of liability for costs where a claim has settled without admission of liability and without agreement as to costs, which were summarised as:

- 1) The court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.
- 2) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost.
- 3) At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between the position will, in differing degrees be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.
- 4) In the absence of a good reason to make any other order the fall back is to make no order as to costs.”

18. I add to the above citation from the judgment of the Judge the following:

(1) "Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the Court is forced to the conclusion that he has not balanced the various factors fairly in the scale" *AEI Ltd-v-PPL* [1999] 1 WLR 1507 at 1523 C-D.

(2) In *BCT Software Solutions Ltd v C. Brewer & Sons Ltd*. [2003] EWCA Civ 939, Mummery LJ stated that in a case where a summary determination had been embarked upon with the parties agreement, the usual reluctance of the appellate court was especially pronounced. At para. 8, Mummery LJ said: “...This court is entitled to approach an appeal against a costs order, which has been made as part of a compromise, with an even greater degree of reluctance than is usually the case when it is

asked to interfere with the discretion of the trial judge...If there is a point of principle in this case, which I very much doubt, it does not arise from the way in which the judge exercised his discretion, but from whether he should ever have embarked on this...As both parties agreed that he should undertake the task, it is reasonable to expect them to accept his decision, unless it can be shown that the result is, in all the circumstances, manifestly unjust. I would certainly not be inclined to interfere with the judge's decision simply because it is possible to detect imperfections in his approach or in his reasoning.”

(3) At para. 15, he said “There are the additional special circumstances mentioned earlier. In the absence of manifest injustice, an appellate court should not interfere with a discretion, which has not been exercised at the end of the trial, as is usually the case, but with the agreement of the parties when they have settled the case.” At para. 18, he said “...I would probably have ended up making no order as to costs. I very much doubt whether I would have started out by dividing the costs into four equal portions. But the appeal is not about what I would have done in the judge's place. It is about whether what the judge has done was legally erroneous and has produced a manifest injustice.”

(4) Chadwick LJ, in agreeing with Mummery LJ, said at para. 27 “ **But it is not open to the appellant to complain that the judge set out to do what both parties had asked him to do – that is to say, to make an order about costs and to decide what order to make on the material before him and without determining disputed facts. Nor is it open to the appellant to complain that, in seeking to perform that task, the judge adopted an approach which he, himself, described as "broad brush".** It is difficult to see what other approach the judge could have adopted in the circumstances.” (emphasis added)

19. There is reason to question whether the need for a “manifest injustice” is pitching the matter higher than is necessary. In *Patience v Tanner and another* [2016] EWCA Civ 158, Gross LJ with whom Black LJ agreed, asserted that the approach established in *F & C Alternative Investments Ltd v Barthelemy (No.3)* [2012] EWCA 843 [2013] 1 WLR 548 must be employed. This test at para. 42 is that “an appellate court may only interfere if the decision on costs is wrong in principle; or if it involves taking into account a matter which should not have been taken into account or failing to take into account a matter which should have been taken into account; or if it is plainly unsustainable. ”
20. Gross LJ further held that, while it was unclear whether the additional element of ‘manifest injustice’ introduced in *BCT Software Solutions Ltd v Brewer & Sons* [2003]

EWCA Civ 939 qualified as an official prerequisite to overturn a judicial costs decision, he felt it could be applied in the instance of the case of *Patience v Tanner and another*. It might be said that it is only necessary to show that the matter is wrong, not that it is manifestly wrong.

21. On one reading, the term “*manifest injustice*” might be understood as emphasising that where the parties have entrusted the Court with such an imprecise task as to determine the costs where a trial has not taken place, it is the more difficult to demonstrate that the Judge has gone wrong in a way that the appellate court can interfere. It is not necessary for the purpose of this judgment to decide the point as to whether there is a separate requirement of proving a “manifest injustice” if it means more than that the court below was “wrong”. I shall proceed for the purpose of this appeal by assuming that there is no additional requirement of having to establish “manifest injustice”.

V The case of D8 that he was the successful party

22. I shall in due course consider the various grounds of appeal. D8 submits that an order should have been made for C to pay his costs. He points out that the reason that there was no trial was because of the structure of the offer which it was made whereby one defendant could accept the Part 36 offer without the involvement of the other defendants. D8 says that he was therefore deprived of the ability to bring the case to trial, and he would then have been able to vindicate his position of showing that he had reason to believe that consent had properly been obtained, he acted reasonably at that stage prior to the operation and despite the settlement between C and D2, D2 properly procured consent.
23. The difficulty was that there was not a trial between C and D8. In the submission of D8, that was not caused by D8, but was the result of the way in which C chose to settle the substantive case with D2 and without involving D8. In those circumstances, D8 submitted that the Judge should have recognised that C had brought an end to its claim against D8 without tying up the matter consensually with D8. By so doing, the costs of D8 ought to be met by the person who had brought the case to an end in this way.
24. Further, D8 submitted that since D2 accepted the Part 36 offer of C, it must follow that D2 is the unsuccessful party as between the defendants. Here too, D8 says that just as C deprived D8 of the opportunity to be vindicated at a trial, so did D2 by compromising the case without the involvement of D8. Further, D8 submits that the nature of the settlement is testimony to the fact that D2 has been the unsuccessful party. Accordingly, a submission of D8 is that if it is unjust for his costs to be paid by C, so his costs should be borne directly by D2 (a Sanderson order) or by C and passed on by C to D2 (a Bullock order).

VI Discussion

25. I shall first consider the submission that D8 was the successful party against C or D2 before considering specifically the grounds of appeal. The submission is fallacious because as the Judge commented in argument, there was no finding of success in this case.
26. The suggestion that the only reasonable costs order was one in favour of D8 against C or D2 may have been appropriate in the event that a strike out had succeeded, but there

is no appeal against the refusal to strike out. In my judgment, the Judge was entitled to find that it was reasonable for C to bring her claim not only against D2, but also against D8. The reason for this is that given that there were issues about consent against D2, so it was reasonable to say that there were consent issues against D8 as the operating surgeon. Indeed, that position was reinforced when D2 identified the duties of D8 in the paragraphs of D2's Defence referred to above, and when a part of D8's case was that he had relied on the process of D2. In my judgment, the suggestion that there was no case for D8 to answer is untenable.

27. There had not been a conclusion of the dispute between C and D8 at the point when D2 accepted the Part 36 offer. The fallacy is to assume that there was a conclusion because there were no more damages to claim. There was left over the resolution of the costs between C and D8. It is apparent from the above cases that settlement of the substantive dispute does not preclude a trial or (subject to the parties and then the judge) a summary determination of costs.
28. Further, since the issues have not been tried between C and D8, it does not follow that there was a successful party, and in particular for this purpose, it does not follow that D8 has been successful against C.
29. I now refer to D8's point that since D2 accepted the Part 36 offer of C that it must follow that D2 is the unsuccessful party and so D8 should be paid his costs by D2. That does not necessarily follow. There has not been any ruling as between D2 and C, let alone any determination as to whether the responsibility as between D2 and D8 lies entirely or in part with D2. In those circumstances, this is not a case where the Court needs to make an order for costs in favour of D8 against D2. Bullock and Sanderson orders might have been just if the Court was able to say that D2 was the unsuccessful party vis-à-vis D8. The Court is unable to conclude success one way or the other as between D2 and D8, and so such orders in this case would have been unprincipled and unjustified.
30. This is the answer to the submissions that the Judge ought to have made a costs order in favour of D8 to reflect his success in the action. As regards the alternative submissions of D8 that, even without an adjudication of success in his favour, he should still have had his costs of the action, these matters are considered in the discussion of the grounds of appeal which now follow.

VII The grounds of appeal

31. The judgment now considers the specific grounds of appeal.

(1) First ground: summary process

32. In the alternative to the submission that D8 was the successful party, D8 says that absent a trial, there was not an adjudication between C and D8. If D8 was not the successful party, then nor was C. He says that the Judge was wrong in ordering that D8 should pay the costs of C. Although a summary determination was agreed, the first ground is that nonetheless the summary process was unjust. It is said that this was because the Judge went outside an acceptable summary process, making findings of fact as to which

party would be liable, or was likely to be liable or successful if the claim had gone to trial. This was used to justify the order which was made. D8 says that had the Judge not gone outside the summary process, he could not have come to a conclusion that D8 should pay the costs of C, but at lowest there ought to have been no order as to costs.

33. In my judgment, there was nothing wrong with the approach of the Judge. He adopted the submission that *“the expert evidence confirms that ultimate responsibility for consent lies with the surgeon, D8.”* There was sufficient evidence in the agreed parts of the joint ophthalmic surgeon’s report to support this conclusion. In particular:

(i) *“The Ophthalmic surgeon had ultimate responsibility to ensure personally that the patient had undergone a sound informed consent process and understood the potential benefits and risks.”* [Joint Ophthalmic Report, Q16 – p.375]

(ii) *“We agree that the ophthalmic surgeon carried the ultimate responsibility for the informed consent process.”* [Joint Ophthalmic Report, Q18- p.379]

(iii) *“The surgeon carries the ultimate responsibility for the consent form as part of the informed consent process.”* [Joint Ophthalmic Report, Q28- p.386]

34. There was also expert evidence from optometrists for C and D2 (not for D8) who agreed that:

(i) *“Optometrists regularly refer patients to surgeons, but the surgeon should then decide and take responsibility for what follows in terms of surgery or other treatment. A surgeon’s decision is final, regarding suitability for all procedures, elective or otherwise. As mentioned earlier we both believe the optometrist role is informative and the surgeon’s decision is final.”* [Joint Optometrists Report, Q2, - p.404]

(ii) *“SN and GW both agree that it is the surgeon’s responsibility to ensure that the patient has fully understood any information imparted by anyone else, and then discuss things accordingly with the patient prior to undertaking the procedure.”* [Joint Optometrists Report, Q15, - p.424]

35. Mr Dunne on behalf of D8 drew attention to aspects of the case which D8 intended to run in defence of his position so as to say that the Judge was not entitled to come to any

assessment without a trial so that at worst for D8 the default position of no order as to costs applied. He drew attention among other things to the following:

- (i) D8's expert stated that the informed consent process of D2 was not substandard [Joint Ophthalmic Report Q15 and reference to statement of Mr Crewe-Brown p.375]
 - (ii) D8's expert stated that if the witness evidence of D8 was accepted, D8 appropriately satisfied himself that C understood the material risks of the ophthalmic surgery to be performed and ensured that her consent was properly obtained prior to the surgery [Joint Ophthalmic Report Q20 p.381 and Q21 p.382]
 - (iii) The experts for D8 and C agreed that it was reasonable for D8 to rely on the records of D2's staff [Joint Ophthalmic Report Q22 p.383]
36. This does not mean that the optometrist did discharge its duty. A part of the argument of D8 was that the consent process was led by D2. D8 said that he relied on the system of D2, and that he was entitled to do so. D8 had expert evidence to support his case that he had reasonable grounds to believe that D2 did discharge its duty. However, this only begged the question as to the nature of D8's liability if in fact, unknown to him, D2 did not in fact discharge its liability. If in fact D2 had not discharged his liability, then the question was whether D8 independently obtained full consent. In that regard, D8's pleaded case was that his system was that he would have a brief conversation with the patient, but he does not recall the precise conversation with C prior to her operation. There is no documentary evidence in respect of any particular advice given by D8 to C. In short, if the duty was non-delegable, he was in law likely to be dependent on D2 having discharged his duty.
37. In oral reply submissions, Mr Dunne for D8 said that the level of detail in paragraph 18 of the Judgment was in effect to find that D8 had lost. This was contrary to what the Judge had said in argument, that D8 was neither successful nor unsuccessful. Further, he said that the Court was not entitled to reach the conclusions in paragraph 18 without a trial. Likewise, D8, in the skeleton argument on his behalf, pointed to observations in the transcript about D8 having the primary responsibility for the consent in the case which was said to depend on fact finding which could only be made after a trial: see D8 skeleton argument for appeal para. 28-30.
38. In my judgment, the Court was not adjudicating as to which party had won or resolving disputed points of fact. It was doing that which was permissible on a determination of costs without a trial, namely applying a broad-brush approach. This led not to a decision that D8 was bound to lose if the case were contested, but that there were such significant difficulties in his case that justice was done by an order for costs against it. By electing the summary process rather than a trial of the issues for the purpose of costs, the parties took upon themselves the risk that the broad-brush approach may not be as good to each of them respectively as a decision after a trial.

39. The Judge went on to accept the submission that “*The majority of that process [of obtaining consent] was delegated to staff of Optical Express or its associated companies. D8’s defence makes clear his reliance on the delegated process, the forms and the records of the same.*” As noted above, this is no more than a summary of the pleadings and in particular of D8’s defence.
40. The Judge then accepted the submission “*If that process was negligent, however, D8 is equally responsible; even if the activity can be delegated the responsibility cannot.*” The important points here are as follows. This was not challenged below, nor did it form a part of the grounds of appeal. On the contrary, D8’s case was that he himself ensured that C was properly counselled and understood the consent form before signing it and was content to proceed to surgery: see his Defence para. 4 and especially 4(a)(vii) and 18(e), (g) and (h).
41. C has drawn attention rightly to the following in this regard which supports the ability of the Judge to accept the submission that the primary duty of D8 was non-delegable, namely
- (i) D8’s witness statement confirms “*My role when I see the patient is to ensure that they understand all of the information prior to the procedure going ahead... I do ensure that... they understand all of the risks and benefits associated with the proposed procedure*” (para.15) and also that “*my obligations [as surgeon] were to... check by discussion with the patient that every aspect covered in the consent form had been read and understood before being initialled and signed*” (D8 Witness statement, para.16)
 - (ii) On the consent form D8 declares “*I have discussed the risks, benefits and alternatives to cataract/RLE surgery with the patient. I am satisfied the patient understands the meaning of the technical terms in this document, the nature and purpose of the procedure and the risks and possible complications that are described... I agree to accept this patient on the above terms and provide treatment*” (Form, p4/p8)
 - (iii) D8’s expert agreed “[D8] had ultimate responsibility to ensure personally that the patient had undergone a sound informed consent process and understood the potential benefits and risks” [p375]
 - (iv) GMC guidance: consent discussions can be delegated (GMC para.26) but a surgeon remains responsible for making sure a patient has actually given consent (GMC para.27). D8 cannot deny GMC guidance is relevant; the Supreme Court referred to it generally in *Montgomery v Lanarkshire Health Board* (e.g. paras.107 & 109), and D8 relies on it in his own defence.”
42. In the light of the foregoing, if it were the case that D2 failed to inform C of the risk and D8 largely relied on D2 to inform C of the risk, it is hard to see how D8 would thereby have discharged his personal responsibility. This all showed that the Judge was

entitled on a summary determination to come to his conclusion that “*The claims against the Second Defendant and the Eighth Defendant were inextricably bound up. In my judgment the claim could not succeed against the Second Defendant unless it succeeded against the Eighth Defendant. The Eighth Defendant was responsible for the consent process.*”

(2) Conclusions on first ground

43. In my judgment, the Judge was not wrong in embarking on the summary process, given that he had the consent of the parties: see *BCT Software Solutions Ltd v C. Brewer & Sons Ltd.* at para. 18(2) above. He did not have to do so, but he did so. Given that he had the consent of C and D8, they could not complain that he dealt with the matter summarily. The Judge relied on material available to him in the summary process, he took into account matters which were appropriate, he drew on points from agreed evidence to reach a reasoned conclusion which was available to him. He did not have to decide disputed points of fact, and he did not do so.
44. The Judge was entitled to come to the conclusion in a summary process that it was difficult to envisage circumstances in which D2 would be liable for want of consent, but D8 would not be liable. The case of D8 is that he relied on D2 to procure the consent, and so unless D8 independently procured the consent, D8 would also then be liable. Indeed, the obligation of the ophthalmic surgeon has sometimes been referred to as the primary duty. The Judge was entitled to make a summary determination from the premise D8’s primary duty could not be delegated to D2.
45. It therefore follows that it was not wrong for the Judge to reach the conclusion that the claims against D2 and D8 were inextricably bound up or linked and that it was difficult to see how the two could not stand or fall together. The acceptance by D2 of the Part 36 offer did appear to indicate a lack of conviction in D2’s case, albeit that this was not necessarily the case and the acceptance of the offer was without admission of liability. Nevertheless, the acceptance was enough in a summary process to indicate that D2’s case, if it went to trial, was likely to fail, in which case without convincing evidence that D8 procured the consent himself, it indicated that D8 too would fail. There was no convincing evidence that D8 procured the consent because his main defence was that he relied on D2 to procure the consent. The reasoning of the Judge, and the quotation from Mr Rimmer’s skeleton argument is a tenable way of looking at this matter on a summary process and was well within the broad range of reasonable responses available to the Judge.
46. The matter has been expressed succinctly by D2 in the following terms, which I adopt: “On Ground 1, to the extent that it touches on the Second Defendant, the Judge’s decision was manifestly one within the very broad costs discretion open to him in these circumstances. The Eighth Defendant’s appeal is an attempt to re-argue the merits of the applications; it does not disclose any error of law or serious procedural irregularity such that the Judge’s decision should be overturned.”

(3) Second, Third and Eighth Grounds: The Judge did not evaluate what a just order would be where C settled with D2 without recourse to or involvement of D8 and that the settlement was without recourse to D8 and where D8 was willing to go to trial.

47. This points to a different way of looking at the matter. It is that the CPR Part 36 offer was made in the way in which it was constructed with the effect that a settlement with D2 could take place without the involvement of D8. This meant that D8 should not have been held liable to C on the basis that he had made no admissions and his case against C had not been tried because C chose to settle with D2 without making a settlement with D8 a pre-condition. In this way, C exposed himself to the kind of argument that was being run by D8. The argument then was “D8 had through no fault of his own, lost the opportunity to defend the matter to trial directly as a result of offer terms. The judge did not take into account the prejudice D8 had suffered and would suffer if he incurred a costs liability in these circumstances”: see skeleton of D8 for appeal paras. 41-42. It was submitted that without a trial due to C’s failure to involve D8 in the settlement, either D8 should recover his costs from C or there should be no order as to costs.
48. It is a tenable argument that the Court could not make a definitive judgment that C would succeed against D8, and that in the circumstances the default position of no order as to costs ought to be adopted. However, that does not mean that that was the only tenable position or that a conclusion that D8 should bear the costs was wrong. Since this was not the only way of looking at the matter, and since the way in which the Judge did look at the matter was a different way of looking at the matter and was not legally erroneous, the Judge’s conclusion cannot be set aside or varied on appeal: see *BCT Software Solutions Ltd v C. Brewer & Sons Ltd.* at para. 18.
49. Another way of looking at the matter is that D8 could have insisted on taking the matter to a trial on the issue of costs, yet when the Judge asked whether that would be required, D8, as with C, agreed to a summary determination of the position. Thus, the deprivation of a trial on the remaining issue of costs was caused proximately by D8 not demanding directions for a trial. That is not a criticism of D8’s position generally, but it is an answer to the narrow point that D8 was deprived of a trial as a result of the form of the Part 36 offer.
50. It is also legitimate, and in no way legally erroneous, to look at the matter as if it had come to trial without resolving any points of dispute. The broad-brush view was that the cases of D2 and D8 were indeed inextricably linked, and so if D2 failed to exercise reasonable care to procure consent, and D8 had relied on D2 (even reasonably), D8 as well as D2 would be likely to lose. In this regard, the following points are significant, namely
- (1) for reasons referred to above, and contrary to D8’s argument, it was reasonable for C to have brought the action against D8 on the basis of D8’s concurrent liability with that of D2;
 - (2) whilst D2 did not admit liability and whilst this is not necessarily the case, its acceptance of the Part 36 offer was an indication that it may have recognised that if the matter went to trial, it was likely to lose;
 - (3) in circumstances where D8 on its own case relied on the process of D2 in procuring consent, and where it was likely (albeit not certain) that D2 appeared to lack conviction in its case that it procured consent, D8 would have difficulty in contending that his own actions procured the consent independently of D2.

51. Thus, it was entirely tenable for the Judge to come to the conclusions which he did upon the pleadings, the agreed evidence and the law, and without seeking to resolve disputed points of fact. It was therefore not unjust for the Judge in the summary process to make the order which he did for the costs of C against D8 even although there was never a trial between C and D8 so that there was no determination as between C and D8. Despite the fact that C had created the possibility of D8 ending up without a trial, this consequence was not proximately due to the form of the Part 36 offer, but due to D8 who agreed to the summary process, and who therefore cannot take issue about a broad-brush approach: see *BCT Software Solutions Ltd v C. Brewer & Sons Ltd.* at para. 27.
52. In the end, the preponderance of matters indicated that D8 would have been in a difficult position if a trial had gone ahead, and accordingly the decision that C should recover its costs against D8 was a reasonable and appropriate one, and was not wrong. That was not a decision as to which party was successful, but rather a broad-brush view of the overall merits of the case and a summary determination as to costs reflecting this view.
53. Another judge might have come to a conclusion that no order as to costs was the order which they would have made. That occurred in *BCT Software Solutions Ltd v C. Brewer & Sons Ltd.* where at para. 18 (cited above), Mummery LJ said that he might have made an order of no order as to costs, but that did not render wrong the order which the Judge made and/or entitle the appellate court to substitute its view for that of the Judge. In other words, the decision as to costs came within the wide ambit of the Court's discretion as to costs. That width is respected by an appellate in cases on costs, as is apparent from the references above to *AEI Ltd-v- PPL* and *Patience v Tanner*, identifying the narrow grounds where there is scope for the appellate court to interfere.
54. That is sufficient on which to rest this judgment. There is even less scope in a case where the parties consent to the summary process for the determination of costs without a trial as occurred in this case. This was what led to Mummery LJ requiring the appellant to establish a manifest injustice in the order. That may or may not be an additional requirement. In my judgment, nothing has been identified to take the decision of the Judge outside the wide ambit of discretion available to him, and so his decision was not wrong. That suffices for the purpose of the appeal, which I decide without the need to prove "manifest injustice". If "manifest injustice" had been required additionally, it would not have been established.

(4) Fourth Ground: no consideration to who was the successful party and no reasons given why D8 was not the successful party

55. This ground has been considered above in the sections above headed "D8's case that he was the successful party" and "Discussion". This ground is predicated upon D8 being a successful party. In my judgment, the Judge was right in the course of argument in saying "Well he hasn't been successful, has he. He hasn't been. He can't say he's been successful. Surely the position is it remains an unknown" (p.85). The highest that D8's position could be put was that C had settled the substantive claim without recourse to D8: it does not follow that D8 could be described as "successful". It would

have been different if the strike out application had succeeded, but it did not, and the refusal to strike out is not appealed. The view that it was unknown whether D8 had succeeded was a conclusion well available to the Judge. If it had been the case that a party had been successful and the Judge had made an order not reflecting that success, it would usually be incumbent on the Judge to explain how they had not provided for costs to follow the event. However, that did not arise in this case because there had not been a determination between C and D8. In any event, for the reasons above, D8 had not been the successful party.

(5) Fifth Ground: D8 had a remedy in contribution proceedings which was contrary to the overriding objective because it would lead to more cost, delay and court time.

56. D8 says that the Judge took into account the fact that D8 could obtain a contribution against D2. D8 says that the Judge erred in basing his conclusion on this. This would involve a trial between D8 and D2 which would involve costs, delay and court time, precisely that which was being avoided by the summary process. It was contrary to the overriding objective.
57. The possibility of a contribution claim was referred to in the judgment at paragraph 19. Whilst it was the case that contribution proceedings might have involved costs, delay and court time, there was already a real potential for contribution proceedings between D2 and D8 irrespective of the judgment and for costs, delay and court time to occur. The Judge was entitled to consider it, particularly given the existing scope for contribution proceedings between D2 and D8. In any event, the possibility of contribution was not the primary basis for finding that the costs order should be made. It provided further support for the reasoning referred to in paragraph 18 which has been considered in detail above. In the context of an exercise of discretion in the summary determination of costs where there had not been a trial, the Judge was entitled to take into account the possibility of a contribution claim and it did not render wrong the exercise of his discretion.

(6) Sixth Ground: no consideration or reasons for rejecting a Bullock or Sanderson order

58. D8 submits that the Judge gave no consideration to a Bullock/Sanderson order, and that it was incumbent on him to do so. C is correct to say that this ground must essentially rely on D8's assertion that it was "the successful party", which might make such an order appropriate. D8 raised the potential for a Bullock/Sanderson order in his skeleton argument (which the Judge confirmed he had seen: Judgment para. 2) and in submissions. It was pointed out by D2 in its skeleton argument and by counsel at the hearing that the jurisdiction to make such orders arises where there was a successful and an unsuccessful defendant, and was not appropriate here.
59. In support of the proposition that there must be identifiable successful and unsuccessful Defendants following a trial, which did not occur here since there was no liability trial,

reference was made to *Irvine v Commissioner for the Police of the Metropolis* [2005] EWCA Civ 129, Peter Gibson LJ said at para. 22:

“... The [Bullock/ Sanderson] jurisdiction is a useful one. It is designed to avoid the injustice that when a claimant does not know which of two or more defendants should be sued for a wrong done to the claimant, he can join those whom it is reasonable to join and avoid having what he recovers in damages from the unsuccessful defendant eroded or eliminated by the order for costs against the claimant in respect of his action against the successful defendant or defendants. However, it must also be recognised that it is a strong order, capable of working injustice to the defendant against whom the claim has succeeded, to be made liable not only for the claimant's costs of the action against that defendant, but also the costs of the other defendants whom the claimant has chosen to join but against whom the claimant has failed.”

60. Without a trial, and despite the settlement of D2, this was not a case where, without a trial, as between D2 and D8 one could be identified as successful and the other unsuccessful. Thus, a Bullock/Sanderson order did not lend itself to this case. Accordingly, there was no error, let alone an error of principle, on the part of the Judge in not making any such order.
61. In any event, it was expressed for D8 at the hearing that the question of a Bullock or Sanderson order was one of an exercise of a discretion under CPR part 44.2 (e.g.p.89H-90C). If it had been right in principle to make such order, which in view of the above it was not or may not have been, it was one of a number of orders to be considered. The fact that no such order was made does not amount to an error of principle or one where an appellate court may interfere with the exercise of discretion not to make such an order.

(7) Seventh Ground: “No order for costs”

62. It is not disputed that in the absence of a good reason to make another order, the fall-back position of no order for costs should be considered. This ground of D8 is that this should have been considered, and reasons given for rejecting such an order.
63. As noted above, no order as to costs was a possible order, but so was the order which the Judge made. It is not appealable simply because there is an alternative analysis which D8 wanted the judge to adopt. The analysis which the Judge adopted led him to order that D8 pay C’s costs. The Judge’s analysis and conclusion were well within the broad ambit of his discretion and the range of orders available to the Court. There was no error of principle in the fact that the Judge did come to the conclusion which he did rather than no order as to costs. There was no failure to give reasons: the Judge gave reasons for making the order that D8 pay the costs of C. That was not only his reason

for the order which he made, but also his reason for not having made some other order. In my judgment, for all the reasons set out above and especially at paragraphs 43-46, the Judge was entitled to reach the conclusion which he did as to costs.

VIII Conclusion

64. At highest, there are alternative ways of looking at the matter which would have been available to the Judge, and which a different Judge might or might not have adopted. That is not a sufficient basis to overturn or vary the decisions below. The decisions of the Judge were well within the generous ambit of discretion available to a Judge deciding costs issues, and a fortiori where the decision is about broad-brush costs issues which the parties have entrusted to the Court to decide without requiring a trial. As set out above, the decisions in this case were reasoned and justifiable. There were no errors of principle. D8 has been unable to identify any respect in which the Judge was wrong. It follows that the appeal will be dismissed.