Claim No: F52YJ448

IN THE COUNTY COURT AT MANCHESTER

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

Date: 22nd July 2024

Before:

HIS HONOUR JUDGE HASSALL

B E T W E E N:

Mr Martyn Ian Haynes

Claimant

- and -

Total Plant Hire Limited

Defendant

- -

Chris Barnes KC and **Christopher Allen** (instructed by Gregory Abrams Davidson Solicitors) for the **Claimant**

Charlie Woodhouse KC (instructed by Weightmans LLP Solicitors) for the **Defendant**

Hearing date: 2nd May 2024

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Approved Judgment

His Honour Judge Hassall:

Introduction

1. On 13th February 2023 Mr Haynes' claim for personal injuries was struck out automatically due to a failure to pay a trial fee; on 11th January 2024 the claimant applied for the claim to be reinstated and for the necessary grant of relief from sanctions, which the defendant opposed. The court heard oral argument on 2nd May 2024 from Mr Barnes KC for the claimant and Mr Woodhouse KC for the defendant. The court is grateful to leading counsel and also to Mr Allen for their assistance with this case: the matter was argued with cooperation and focus, yet comprehensively. When preparing this reserved judgment the court considered the oral arguments, skeleton arguments, authorities bundle and the evidence in the hearing bundle, especially the statements given by solicitors on both sides.

2. This judgment will have the following format:

(a) Overview

(b) History

(c) First stage of Denton

(d) Second stage of Denton

(e) Third stage of Denton

(f) Application of the law to the facts, with expansion of the parties' main points

(g) Proportionality

(h) Decision on stage 3 and proportionality

(i) Judgment

(j) Formalities

Overview

3. This case concerns a young man who was severely injured, 8 years ago, in a road traffic accident. His claim for personal injury damages proceeded slowly until, due to breaches of directions, his solicitors had to make an application for relief from sanctions. Relief was granted and slow progress resumed, until the claim was struck out. After a long, further delay the claimant's solicitors applied to reinstate the claim.

4. The claimant, through leading counsel, says that he is the innocent victim of a solicitor's omissions and that the erstwhile fee-earner concerned was so bad as to amount to a 'rogue solicitor,' this being an exceptional circumstance. The claimant's firm say that if the claim is reinstated they will, henceforth, prosecute the matter with alacrity and will pay the defendant's costs and the claimant will, so far as possible, agree to other measures intended to mitigate the

effects of the delay. The claimant acknowledges that if relief is granted the claim will enter, and remain until its conclusion, in the 'last chance saloon,' but maintains that justice would be better served by giving an innocent victim of personal injuries one last chance than by causing him to have to sue his former solicitors and hence giving the defendant a windfall. The claimant submits that such an outcome would run contrary to the balance of prejudice and to proportionality. Although stages 1 and 2 of *Denton*[1] are against the claimant it is still within the court's discretion to grant him relief within stage 3. The claimant asks the court to note that, notwithstanding an admittedly problematic history, the case was struck out only due to the failure to pay a trial fee, which is not the worst breach.

5. The defendant, through its leading counsel, says that the case has progressed little in 8 years, with such limited acquisition of medical evidence as there has been now outdated. For the court to cause the parties to re-start the entire process of this litigation now out of misplaced sympathy for the claimant would be redolent of a pre-2013, pre-*Denton*, 'bad old days' judgment. The defendant's solicitors actually prompted the claimant's solicitors to seek reinstatement, more than once, yet without success. The case is so stale that eventually, as the claimant was warned, the defendant's insurer closed its file and cancelled its reserve. The 'rogue solicitor' point is overstated and distracts from what the case has long since truly become: an uncontroversial professional negligence claim, against which the firm that missed the time limits will have no defence. Whilst there may be some limited prejudice to the claimant in refusing relief, the court should also have regard to prejudice caused to the administration of justice and to the defendant (and/or its insurers) by the claimant's delay and should give effect to the ratio of *Denton* concerning giving particular weight to the named factors in CPR 3.9. This is a clear case in which the sanction is proportionate and not just proportionate after some hypothetical future 'last chance saloon' – wherein, doubtless, on the next breach the same submissions would just be made again anyway – it is already proportionate now. Concerning stage 3 of *Denton*, the defendant agrees that in many cases reinstatement following omission to pay a trial fee would be expected and indeed the defendant would not usually oppose the same – but in the context of all the other delays and omissions in this case, before and after that failure, relief should be refused.

6. It will be apparent from the digests above that neither party is short of points that will weigh significantly in the scales, whether for or against the grant of relief. This judgment will set out the relevant facts and law before according such weight to each party's case as seems due.

History

7. On 6th April 2016 the claimant, who was then a final year university student aged 22, was severely injured in a road traffic accident in Manchester. The claimant, a cyclist, collided with a tipper truck driven by an employee of the defendant. Pre-proceedings, liability was denied, but breach of duty and contributory negligence were eventually compromised 90-10 in the claimant's favour. His injuries include a brain injury with significant impairment of executive functioning, processing speed and memory, a fractured left zygoma and a significant brachial plexus injury to his left arm, which after two surgeries has limited function. Notwithstanding these disabilities the claimant did complete his BSc at Manchester Metropolitan University and then successfully progressed to an MSc at Keele University, albeit taking longer than usual to complete the latter.

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[1] *Denton v T. H. White (& Ors)* [2014] EWCA Civ 906.

8. The claimant has capacity to litigate, lives independently and has adapted so as to be able to undertake the majority of activities of daily living unassisted. He has returned to riding a bicycle and in December 2022 was undertaking a teacher training qualification.

9. Both counsel agree that the case is one of real severity, though not the utmost. The case is far from the point at which it could be valued but, during submissions, both counsel used the phrase 'a million' concerning the notional value[2] of the claim currently struck out.

10. Although the Letter of Claim was sent in May 2016, a Claim Form was not issued until 16th April 2019. It was received by the court on 5th April 2019, one day before the expiry of the 3-year limitation period. Proceedings were then served on 14th August 2019, 2 days before the expiry of the Claim Form.

11. The Defence did not admit[3] breach of duty and pleaded contributory negligence. The defendant invited the claimant to a Joint Settlement Meeting and, on 6th December 2019, made a 75-25 Part Offer. There were no other significant steps in 2019 save for a temporary, agreed, stay for the purposes of negotiation. The defendant was dissatisfied with the claimant's engagement with this process, so the stay was lifted by the court and a CCMC listed at the defendant's request.

12. On 21st May 2020 the defendant wrote to the claimant[4] setting out steps that had been promised by the claimant yet not completed. On 24th June 2020 the court made a directions order requiring disclosure by 14th August 2020 followed by the exchange of witness statements by 27th November 2020. The claimant was directed to serve an updated Schedule of Loss, also by 27th November 2020.

13. The claimant did not comply with the above directions. A signed copy of the claimant's List of Documents was eventually served on 7th September 2020. The witness evidence was eventually served on 1st February 2021. The updated Schedule of Loss was not served at all, which the defendant complains had an ongoing hampering effect on settlement.[5]

14. In September and November 2020, the claimant was examined by a neurologist, neuropsychologist and neurosurgeon instructed by the defendant.

15. On 27th November 2020 the claimant made a without-notice application to the court for extensions of time to the directions (the application being made 2 ½ months after the breached disclosure deadline and on the same day as the witness statements and Schedule of Loss deadline).

16. The extensions were granted by the court on 3rd December 2020. On 21st December 2020 the defendant applied to set aside this order and on 31st December 2020 the claimant

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[2] The court understands and emphasises that this was entirely without prejudice and closer to a colloquialism than a quantification.

[3] This being a modification of the pre-proceedings position, when it had been denied. On 24th August 2016 the defendant's driver had been convicted of careless driving.

[4] As both parties have been represented by the same firms of solicitors throughout, I may just say 'claimant' and 'defendant' when it is obvious from the context that this means 'through their respective agents.'

[5] Albeit I doubt that the claim would be settled prior to completion of the medical evidence. Adults with capacity can agree to such settlements but they are rare.

cross-applied for another extension of time concerning witness statements (to 1st February 2021) and for relief from sanctions if necessary.

17. The cross-applications were listed and then re-listed due to lack of judicial time. The claimant was in the meantime examined by a care/OT expert and a hand surgeon, again instructed by the defendant.

18. On 20th February 2021 the court set aside the extension order of 3rd December 2020 (the order that the claimant had obtained without notice) and refused the claimant's underlying application of 27th November 2020. However, the claimant's subsequent application dated 31st December 2020 was transferred to Manchester and re-listed before District Judge Goodchild on 27th January 2022, when the claimant was represented by Mr Willems KC.

19. In a reserved judgment handed down on 10th February 2022 the Judge granted the claimant relief from sanctions and listed a CCMC. The defendant's solicitors' evidence[6] summarising the oral judgment is not contested and is as follows:

> *'The decision of the District Judge was that the breach was serious and significant. She found that there was no good reason for the breach. She found that the application for relief had not been made promptly due to the claimant's own failure in issuing the wrong application. The need to enforce orders and compliance was against the claimant. The claimant's conduct had caused inefficiency and delay. The breach was in a pattern of failure to engage and poor conduct. However, the Judge held that it would not be just to deprive the claimant of the ability to rely on witness evidence, central to his claim, that such a sanction would be disproportionate to the breach.'*

20. The claimant was ordered to pay the costs of all three applications.[7]

21. On 3rd May 2022 the defendant made the 90-10 Part 36 Offer.

22. On 4th May 2022 at the CCMC, District Judge Moss accepted the claimant's submission for trial of a preliminary issue. (The defendant opposed the same given the cooperation concerning expert quantum evidence, the JSM and the offer made the day before.[8]) The Judge struck out the parts of the Defence that did not admit breach of duty (as this was by now no longer in issue) meaning that this trial would have been limited to contributory negligence.[9]

23. On 8th June 2022, a Notice of Trial Date listed the preliminary issue trial for 13th March 2023. The same order contained the standard 'unless' provision concerning payment of the trial fee by 13th February 2023.

24. On 22nd September 2022 the claimant accepted the defendant's 90-10 offer, some 4 months after its expiry. At this point, of course, the trial of the preliminary issue became otiose but the claimant did not inform the court of the settlement and did not ask for the trial on 13th March 2023 to be vacated.

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[6] Witness statement of Mr Seva Singh, Partner in Weightmans LLP, at para 63.
[7] (Claimant's 27th November 2020, defendant's 21st December 2020, claimant's 31st December 2020).
[8] For the avoidance of doubt, as I said during the instant hearing, I accept that the claimant was entitled to take advice upon that offer and to give it the usual 21 days of consideration.
[9] Although it has frequently been referred to in this case as a trial of 'liability.'

25. On 25th October 2022 the defendant proposed a draft consent order to the claimant, confirming the liability compromise and providing quantum directions through to a trial in late 2023. The defendant chased a response via a letter on 2nd November 2022 (including seeking confirmation whether the claimant was going to attend an appointment for medical examination) and again on 21st November and by telephone on 9th December. The defendant's solicitors' attempts to progress the matter were unsuccessful.

26. In the absence of effective solicitor-to-solicitor communication, the defendant's solicitors attempted a different approach: by asking leading counsel, Mr Horlock KC, to liaise on the defendant's behalf with Mr Willems KC. This communication, on 13th December 2022, resulted in a further draft order and an agreed interim payment of £150,000, to be paid in tranches before and after the claimant had attended upon the defendant's medical experts for updated reports.

27. Notwithstanding this apparently successful resort to leading counsel, the claimant's solicitors took the matter no further. The defendant's solicitors wrote to them again on 16th December 2022 and on 10th January 2023 and on 13th January 2023. Then, on 16th January 2023, they wrote twice asking firstly:

> *'Are you now in a position to agree/finalise the proposed order? We can then request the payment urgently'*
>
> And secondly, with some prescience:
>
> *'my only other concern is letting the court know that the liability trial can come out ASAP, if the order may be some time, should we consider a short consent order?'*

28. The claimant's solicitors' responses were sporadic and of questionable value, such as:

> Email of 18th January 2023:
>
> *'Yes, I think a shortened Order dealing with the liability agreement is the best idea until we can get the conference arranged and have a thorough discussion with the Claimant.'*
>
> (No attempt was made on the claimant's side to draft any such order or to inform the court of the position.)
>
> Email of 20th February 2023:
>
> *'Hi Shaun, Is there any update on the order and interim?'*

29. The above was a double non-sequitur by the claimant's solicitor, in that, as will already be apparent:

(a) in a reverse of conventional litigation practice, the defendant's solicitors had long-since already drafted a consent order progressing the matter and were awaiting the claimant's solicitor's response; and

(b) a subsequent version of the consent order had provided for the interim payments to be made in tranches.

30. Notwithstanding that, on 20th February 2023 the defendant's solicitor did indeed draft yet another version of the consent order, confirming the compromise of liability and vacating the trial of the same and providing for a CCMC.

31. However, in the meantime, on 13th February 2023, in the absence of payment[10] of the fee for the superseded (yet still listed) trial, the claim became automatically struck out. The court sent notice of this to the parties on 22nd February 2023.

32. On 24th February 2023, the claimant's solicitors signed the latest (20th February) version of the consent order. It will be noted that it took the defendant the 4 months from 25th October 2022 to 24th February 2023 to secure this elementary step from the claimant, notwithstanding that responsibility for the prosecution of a claim lies upon the claimant.

33. The defendant's solicitors filed the signed order at court immediately, on the same day, 24th February 2023. Also on the same day, 24th February 2023, the defendant received the notice of strike-out from the court.

34. On 4th April 2023 the claimant's solicitors contacted the defendant's solicitors to say that they had asked the court about a date for the CCMC but had been informed by the court that the case had been struck out and that they did not have a copy of this order. The defendant's solicitors immediately provided the claimant's solicitors with a copy of the order.

35. On 27th April 2023 the claimant applied to 'restore the case.' It will be noted that this application was filed at least 23 days after the claimant had been reminded by the court of the strike-out and had the same confirmed to them by the defendant. It was 2 ½ months after the automatic strike-out itself, of which the claimant had been forewarned.

36. On 10th May 2023 the court wrote to the claimant at the direction of District Judge Moss, saying that:

> *'The application contains no adequate explanation as to why relief from sanctions should be granted.'*

37. That letter was received by the defendant on 15th May 2023.

38. At the instant application hearing, leading counsel agreed that the claimant's purported application to restore of 27th April 2023 was indeed invalid because it neither contained an application for relief nor reasons for the same. Amongst other things, it will be noted that CPR 3.9(2) imposes a mandatory requirement that an application for relief (if made, which it was not) be supported by evidence.

39. The claimant made the current, procedurally valid, retrospective application for reinstatement and relief from sanctions on 11th January 2024. That was:

(a) 11 months (332 days) after the claim had been struck out on 13th February 2023;

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[10] Or a successful application for fee remission, which the claimant had achieved before and for which he was likely still eligible.

(b) about 9 months after 4th April 2023, when the claimant's solicitors told the defendant's solicitors that the court had told them that their client's claim had been struck out; and

(c) about 8 ½ months after the inadequate first attempt to reinstate the claim on 27th April 2023.

40. However, the intervening 8 ½ months were not months of complete silence. On 5th September 2023 the defendant had written to the claimant as follows:

> *'Having today, checked with the court to ascertain if it has received any further communication from you, we have been told that there has been no such communication and that according to the court's records the matter remains struck out. You will no doubt appreciate that in the interest of costs and in circumstances in which the claimant's claim for damages remains struck out for a period now exceeding 6 months without any action by the claimant to reinstate the claim, following the court's letter dated 10th May 2023, the defendant must consider whether it can reasonably be expected to incur further legal costs and disbursements in a claim which is struck out.*
>
> *We note with some dismay that the claimant's failure to respond to the court's letter dated 10th May 2023 comes off the back of a persistent history of delays and failure to comply with previous court orders.*
>
> *The purpose of this letter is to inform you that unless you confirm within the next 7 days that you have acted to restore the matter and provide us with copies of your correspondence to the court, we will advise our insurer client to stand down the outstanding appointments with the experts instructed on behalf of the defendant and to consider closing their file.*
>
> *We take this opportunity to remind you that insurers hold reserves against claims. The prolonged tying up of such reserves is undesirable and can impact on an insurer's business. This latest example of dilatory conduct is prejudicial not only to the insurer, but also to medical experts who allocate medical examination appointments, taking them away from their practice only to find that appointments are cancelled at short notice. The prejudicial reach extends to the court service also which must divest its valuable and scarce resources dealing with applications which could and should have been avoided.*
>
> *Accordingly, we invite you to take heed of the contents of this letter and proceed with alacrity. We look forward to hearing from you.'*

41. Some features of that correspondence deserve to be highlighted, as follows:

(a) by seeking to prompt the claimant to 'restore the matter' and 'proceed with alacrity' the defendant was, to an appreciable extent, acting against its own interests;

(b) the defendant did not adopt a keep-quiet-and-wait approach;

(c) this was exemplary cooperation and consistent with, if not going above and beyond, the requirements of CPR 1.1, 1.3 and 1.4;

(d) the reference to the possibility of standing down the outstanding appointments with the defendant's medical experts was reasonable and prospective: it was not a *fait accompli*;

(e) the defendant was not saying 'by reason of this claim having been struck out months ago, we have stood down our medical experts' – rather, the defendant was saying that unless you hurry up with an application to reinstate, we will have to stand down our medical experts.

42. During the 8 ½ month hiatus, the claimant's solicitors did little but not nothing. On 27th September 2023 they wrote to the court, saying:

> *'We refer to the application by consent sent per the email below. I note that despite our previous letters, we have not received a response?'*

43. There are a number of difficulties with that correspondence, including that the defendant had received the court's letter of 10th May 2023 and that the claimant had apparently waited 152 days (since 27th April 2023, when the first application to restore was made) before reverting to the court. Furthermore, the defendant's solicitors say that they were informed by the court, on 4th September 2023, that there had been no further correspondence from the claimant.

44. The court replied to the claimant's solicitors on 11th October 2023, attaching another copy of the court's earlier letter of 10th May 2023. The claimant's solicitors responded on the same day, asserting that the 'initial correspondence was not received' and promising to 'deal with the judge's request immediately.'

45. That did not happen. The defendant wrote to the claimant on 6th October 2023 to say that they had cancelled the outstanding medical appointments and, on 13th November 2023, the defendant's insurers released their reserve and closed their file.

46. On 11th December 2023 the claimant's solicitors suspended the employment of the fee earner that had had conduct of this claim 'pending an investigation into an unrelated matter related to client care.' Mr Richard Malloy took over conduct on 2nd January 2024 and the instant application followed on 11th January 2024.

First Stage of Denton

47. Naturally, the parties' submissions have chiefly focused on the three-stage test set out in the leading case of *Denton*.

48. Concerning the first stage, the claimant concedes that the breach was serious and significant[11] but asks the court to note, applying *Badejo v Cranston*[12] per Fancourt J at [16], that:

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[11] See *Denton* at [26].
[12] [2019] EWHC 3343 (Ch).

although -

(a) part of the purpose of the early payment of a trial fee is to enable the listing of cases to proceed in an orderly way, in the interests of all court users;

and -

(b) this was a moderately serious breach;

nevertheless -

(c) the claimant's omission to pay the trial fee was a matter of inadvertence;

and -

(d) it was far from the most serious of the breaches that litigants can commit.

49. The defendant accepts the above and in turn asks the court to note that it would not ordinarily oppose an application for relief following non-payment of a trial fee. The defendant says that it is only doing so because of the pre- and post-breach history.

50. On a point of nuance, I respectfully disagree with the following part of the defendant's solicitor's witness statement (Mr Singh, para 14):

'this is an extremely serious and significant breach'

And with the same approach from the claimant's side (Mr Malloy, 1st statement, para 28):

'snowballed into an exceptionally serious breach'

51. I disagree with both solicitors' assessment of severity because their reasoning flows from matters ancillary to the breach, not the breach itself. But in *Denton* at [27] the Court of Appeal held that:

> 'The assessment of the seriousness or significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past. At the first stage, the court should concentrate on an assessment of the seriousness and significance of the very breach in respect of which relief from sanctions is sought. We accept that the court may wish to take into account, as one of the relevant circumstances of the case, the defaulter's previous conduct in the litigation (for example, if the breach is the latest in a series of failures to comply with orders concerning, say, the service of witness statements). We consider that this is better done at the third stage (see para 36 below) rather than as part of the assessment of seriousness or significance of the breach.'

52. The Court of Appeal later mentioned the question of promptness of the application - but also within the said para 36 and hence also within stage 3, not stage 1.

53. In other words, properly analysed, the claimant's omission to pay the trial fee remains a moderately serious breach.[13] It is not magnified into being an 'extremely' serious breach by reason of the defaulter's previous conduct. Neither is it magnified by delay in making the application. But the court's decision on how to approach this moderately serious breach may take into account those other matters as relevant circumstances under stage 3.

Second Stage of Denton

54. The claimant concedes that there was no good reason for the breach. Factors such as the 'rogue solicitor' point are not proposed as amounting to a good reason, rather they are relied upon within the third stage, below.

55. Given that the claimant was unilaterally responsible for a significant breach, without good reason, the parties agree that the matter must proceed to the third stage. The evidential burden is on the party making the application – and, as noted earlier, CPR 3.9(2) contains a mandatory requirement concerning evidence. As is normal in such cases, most of the relevant facts are not in issue. Where, however, the party asserting a fact is required to prove it, the court (whilst not conducting a mini-trial) must respect the maxim that he who asserts must prove. Hence, whilst the defendant may rely upon evidence in response, it is for the claimant, as the defaulter and applicant, to put evidence before the court going to any facts beyond the defendant's knowledge and/or admission that are said to support the grant of relief.

Third stage of Denton

56. At stage 3 the court will consider all the circumstances of the case so as to enable it to deal justly with the application, whilst giving particular weight (though not paramount importance) to the two named factors in CPR 3.9(1), being the need:

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

and

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

57. Whilst the Court of Appeal made clear that the factors above never mandate a refusal of relief, they are a steer towards rigour and hence away from the misplaced leniency with which breaches had at times been approached before the Rules were amended in 2013. See *Denton* at [34]:

> 'Factor (a) makes it clear that the court must consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief. Factor (b) emphasises the importance of complying with rules, practice directions and orders. This aspect received insufficient attention in the past. The court must always bear in mind the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance is no longer tolerated.'

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[13] Particularly where it related to a preliminary issue trial limited to contributory negligence.

58. I shall proceed to consider all the circumstances by reference to a further summary of the parties' main points with, where appropriate, expansion upon them.

Application of the law to the facts, with expansion of the parties' main points

The claimant's main points

59. The main points relied upon by the claimant in favour of the grant of relief are that:

(a) he was severely injured;

(b) liability has been agreed 90-10 in his favour;

(c) failure to pay a trial fee, though significant, is not the worst default;

(d) the claimant is the innocent victim of his solicitor(s)' failures;

(e) leaving a claimant to sue his solicitors is an imperfect remedy;

(f) in this case the fee earner concerned should, exceptionally, be treated as having 'gone rogue';

(g) the claimant's solicitors' firm might not even be vicariously liable for the 'rogue solicitor's' failures;

(h) the balance of prejudice favours the claimant, particularly as, upon reinstatement, lesser sanctions could still be (and should be) imposed;

(i) all the problems are openly accepted and every offer of amelioration has been made (see below);

(j) the claimant accepts that his reinstated claim would be in the 'last chance saloon';

(k) it would be inefficient to make the claimant have to commence further litigation, whether against his own solicitors or as another action against the defendant combined with a Section 33 application under the Limitation Act;

(l) if the claimant were unable to recover against the original tortfeasor for procedural reasons, then public confidence in our system of civil justice could be reduced, even if the claimant remains able to recover against his solicitors via a professional negligence claim.

60. The defendant joins issue with much of the above. The defendant's main points against the grant of relief (which in turn the claimant joins issue with) are that:

(a) after the strike-out, there has been too much delay in making and pursuing the instant application;

(b) before the strike-out, there was too much other delay;

(c) the claimant has required relief from sanctions before;

(d) although the defendant would not usually oppose reinstatement following failure to pay the trial fee, the context of the failure and the delays that preceded and followed it make it more just that relief should be refused, which would be a proportionate outcome;

(e) prejudice, though relevant, is not the starting point and in any event either favours the defendant or at least is not one-sided, particularly having regard to the defendant's insurer's and reinsurer's reserve-setting and need to manage their financial affairs;

(f) the claimant's solicitors' firm as a whole bears responsibility;

(g) the claimant, personally, is not altogether innocent of contributing to the delay;

(h) whatever the allegedly 'rogue' solicitor may or may not be found to have done elsewhere, this claim features either entirely, or predominantly, just run-of-the-mill negligence;

(i) the proposition that the claimant's firm might somehow escape liability for the strike-out is belated, opportunistic and fanciful;

(j) concerning the 'last chance saloon', similar submissions may have been made to the court back when leading counsel secured the previous grant of relief from sanctions – but in any event they can and will just be repeated in future, as many times as the claimant requires;

(k) although both parties recognise that the application will succeed or fail on stage 3 of *Denton*, only the defendant's submissions sufficiently acknowledge the ratio of *Denton* in that 'particular weight' should be given to the named factors in CPR 3.9;

(l) although all prior decisions are fact-specific, it is still noteworthy that the Court of Appeal has more than once treated delay in making the application for relief as weighing heavily against the grant of relief;

(m) the application was made 11 months after the default;

(n) the instant default has, alone, caused years of additional delay.

61. Not all of the points above require expansion. I shall proceed to expand as seems appropriate.

The claimant's open acceptances & offers

62. On behalf of the claimant and the claimant's firm, Mr Barnes has openly given or offered the following:

(a) a formal apology given in open court at the start of the hearing;

(b) an unconditional offer to forego all interest on damages applicable to the delay;

(c) an assurance that costs are not in issue: the claimant will pay the defendant's costs;

(d) an assurance that the claimant's solicitors will indemnify him against any personal consequences of (c) above;[14]

(e) an acknowledgment that if his claim is reinstated it will be in the 'last chance saloon,' i.e., must be prosecuted with alacrity and is vulnerable to strike-out on any further lapse. The claimant says that this could be reflected in this judgment and if appropriate in recitals in a court order.

63. I accept that, in aggregate, the above amounts to the claimant's side doing everything now possible to mitigate the harm done by the delays leading to this judgment. That does not mean that I believe that all harm can be erased: delay cannot be reversed. But I do accept the significance of a comprehensive suite of acknowledgments and open offers as above.

Delay in making the application

64. Factors expressly identified in *Denton* as potentially relevant at stage 3 included the previous history and delay in making the application, [36]:

> 'As has been pointed out in some of the authorities that have followed *Mitchell*, the promptness of the application will be a relevant circumstance to be weighed in the balance along with all the circumstances. Likewise, other past or current breaches of the rules, practice directions and court orders by the parties may also be taken into account as a relevant circumstance.'

65. Concerning delay in making the application, in Denton at [15] the Court of Appeal summarised the case of *Durrant v. Chief Constable of Avon and Somerset Constabulary* [2013] EWCA Civ 1624, as follows:

> 'the defendant was in breach of successive orders for the service of its witness statements. On 19 November 2012, Lang J ordered that statements be exchanged by 21 January 2013. Following the defendant's failure to comply, Mitting J made an unless order on 26 February 2013 requiring statements to be served by 12 March 2013. The defendant again failed to comply. Eventually, the defendant served two statements one day late and other statements subsequently. The judge granted relief from sanctions, permitting the defendant to rely on all his late statements, and then adjourned the trial so that the claimant would have time to deal with the new evidence. The Court of Appeal, applying the *Mitchell* guidance, reversed that decision. In relation to the two statements which were only one day late, Richards LJ delivering the judgment of the court said this at para 48: "The position concerning the two witness statements that were served only just out of time is less clear-cut. … [There follows a quotation from *Mitchell*] … As we have said, the non-compliance in relation to the two statements, taken by itself, might be characterised as trivial, as an instance where "the party has narrowly missed the deadline imposed by the order". The non-compliance becomes

[14] I do not know whether the claimant's solicitors would also indemnify him against the loss of interest at (b) but that is peripheral.

more significant, however, when it is seen against the background of the failure to comply with Lang J's earlier order, and the fact that Mitting J, in extending that deadline, had seen fit to specify the sanction for non-compliance".'

66. The delay in making the application in *Durrant* was 6 weeks. At [49] in *Durrant*, Richard LJ said:

> 'Moreover, even in relation to trivial non-compliance, the judgment in *Mitchell* states that "the court will usually grant relief *provided that an application is made promptly*" (emphasis added). The application in this case was not made promptly; far from it. Nothing was done about the non-compliance for over two months, until the application for relief dated 15 May, which covered the two statements served in March as well as the four additional statements then sought to be relied on. By that time the trial, fixed for 10 June, was imminent. Unless and until relief from sanction was obtained, the claimant could not be expected to prepare to deal with the evidence of witnesses whose statements had been served out of time. She was entitled to proceed on the basis that, as provided in Mitting J's order, the defendant could not rely on the evidence of any witness whose statement had not been served by the deadline. It is, moreover, of considerable significance that she had protested loudly that the statements were late. There can be no question of the defendant having been lulled into a false sense of security; and it was immediately obvious that an application for relief against sanctions would have to be made. This makes the delay all the more inexcusable.'

67. Whilst I have due regard to the fact that *Durrant* was decided by reference to *Mitchell*[15] and so before *Denton* added some nuanced guidance to the correct interpretation and application of *Mitchell*, I note that at no stage did the Court of Appeal in *Denton* (or in any subsequent case) indicate that *Durrant* may have been wrongly decided.

68. Furthermore, in *Clearway Drainage Systems Ltd v Miles Smith Ltd* [2016] EWCA Civ 1258, Etherton MR held at [69] that:

> 'As to promptness, the judge was right to say this was relevant. She was fully entitled to take into account the delay of some two months following CMS' letter of 18 April before the applications for relief were made.'

69. Similarly, in *Oak Cash & Carry Ltd v British Gas Trading Ltd* [2016] EWCA Civ 153, Jackson LJ was dealing with a failure to file a pre-trial checklist. The PTC was eventually filed 2 days outside of an unless order, so the case had already been automatically struck out. It will be recalled that Jackson LJ gave the minority judgment of the Court of Appeal in *Denton* in which (although the learned Lord Justice agreed with the outcomes of the three appeals) he argued for a slightly less rigorous approach to the named factors in CPR 3.9. Notwithstanding that, Jackson LJ applied *Denton* in the *Oak* case as follows:

> 56. 'As at 21st February the late filing of the listing questionnaire had not had any adverse impact on the smooth conduct of the action. The moderately late filing of a PTC is not like the late service of evidence or the late disclosure of documents. It does not disrupt the work schedule of any other party to the action. The PTC is needed for administrative reasons, except in those cases where the court dispenses with that procedural step. The

[15] *Mitchell v New Group Newspapers Ltd* [2013] EWCA Civ 1537.

late provision of the PTC in this case did not have any adverse effect on the administrative processes of the Oxford County Court.

57. If, therefore, the defendant had promptly applied for relief from the sanction, in my view this is a case where one of two things would have happened. The claimant may (and should) have consented to the application. Alternatively, the court would have acceded to the application when applying stage 3 of the *Denton* test.

58. Unfortunately the defendant did not make a prompt application for relief pursuant to rule 3.9. On 25th February 2014 the claimant's solicitors applied to the court for judgment in default. BB responded by sending a letter to the court, which they did not copy to the claimant's solicitors. In that letter BB asked for the court's "forgiveness". Even then they did not make the appropriate application.

59. Events followed an inevitable course. Since there was no extant defence, on 18th March 2014 the court issued a default judgment in favour of the claimant.

60. BB waited for another week. On 24th March 2014 they issued an application for relief from the sanction pursuant to rule 3.9. By then, unfortunately, the trial date had been lost. If the court had granted relief at that late stage, it would have needed to fix a new trial date some time after the original trial window. The serious consequences of losing a trial date are discussed in *Denton* at paragraph 89.

61. In my view the defendant's lack of promptness in applying for relief is the critical factor.'

70. On the claimant's behalf I observe immediately that the loss of an effective trial in *Oak Cash & Carry* is a distinguishing feature of great importance. I also remind myself that decisions on relief from sanctions are fact-specific. I am grateful to counsel for not burdening the court with the dead weight of legion decisions in either direction. I take on board Mr Barnes' helpful approach, when he said that he was not arguing that every defaulting claimant should get a good result just because some had.[16] I expect that, had Mr Barnes and Mr Allen shown less restraint, they could have put more 'anti-Durrant' and 'anti-Clearway' precedents before the court. I acknowledge that *Oak Cash & Carry* was not referred to in argument and by mentioning it I perhaps do the very thing that counsel refrained from. I do not take *Durrant*, or *Clearway*, let alone *Oak Cash & Carry*, as establishing any bright chronological lines.

71. Even so, I do consider these decisions to be significant. Rulings of the Court of Appeal on relief from sanctions are rare, even more so on the specific issue of delay in making the application. *Clearway* was a decision of the Master of the Rolls. In all three of these decisions, on different facts and in different circumstances, the Court of Appeal adopted a consistently rigorous approach to delay in making the application. My judgment is not fixed by these cases – but it is informed by them.

Loss of public confidence

72. Mr Barnes, echoing something said in his instructing solicitor's witness statement, ventured to submit that if relief was refused to his client, and thus the claim against the original

[16] Said in the context of *Cable* but also generally.

tortfeasor should fail, there might be a loss of public confidence in our system of civil justice. I should emphasise that this ambitious proposition was not advanced with any inappropriate vigour.

73. I consider this point to be without merit because:

(a) reasonable people either know, or ought to know, or should be deemed to know, that a system of justice needs rules and a rule without consequences is merely advisory;

(b) sometimes the consequence for a breach will be the loss of the primary claim – whether it should be, or not, depends upon the other tests identified in this judgment;

(c) in reality, the claimant's remedy is to receive a transfer of funds from an insurance company, not from the driver who did the damage. Whether the name on the transfer belongs to a motor insurer, an employers' liability insurer, or a professional negligence insurer, is not a matter likely to trouble the officious bystander for long.

74. If I am in error about any of the above, I take comfort from the fact that Dyson LJ (as he then was)[17] must have fallen into a similar error when he decided *Hashtroodi v Hancock* [2004] EWCA Civ 652.

75. In *Hashtroodi*, the claimant had been caused tetraplegia by a motorcycling accident when he was aged 46 and (then) employed. The breach in question concerned CPR 7.5 and 7.6 and failure to serve a Claim Form, which is a self-contained branch of law, wherein, unusually, the court has little or no discretion. I therefore emphasise that I do not in any way conflate the Court of Appeal's decision in this case with the exercise I am conducting. I am merely answering the 'public confidence' point. I observe that the Court of Appeal said:

> 21. It is easy enough to take the view that justice requires a short extension of time to be granted even where the reason for the failure to serve is the incompetence of the claimant's solicitor, especially if the claim is substantial.
>
> Then later:
>
> 34. Our review of the facts discloses that the only reason for the failure to serve the claim form within the four months' period was the incompetence of L&M. The deputy master observed that Mr Pike sought to look after his client's interests, and it was not "absolutely certain" that a negligence claim against the solicitors would succeed. On the material that has been presented to this court, we can see no answer to an allegation of negligence against the solicitors. (…)
>
> 35. It follows that this is a case where there is no reason for the failure to serve other than the incompetence of the claimant's legal representatives. Although this is not an absolute bar, it is a powerful reason for refusing to grant an extension of time.

[17] It may be noted that Lord Dyson MR, as he later became, was one of the two contributors to the lead judgment in *Denton*.

76. It will be noted that the court took into account that the claimant had suffered one of the most catastrophic of all injuries, yet refused relief even though the default was due to 'the incompetence of the claimant's legal representatives.' Rather than that factor being treated as mitigating, it was described as 'a powerful reason for refusing to grant an extension of time.' No concern was expressed about any public confidence implications of the inevitable replacement of the road traffic claim by a solicitors' negligence claim.

The effects of the default: increased costs, wasted court time & delay

Increased costs

77. It will be recalled that the claimant accepts that the default has wasted time and costs and offers to pay the defendant's costs and waive the appropriate period of interest, therefore. Although I accept that in this respect the claimant can now do no more, I observe that even costs paid by the defaulter are still, ultimately, increased costs.

Wasted court time

78. This is a factor expressly identified in *Denton* at [45]:

> 'We should say something about the submissions that have been addressed to the consequences of scarce public resources. This is now sadly a fact of life, as much in litigation and in the courts as elsewhere. No judicial pronouncement can improve the position. It does, however, make it all the more important that court time is not wasted and hearings, once fixed, are not adjourned.'

79. The instant breach did not result in a hearing being adjourned but it has wasted court time, having occasioned a full day's listing before a Circuit Judge[18] and judicial time in writing this judgment. It has inevitably required some administrative time from court staff also.[19]

80. Mr Woodhouse reminds the court that the claimant's previous application for relief also resulted in three hearings (two application hearings, plus the reserved oral hand-down and costs argument hearing). That prior wastage does not go directly to the significance of the instant breach but it is relevant to the court's treatment of it, within stage 3 of *Denton*.

Delay

81. Counsel disagree over how much delay the instant breach, including delay in making the application, has caused.

82. Mr Woodhouse said that even ignoring all the delay before the strike-out and the fact that the claim should never have been struck out, the delay occasioned 'strictly from the date of the strike-out of 23rd February 2023' would be the time from then to the handing down of judgment (17 months) plus a minimum of 12 months before medical appointments could be reinstated and reports achieved. Concerning the latter, Mr Woodhouse asked the court to note that even though the parties would not wait for a CCMC before progressing the medical reports,

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[18] The parties requested that the matter be heard by a Circuit, not a District, Judge and HHJ Bird, the Designated Civil Judge for Greater Manchester, so directed.

[19] An easily overlooked yet especially hard-pressed resource.

reports from neuropsychologists, neuropsychiatrists and neurologists could not be obtained more quickly than that due to the long waits for appointments. Hence the defendant says that the omission to pay the trial fee has delayed this case by (17 + 12) 29 months.

83. Mr Barnes said that he did not accept the premise of the first part of Mr Woodhouse's arithmetic, in that there was not a CCMC listed at the time of the strike-out. I understand Mr Barnes' point but on the other hand there is not one listed now, either. Perhaps the most accurate summation would be to say that 'the entire time to judgment need not necessarily have been wasted, but in this case it was.' This is because, it will be recalled, many attempts were made by the defendant's solicitors to agree a consent order, to make interim payments and to progress the medical evidence, but nothing useful was achieved. In other words, this is not a case in which (hypothetically) the claimant's side had busily made a lot of useful progress, during a time when they were ignorant of a strike-out, with the progress remaining useful if the matter were to be reinstated.

84. Concerning the second part of the arithmetic, Mr Barnes acknowledged the difficulties concerning achieving further medical evidence but expressed the hope that it could still take less than 12 months. Mr Barnes did not tie his submissions to a specific figure.

85. I do not think this judgment is tied to a specific figure, either. But on a rough-and-ready basis, if the claimant's solicitors had taken a proper grip on this case in February 2023, averting the strike-out and progressing the medical evidence, the reports should have been achieved by the start of 2024. If I grant relief, that becomes by mid-2025. That seems to me to be an operative delay of roughly 18 months. In the context of the authorities, including those dealing with delay in making the application, that is an amount of time of profound concern. Such concern is amplified yet further by the recollection of District Judge Goodchild's words upon granting the first order for relief from sanctions in 2022:

> 'The claimant's conduct had caused inefficiency and delay. The breach was in a pattern of failure to engage and poor conduct.'

86. If the court refuses relief, the claimant may claim against his current firm of solicitors for professional negligence. The adequacy of this remedy is examined below.

Claims against solicitors: an imperfect remedy

87. I will deal firstly with the usual imperfections of any secondary claim against solicitors, before coming to the 'rogue solicitor' point.

88. I accept Mr Barnes' submission that the courts have always recognised that a secondary claim against solicitors following the loss of a primary claim against a third party due to professional negligence may be an imperfect remedy. In law, such a claim is for 'loss of a chance' and I take judicial notice of the fact that such claims are usually settled on a multiplier of less than 1, e.g, 0.9 or 0.95, to reflect the litigation risk of the original claim.

89. I have considered Mr Woodhouse's submission that no such reduction is likely here because the only litigation risk (after the 90-10 liability settlement) was risk that the claim be lost due to some other negligence by the same solicitors, which could hardly be relied upon as a notional defence. There is some force in that but not total force: another way in which a damages-only claim might be lost is due to a loss of interest or cooperation by the client, and

Mr Woodhouse's own submissions included the allegation that there was some prior evidence of that in this case. Having said all that, as the original claim was for quantification only of severe personal injuries, I do accept that any appropriate reduction would be small.

90. As Fancourt J said in *Badejo* at [20]:

> 'The claim that may be brought against the solicitors is of course a harder claim to bring and prove, and would be more expensive for the appellant, and the measure of damages recovered may well be less than the full amount of the claim against the respondent.'

91. Fancourt J then held at [23]:

> 'Ultimately, in my judgment, despite the fact that a moderately serious breach was committed without mitigating circumstances, justice is better done in this case by enabling the current action to proceed to a trial, rather than requiring the appellant to start new proceedings for his claim, or alternatively a claim for negligence against the solicitors, or possibly both.'

92. It may be noted that the underlying claim in *Badejo* concerned a contractual argument about an alleged option agreement, which is a rather more uncertain prospect than a 7-figure personal injuries claim in which liability has been settled. That may be an irrelevant distinction, however, because the Court of Appeal adopted a similar approach in *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 1015, holding at [90]:

> 'The appellant was the victim of an accident for which the defendant had long ago admitted liability. His claim was started in good time under the RTA Protocol, and he was not responsible for the catalogue of errors and delays since then. His claim form was issued within the prescribed three years. If that claim was struck out now, he would have to start all over again, this time with a professional negligence claim against his current solicitors, with all the risk and uncertainty, not to say cost, that such a claim would involve. Moreover, that would be a loss of a chance claim, which is inevitably an inferior type of satellite claim, particularly when compared to the present proceedings, which involves a claim against the primary defendant who has already admitted liability.'

93. In *Cable* the Court of Appeal was concerned with the infliction of a sanction after an abuse of process, not with the removal of a sanction after a valid automatic strike-out. But overall the point is much the same.

94. Mr Woodhouse has submitted that the claimant ought himself to have realised that his claim was proceeding at an unacceptable pace; hence in this case he does bear some share of the blame personally. I prefer Mr Barnes' submission that the court should hesitate long before finding that a young man with a brain injury (even with capacity and pursuing a professional qualification) and no experience of litigation should have realised that things were amiss. I thought Mr Woodhouse's fire was better aimed at the claimant's solicitors' firm as a whole – i.e., what other members of the firm, not the lay client, should have realised. I return to that

under the 'rogue solicitor' point and also under 'the vicarious liability non-admission' below. But I do treat the claimant as personally blameless.[20]

95. Although I accept Mr Barnes' submission that the court should approach the prospect of a secondary professional negligence claim as causing the claimant some prejudice, it may be noted that in other cases the senior courts have seemed more sanguine about that prospect than in *Cable*.

96. In the well-known decision of the Supreme Court in *Barton v Wright Hassall* [2018] UKSC 12 it was held that the Rules would be enforced as rigorously against litigants-in-person as against represented parties even though, at [41(v)] it was noted that:

> 'As an unrepresented litigant, Mr Barton has no recourse to solicitors' insurers of the type which would be available to a represented litigant whose solicitor made the same mistake as he did.'

97. The Supreme Court neither said, nor implied, that the court should be reluctant to refuse relief to those left with the remedy of suing their erstwhile solicitors. In fact, for reasons I think obvious, the implication is that if (which it was not) the court had been minded to apply a different standard, it might have expected higher standards from those represented by solicitors, on the reasonable basis that their clients would be largely protected from the consequences of refusal of relief by recourse to a professional negligence claim.

98. Similar words feature in the Court of Appeal judgment in *Hashtroodi v Hancock* to which I have already referred under the 'public confidence' point. But I still accept the main thrust of Mr Barnes' submission. Overall:

(a) I prefer Mr Barnes' submissions on the fact of prejudice and accept that a refusal of relief will cause the claimant prejudice, including either the probability or at least the real risk of:

  (i) delay;

  (ii) irrecoverable costs;

  (iii) loss of damages;

(b) Hence, I reject Mr Woodhouse's submission that the court should approach the matter on the basis of no loss of damages at all;

(c) However, I accept Mr Woodhouse's submission that the loss of damages will probably be small;

(d) I also accept Mr Woodhouse's submission that the process of quantification, in a case in which much of the medical evidence has yet to be obtained, will be

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[20] Mr Woodhouse made stronger points concerning some occasions of lack of engagement by the claimant personally, e.g. not attending medical appointments with the defendant's experts. Those were areas of valid concern but not such concern as to affect this judgment. They did not bear upon the strike-out or the delay in applying to reinstate and any effect upon the overall timescale (if any) is reflected in that whole timescale.

similar whether the matter proceeds as the original claim or as a secondary professional negligence claim.

The 'rogue solicitor' point

99. Mr Barnes submits that the conduct of the fee-earner concerned was so bad as to amount to an exceptional circumstance, in that a solicitor had 'gone rogue.' This was said to have two effects on the application: firstly, the court should give the claimant more leeway than would have been the case following run-of-the-mill negligence by agents; and secondly, when weighing the prejudice to the parties that would follow from a refusal of relief, the court should take into account that the claimant's firm was not conceding that they would necessarily be vicariously liable for the wrongdoing of the fee-earner concerned. Concerning vicarious liability, it may be important to note that this was put as a non-admission, not at this stage as a positive denial. Mr Barnes' argument was not that the court should approach this aspect of the claimant's firm's putative defence as likely to succeed - merely that the court, when weighing the scales, should factor in a risk to the claimant that it might succeed.

100. The evidence in support of these propositions comes from the claimant's solicitors' witness statements. The allegations against the fee-earner concerned have developed. Before going through the same, I pause to note that during the instant hearing I expressed some concern to Mr Barnes that the court was being asked to deliver a judgment in open court that would include some serious allegations (not findings, but allegations) against a professional person who had had no apparent right of reply. Mr Barnes accepted that the claimant's solicitors' witness statements had not been seen by the fee earner concerned, so he had had no opportunity to comment on them. Although, on Mr Barnes' instructions, it was overwhelmingly unlikely that he would disagree with the same, Mr Barnes accepted that it was a theoretical possibility. Mr Barnes asked the court to accept that his instructions came from the fee earner's former employers who are, of course, senior solicitors.

101. I think it would be over-cautious of the County Court, of its own initiative, to adjourn an interlocutory application within two-party damages litigation in order to permit a person once employed by the claimant's own solicitors' firm potentially to intervene as a non-party. It would certainly result in yet more delay and costs. It would neither be usual nor desirable for the court (if faced with a dispute over the fact or extent of the alleged wrongdoing) to stay the entire application to await the SRA's decision. I shall therefore proceed to deal with the application before the court, albeit with a degree of caution, as follows:

(a) I will continue only to refer to the solicitor in question as 'the fee-earner concerned';

(b) I shall not specify the fee-earner's precise role within claimant's firm, save to say that it was senior and related to personal injuries;

(c) I repeat and emphasise that the allegations to which I am about to refer are no more than that – the court is neither making, nor even reciting, findings;

(d) I similarly repeat and emphasise that neither the defendant nor the fee earner concerned has had any input into this part of the evidence;

(e) I am not going to set out additional, serious, allegations that Mr Barnes (quite properly) set out in oral submissions to the court on instructions, which did not relate to the instant case, which were said to have been conveyed to Mr Barnes' solicitors by the SRA, to which the fee earner was said to have 'confessed' (to the SRA, not the firm), which were not in the claimant's solicitors witness statements, which appear inconsistent with the SRA's own handling of this matter (see below), and of which there is no evidence before me in the application anyway.

102. The allegations began in Mr Malloy's 1st statement of 11th January 2024 in (perhaps understandably) opaque terms (para 29):

> 'In December 2023 [the fee earner concerned] was suspended by the firm pending an investigation into an unrelated matter relating to client care. At the time of writing this statement that investigation remains ongoing and it would not be proper to comment further on the nature of [his] suspension.'

103. In Mr Malloy's 2nd statement of 24th April 2024 he added a number of allegations/developments, being that: the fee earner concerned had delayed and frustrated the firm's investigation and then resigned before its conclusion; the firm was working closely with the Solicitors Regulation Authority and had reported the matter to the police;[21] the fee earner had lied to and misled colleagues and had deleted emails,[22] destroyed post and amended documents; that communications on the instant case (such as the chasing emails from the defendant and court orders) could not be found, so had been deleted. Reference was made to a medical matter[23] but beyond that it was said that there was no known motive for the misbehaviour alleged.

104. In Mr Abrams' statement dated 11th January 2024 he expressed surprise and dismay over the fee earner's conduct given his long and previously creditable history at the firm and said (para 23) that the conduct:

> 'goes against the ethos of the Firm and all the procedures that the Practice has put in place to avoid issues such as this.'

105. Whilst I do have sympathy for the predicament faced by the claimant's solicitors' firm, I observe that Mr Abrams did not say what those procedures were, save for 'monthly file reviews'[24] by Mr Ian Kay, or how it was that effective procedures could have permitted this claim to proceed as it did before, to, and after, the strike-out.

106. I reject the claimant's 'rogue solicitor' point for the following reasons:

(a) there is insufficient evidence to cause the court to approach this application differently from any other relief from sanctions application arising out of apparent solicitors' negligence;

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[21] The police said that they would await the findings of the SRA.
[22] Including double-deletion, so that the deleted copy could not be retrieved.
[23] Again, I think it appropriate to refrain from specificity.
[24] These have been the subject of effective criticism by Mr Singh, the defendant's solicitor, see later.

(b) there is no evidence of malfeasance concerning the strike-out of the claimant's claim;

(c) the evidence is predominantly of run-of-the-mill negligence;

(d) the court should approach 'rogue solicitor arguments' with caution;

(e) the defendant is right to say that the claimant's firm as a whole bears some responsibility.

107. I shall expand on the above in turn.

Insufficient evidence to cause the court to approach this matter differently

108. Serious though the claimant's firm's concerns may be, there is no evidence before me from the SRA, nor from the police. There are no exhibits from third parties. There are no exhibits (redacted or otherwise) going to the fee earner's conduct of other files. The allegations, though serious, are put without any specific details (e.g. dates, what went wrong, what the circumstances suggest as to the nature or motive behind the alleged wrongdoing, *etc.*) On the claimant's own evidence the matter remains at the stage of investigation (with the police awaiting the SRA investigation before doing their own, if any). There is no evidence before me as to the likely conclusion of the investigation(s) nor, by definition, any findings.

109. As at the date of this judgment, I think it significant to note (via the public portal of the Solicitors Regulation Authority) that the fee earner concerned has a practising certificate, remains an officer of the court, and is currently able to act as a solicitor for any member of the public, subject to conditions imposed on 17th June 2024, principally that he:

(a) 'may act as a solicitor only as an employee and only where the employment has first been approved by the SRA';

and

(b) 'may not be a signatory to any client account and does not have the power to authorise payments or transfers from any client account.'

110. The above are interim decisions pending a final resolution by the SRA. They are not inconsistent with the claimant's written case albeit I observe that they do not appear to suggest the strongest evidence of the worst wrongdoing (in that one might expect the SRA to impose a complete interim suspension from practice, in such a case). Even giving due regard to (b) above, I do consider them to be somewhat inconsistent with the unwritten, additional, third-party hearsay, allegations of 'confessions' that Mr Barnes, acting entirely properly on his instructions, put to the court in oral argument. Even if I am wrong about that, I remind myself that there is no evidence before me of those matters.

No evidence of malfeasance concerning the strike-out of the claimant's claim

111. There is no evidence before me that the claimant's claim was at any time harmed by any act or omission actuated by an improper motive, whether going directly to the strike-out

and/or delay in applying to reinstate, or to any other part of the case. The claimant's evidence[25] actually says as much, concerning non-payment of the court fee:

> 'this was not a deliberate or malicious act by [the fee earner concerned] for which there was any benefit to be gained.'

112. I agree. There is no basis for supposing or inferring that the striking out of this case could possibly have benefited the fee earner in any way. There is no evidence that, for reasons rational or irrational, he sabotaged the litigation. Concerning the deletion of material in other files, as Mr Woodhouse pointed out, the claimant relies upon inference rather than direct evidence concerning the same.

113. I accept that the claimant's firm have expressed serious concerns over deletion of correspondence and Mr Malloy in particular believes that this affected the post-breach period of delay in making the application. I understand why Mr Malloy (in effect) submits that there are strong grounds for drawing inferences. But against that, I note that even during that time the fee earner concerned was not completely disengaged from the claim: he actually contacted the court and the defendant to enquire about the status of the matter. The 'double deletion' point is another way of saying that no trace of a document exists. Mr Malloy's concerns are valid, but that is not quite the same thing as saying that all documents not on a file must necessarily have reached that file and then been destroyed. There is no I.T. or data recovery evidence before the court. I am not conducting a trial and cannot make specific findings. There is insufficient evidence to do so anyway. I give weight to the claimant's firm's concerns: I consider them important – though not necessarily of overwhelming importance. They appear to go entirely, or almost entirely, to the period of delay in making an effective application. There was, of course, the earlier, inadequate application. They do not appear to go to the breach itself and the claimant's own evidence appears to be that they could not do so.

The evidence is predominantly of run-of-the-mill negligence

114. A review of the history yields the observation that the fee earner concerned never completely disengaged from the litigation, save perhaps just before his suspension. The claim proceeded at an unsatisfactory pace, but it did proceed. The overall picture is of foot-dragging delays, sporadic engagement, non-sequitur correspondence and generally inadequate prosecution, culminating in the omissions to inform the court that the preliminary issue trial was otiose, or to pay the trial fee, or to make a timely application for relief. That is run-of-the-mill negligence, typical of the pattern this court has seen in many other problematic cases. Although, admittedly, such failures are not usually seen in higher value claims, beyond that there is nothing special about it.

The court should approach 'rogue solicitor arguments' with caution

115. There is nothing illogical about the claimant's submissions on this topic and nothing to cause me to consider them to be, in principle, misconceived. I do, however, believe that they should be approached with caution. Firstly, when the court weighs the third stage of *Denton*, it is not conducting a mini-trial into the particular acts and/or motives of an alleged malefactor. In my judgment, the court will usually do better to attach weight to objective facts such as key dates and obligations missed, rather than attempting to divine, for example, intent.

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[25] Mr Malloy's 1st statement, para 17.

116. Secondly, if the misfortune of having a 'rogue solicitor' provides an applicant with a route to relief, yet the more anodyne misfortune of having a merely 'negligent solicitor' does not, that could have counter-intuitive consequences: most obviously that the worse a client can prove their litigation to have been conducted, the better their prospects of having it reinstated.

117. I repeat that there is nothing illogical about the above: similar arguments have been considered many times in the vicarious liability cases. It is possible that in a future case a rogue solicitor argument could succeed. But it seems to me that any such success should occur in a case in which the evidence is both clearer than in this one and more directly related to the instant file and the instant failures.

118. The evidential burden is on the claimant and the evidence, in my judgment, is neither so clear, nor so directly relevant.

The claimant's firm as a whole bears some responsibility

119. I accept the defendant's submission that a client of a solicitor's firm, engaged in 7-figure litigation, is entitled to expect from that firm an appropriate level of collective responsibility and supervision, including peer-to-peer review, systemic checking and frequent file reviews, such that it should be difficult in the extreme for a case of this kind to be jeopardised by one fee earner's omissions.

120. I note (and where necessary, take judicial notice) that:

(a) other members of the firm knew, or ought to have known, that in this case:

(i) the accident was in 2016;

(ii) breach of duty had been conceded;

(iii) there had been no interim payment;

(iv) the medical evidence was at an early stage;

(v) leading counsel had had to appear at an earlier relief from sanctions application;

(vi) adverse costs orders had been made on 3 applications;

(b) incoming correspondence should (at least occasionally) be reviewed by other fee earners;

(c) files should be reviewed at set intervals in conjunction with other fee earners;

(d) I.T. systems should prevent or minimise the risk of deadlines being missed;

(e) it is possible for I.T. systems to include records of communications that individual users cannot delete without trace.[26]

121. In particular, I accept Mr Woodhouse's submission that the sheer age of the case, combined with no interim payment, little medical evidence, no updated Schedule of Loss, a prior application for relief and no quantum directions, were flags coloured at least amber. I accept the defendant's submission that much of the claimant's arguments depend upon the court accepting that in 21st century, 7-figure litigation, it is likely that all of the failures in this case could be the sole responsibility of one individual.

122. In his witness statement for the defendant, Mr Singh offered the following critique of the claimant's firms procedures (para 43 onwards):

> 'Mr Abrams notes at paragraph 17 of his statement that this file would have been subject to 'monthly file reviews' with a supervisor, Mr Kay.'
>
> 'I note that this matter was dealt with by [the fee earner] between at least May 2016 (Letter of Claim) and December 2023 (his suspension). This equates to 91 months, and so 91 monthly reviews with Mr Kay.'
>
> 'It is noteworthy that there is no evidence from Mr Kay, explaining exactly what supervision he provided, and how, within the very many monthly file reviews, he did not note the lack of progress, or failings in the management of this claim.'
>
> 'Even a cursory review of the case management system in this case would have revealed a lack of activity and failings in the conduct of this litigation.'

123. Later, Mr Singh posed the question over what transpired during Mr Kay's monthly file reviews in 2023, including in mid- to late 2023, after the claimant's firm had corresponded with both the court and the defendant about the strike-out.

124. I accept all of Mr Singh's points above. The claimant has not sought to rely upon further evidence in answer to them; perhaps they are unanswerable. It is important to note that notwithstanding the serious allegations of deletion and 'amendment' levelled at the fee earner, nobody is accusing him of relevant fabrication, i.e. nobody is saying that he falsified progress on this matter that was not, in fact, occurring, whether concerning the litigation generally or about reinstatement. Nobody is saying that he 'amended' documents on this file or (e.g.) faked a court order reinstating this case, after the claimant's firm knew that it had been struck out in April 2023. The lack of progress on this matter was obvious and should have spoken for itself. I think it noteworthy that the fee earner's suspension in December 2023 was due to other files: the claimant's firm had not registered a problem with this file, even by then.

125. I prefer the defendant's submission that upon proper analysis, responsibility is more likely to be shared. Naturally, this also has implications for the vicarious liability point that follows.

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[26] Note that I do not go so far as to say that the claimant's firm were obliged to use such systems. But I do think that if (as they say) the claimant's firm's systems permitted one individual permanently to delete materials from files without trace, then effective periodic supervisory / peer-to-peer reviewing of files was all the more important, together with common-sense attention to simple metrics such as how old a case was.

The vicarious liability non-admission

126. Mr Woodhouse observed that this new line of argument had been put for the first time in his learned friend's skeleton; he said that it was opportunistic and inconsistent with the promises of indemnification of the client re costs.[27] It does not feature in any part of the claimant's solicitors three witness statements. Neither, therefore, has the claimant put before the court the terms of any insurance policy nor any indication of position by the claimant's solicitors' insurers. I note that the court has not been referred to any authority concerning vicarious liability, even though this is a matter that has recently been the subject of judicial decision at the highest level.

127. Amongst the many imponderables are whether a future claim might be made against the claimant's firm as first defendant and the fee earner concerned as second defendant, meaning that vicarious liability would not be the only route (subject to means and/or insurance) to an enforceable judgment. But it is unnecessary to speculate about this and other questions because the evidential burden is on the claimant and it is nowhere near discharged.

128. Consistent with the court's decision above on the rogue solicitor point, I accept Mr Woodhouse's submission that the claimant's solicitors have put insufficient evidence or legal argument before the court to cause the court to approach the secondary claim against solicitors as anything other than a routine matter of inevitable liability. I repeat that the evidence before me is predominantly of run-of-the-mill negligence, typical of the pattern this court has seen affecting many other problematic cases. I have accepted Mr Singh's critique of the claimant's firm's supervision of the fee earner concerned, which puts a hole in the vicarious liability non-admission. Even more fundamentally, the main thing that the claimant would sue his solicitors for would be omitting to pay the trial fee and thus causing the strike-out, which all agree was just negligent.

129. In the absence of positive evidence to persuade the court otherwise, the court approaches the matter on the basis that: (i) solicitors who omit to pay court fees on behalf of their clients will be found negligent and (ii) their employers will be vicariously liable for that omission and (iii) solicitors are insured. I reject Mr Barnes' submission that there is any significant risk of the contrary. I also repeat my earlier acceptance of Mr Woodhouse's submission that the firm as a whole bears some responsibility anyway.

130. For the reasons given, on the evidence I do not believe that the court should give a judgment on this application for relief from sanctions that is made significantly different by the rogue solicitor point, nor by the vicarious liability non-admission.

The claimant's submission on efficiency

131. In my judgment, one of the claimant's weaker arguments was that it would be inefficient and costly to let the claim remain struck out, because his pursuit of a second action against his solicitors and/or attempt to relitigate the instant case via fresh proceedings and an application under Section 33 of the Limitation Act would tie up yet more court time and waste

[27] I do not agree with Mr Woodhouse about consistency. It is not inconsistent to seek to avoid an outcome (the application failing) yet to reserve one's position if the primary submission fails. Whether or not the claimant's solicitors tactics are opportunistic is not a matter for me: the court is concerned with merit, not value judgments.

more costs. The claimant argued that this would be contrary to the named factor (a) in CPR 3.9.

132. I reject this approach. It seems to me that it would reverse the wisdom of the rule-makers (concerning the 2013 reforms) and of the Court of Appeal in *Denton*. In the present context, giving particular weight to the named factors means that in appropriate circumstances inefficiently conducted cases may be struck out, or permitted to remain struck out. It does not mean that the court should tolerate inefficiency for fear of causing more inefficiency. The former approach comes with a range of nationwide benefits including deterrence. The latter approach is redolent of the 'bad old days' that led to the 2013 reforms, as noted in *Mitchell* and *Denton*. For my part I cannot see how *Denton* could, or should, be reinterpreted to support this part of the claimant's argument.

The defendant's evidence about insurance

133. The defendant has adduced detailed witness evidence concerning its underwriting, reserve-setting and reinsurance arrangements. Whilst I agree with the defendant's basic point that delay affecting insurance companies[28] is not victimless, I also respectfully agree with Mr Barnes that this detail added little to the application beyond complexity.

134. This is not to say that I find that the grant of relief would cause the defendant no, or even little, prejudice. I do not accept Mr Barnes' submission that prejudice to insurers should be ignored. I think that the best approach to these issues is for the court to give due weight to the general point that, as the higher courts have indicated, prejudice caused by delay takes many forms, includes many hidden costs, and can affect many people and interests, and may easily, though wrongly, be underestimated.

Prejudice

135. I accept Mr Barnes' submission that the claimant is likely to suffer more prejudice should the application fail, than the defendant would if the application succeeds: the claimant is a severely injured individual who would be required to pursue the imperfect remedy of suing his solicitors, with the delay, risk of irrecoverable costs and likely loss of some damages that entails.

136. However, I do accept Mr Woodhouse's submission that the loss of damages component of the prejudice suffered by the claimant is likely to be small; that the exercise of quantification within the secondary claim will be similar to within the primary claim; and that there would be some prejudice caused to others, by the granting of relief. So although I do accept the claimant's submission that his prejudice is worse, the matter is not entirely one-way.

137. In any event, I remind myself that the balance of prejudice is significant but neither (following the 2013 reforms to the Civil Procedure Rules) the starting point on an application for relief, nor a named factor in CPR 3.9, nor therefore one of the two factors that the court should give particular weight to, pursuant to *Denton*, when considering all the circumstances. It remains significant, amongst the circumstances, but it is one of many circumstances.

The defendant's criticisms of the claimant personally

138. I have dealt with this earlier and will not rehearse the same save to say that:

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[28] Amongst others, including the defendant itself.

(a) I dismiss the defendant's criticism concerning the claimant realising something was wrong and/or preparing a witness statement himself;

(b) although the defendant made some valid points concerning some lack of cooperation by the claimant personally, those points have not affected this judgment.

Proportionality

139. In both *Badejo* and in *Cable v Liverpool Victoria* the senior courts emphasised that strike-out must be a proportionate sanction.[29] Understandably, Mr Barnes placed particular reliance on this. I agree, though I would temper my agreement by observing that a correct application of stage 3 of *Denton* ought to produce a just outcome. If a court managed to direct itself to one outcome under stage 3 of *Denton* and a different outcome under proportionality, the discrepancy would probably be an indication that the *Denton* exercise had not been conducted justly and needed revisiting.

140. In *Badejo*, the High Court overturned the Circuit Judge's refusal to reinstate another case that was struck out due to non-payment of a trial fee, holding that the court below had misdirected itself by failing to consider proportionality and that, in all the circumstances, the sanction was disproportionate.

141. The need to consider proportionality is a matter of law but the product of this necessary consideration is fact-specific. In *Badejo* nothing else had gone wrong, the trial fee failure was an isolated breach, the parties were ready for trial and, once the omission to pay had been spotted, had the court listed a quick 30-minute application hearing before the trial (which it did not) the whole problem could have been cured and the trial could have proceeded.

142. In my judgment, although *Badejo* and the instant case both concern omitting to pay a trial fee, when the court considers all the circumstances at stage 3 of *Denton*, they are cases on different parts of the spectrum. The authorities support the proposition that the same breach may receive a worse sanction by reason of an adverse history and/or delay in making the application - not 'must' but 'may.'

143. I accept, and respectfully agree, that in *Badejo* the sanction was disproportionate. As to whether it is proportionate in this case, I conclude matters below.

Decision on Stage 3 of Denton and proportionality

144. I have taken into account all the parties' submissions. The points I found most persuasive in support of the application were that this was a moderately serious breach, the claimant is personally blameless, severely injured, has been let down by solicitors and, if relief is refused, will probably have to pursue a secondary professional negligence claim suffering, overall, more prejudice from such an outcome than the defendant would from the contrary.

145. The points I found most persuasive against the application were that there was delay in making it to the extent that it was filed 11 months after the event, the total delay attributable to

[29] Albeit that, as noted earlier, in *Cable* the Court of Appeal was dealing with whether to impose a strike-out once an abuse of process had been identified, not with whether to reinstate a claim following a valid strike-out. But *Badejo* dealt with the same exercise as the instant case.

the breach (and associated failings) is around 18 months, the accident was 8 years ago, the claimant has made little progress in all that time, and has already had to achieve relief from sanctions previously, when the court held that: 'The claimant's conduct had caused inefficiency and delay. The breach was in a pattern of failure to engage and poor conduct.' It is regrettable that after that occasion, the matter was not only struck out but also the subject of haphazard progress both before and after the strike-out, the latter period even including earnest attempts by the defendant's solicitors to achieve a solution, yet to no avail. The claimant's breaches have together wasted several days of precious court time and associated administrative resources. The fee earner concerned was not a sole practitioner and the claimant's solicitors' firm as a whole bears some responsibility.

146. I have taken into account the parties' other points also, giving them some weight in aggregate, even if not so much individually as the ones briefly recited above.

147. I have reminded myself of the ratio of *Denton* and have given particular weight to the need for litigation to be conducted efficiently and at proportionate cost; and for the court to enforce compliance with rules, practice directions and orders.

148. In all the circumstances, I prefer the submissions of the defendant under stage 3 of *Denton*. The claim should never have reached this state but having done so, it is just that it remains struck out.

149. Although this was a disproportionate outcome in *Badejo*, in my judgment it is proportionate in this case, for the same reasons considered within stage 3. The claimant's own submissions concerning the 'last chance saloon' amounted to a sensible recognition that it would be proportionate for the matter to be struck out on any future significant breach, by reason of its pre- and post-strike-out history. I agree with that but I go further and prefer the defendant's submission that it is already proportionate now.

Judgment

150. For the reasons given, the claimant's application for reinstatement and relief from sanctions is dismissed and therefore the claim remains struck out.

Formalities

151. This is a written approved judgment, handed down after circulation of a draft to the parties' legal representatives pursuant to Practice Direction 40E.

152. A separate order of today's date gives effect to the court's decision.