



Neutral Citation Number: [2023] EWCA Civ 1417

Case No: CA-2022-000940

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
HIS HONOUR JUDGE LETHEM
AND ON APPEAL FROM THE COUNTY COURT AT WILLESDEN
DEPUTY DISTRICT JUDGE MCKENZIE
Case No D23YM240

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/11/2023

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE ARNOLD
and
LADY JUSTICE ANDREWS

Between :

JASON FLEMING
- and -
ZURICH INSURANCE PLC

Appellant

Respondent

Ian Denham (instructed by **Advocate**) for the **Appellant**
Paul F McGrath (instructed by **Kennedys Law**) for the **Respondent**

Hearing date: 9 November 2023

Approved Judgment

This judgment was handed down remotely at 10.00am on 28th November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews:

Introduction

1. This is a second appeal against a case management decision made by Deputy District Judge McKenzie (“the DDJ”) on 6 January 2021 refusing an application by the Claimant, Mr Jason Fleming, to increase the value of his claim for damages for personal injury. Permission to appeal against the DDJ’s order was granted on 14 January 2022. Following a hearing on 1 March 2022, HH Judge Lethem dismissed the appeal.
2. Since October 2018, when his former solicitors came off the record, the Claimant, who has some learning difficulties, has mainly been acting in person, with the assistance of his uncle Leander Fleming acting as his “McKenzie friend”. Although Mr Leander Fleming’s desire to help his nephew is laudable, his involvement has not always been helpful. For example, his lengthy written documents have displayed a tendency to accuse others of bad faith or dishonesty without justification. If he is to play a role in future, he will have to respect the boundaries that apply to what a McKenzie friend can properly do.
3. Prior to the hearing of this appeal, Mr Leander Fleming applied for permission to conduct litigation on behalf of the Claimant, and to address the Court of Appeal at the hearing. It became unnecessary for us to determine that application, because as a result of the directions given by Whipple LJ at the time when she granted permission to appeal, the Claimant approached Advocate and they instructed counsel, Mr Denham, to argue the appeal on his behalf. Mr Denham told the court that he had been able to take instructions from the Claimant in conference, and that he had no concerns about the Claimant’s capacity to give him those instructions.
4. The court is grateful to Advocate for the invaluable service they provide, and to Mr Denham and to Mr McGrath, counsel for the Defendant, for their helpful written and oral submissions.
5. Although two of the three grounds on which permission to appeal was granted related specifically to Judge Lethem’s decision, and the reasoning that he deployed in dismissing the first appeal, the issue at the heart of this case is whether the DDJ properly exercised his discretion to refuse the application. Ground 3, which directly addresses that question, is that the DDJ failed properly to take into account material factors, namely, that the Claimant had already been granted permission to serve a second expert report from a consultant orthopaedic surgeon, Mr Osei, and an amended Schedule of Loss, and the consequences that would flow from the service of those documents. If the Claimant is right about that, the discretion would not have been properly exercised, and in principle that would provide a compelling reason for this court to overturn the DDJ’s decision. Understandably, therefore, that was the issue upon which both counsel focused in their oral submissions.
6. In order to evaluate the merits of that criticism, and to put the application into its proper context, it is necessary to set out something of the history of the claim.

Background

7. The Claimant, who was born in June 1973, was involved in a car accident on 20 July 2014. He was driving along the main road, when a vehicle pulled out from a parking space to his right, and drove into the offside of his car. The Defendant is the insurer of the driver of that other vehicle.
8. At the time of the accident, the Claimant was self-employed, principally as a mobile car valet, but also as a painter and decorator. His case is that he worked full-time for approximately 70 hours per week. His work involved having to lift heavy items, such as large containers of water.
9. The claim was received on 13 July 2017, a week before the limitation period expired, though the claim form was not issued until 2 August 2017. Particulars of Claim, to which the original Schedule of Loss was annexed, were served on or around 29 November 2017. The Particulars of Claim stated that the Claimant suffered injuries to his neck, shoulder and lower back, and had ongoing pain and discomfort that would require further review. In support of his claim, he sought to rely on a medical report from a Dr Mirza dated 6 October 2016, a copy of which was appended.
10. Dr Mirza's report, based on her examination of the Claimant on the same date, supported a modest claim for soft tissue injuries to the lower back, and some anxiety, which she expected to fully resolve within 6 months from the date of her report, i.e. by April 2017, around 2 years and 9 months after the accident. On the face of it, therefore, this appeared to be a straightforward "whiplash injury" claim.
11. Although the symptoms had not in fact resolved by the time that the claim form was issued, which was almost 3 months after the date when Dr Mirza expected them to have done so, the Claimant claimed damages limited to £10,000, to include general damages for pain, suffering and loss of amenity in excess of £1,000.
12. CPR 16.4.2 requires, in a personal injury claim, the service of a "schedule of details of any past and future expenses and losses" which the claimant claims. The original Schedule of Loss specified various heads of special damage, namely, treatment (physiotherapy), the Claimant's insurance policy excess, and medication and other general expenses, totalling £855.
13. Dr Mirza's report noted that the Claimant had taken time off work in the aftermath of the accident, returning to work after around 6 weeks. She stated that he was able to return to normal duties, but his hours of work were reduced by around 40 hours per week (i.e. to 30 hours per week) until he returned to full-time work after around another 6 weeks. However, although the Claimant was legally represented at the time when proceedings were issued, no claim for loss of earnings over that 12-week period was made at that stage. There has been no explanation for this.
14. The Defence was served on 14 February 2018. Whilst this formally denies liability, the DDJ and Judge Lethem were told that the Defendant will not be advancing a positive case on liability, but will be contesting causation and quantum. That was confirmed by Mr McGrath at the hearing of this appeal.

15. By order of DDJ Goodman, dated 25 April 2018, the case was allocated to the fast track, and standard directions were given to a trial date of 24 January 2019. Those directions included, in paragraph 6, a direction that by 4pm on 13 August 2019 the Claimant must send an up-to-date Schedule of Loss to the Defendant. Whilst we do not have a copy of that Schedule, it can be inferred that this direction was complied with, because the Defendant's original Counter-Schedule dated 21 August 2018 reflects a claim for a slightly higher figure for the treatment received by the Claimant, but no change in the quantum of the other heads of special damage.
16. The Claimant's former solicitors then commissioned a further report from Dr Mirza which sought her views on the Claimant's medical records, which referred to other accidents he had suffered (including one which had occurred only a few months before the index accident, and which he had not previously mentioned to her). In her addendum report dated 26 September 2018, Dr Mirza stood by her opinion as to the cause of the Claimant's lower back pain and by the prognosis given in her earlier report, but noted that:

“as his back symptoms are ongoing beyond the prognosis given in the report dated 06.10.16, I would recommend a medico legal report from a Consultant Orthopaedic Surgeon to comment on the prognosis and the extent to which these symptoms relate to the accident on 20.07.14.”
- Not long afterwards, on 5 October 2018, the solicitors ceased to act for the Claimant.
17. On 23 December 2018 the Claimant, acting in person, applied to the court for permission to rely upon Dr Mirza's addendum report and to obtain a report from an orthopaedic surgeon, as she had recommended. Although there had been some prior correspondence on the subject between Mr Leander Fleming and the Defendant's solicitors in November 2018, it appears that this application contains the first formal indication that the Claimant might wish to make a claim for loss of earnings, whether past or future. Permission was sought for service of an “updated schedule of loss, to include losses of income [during] past incorrect prognosis period and future losses due to impaired earnings capacity”. In a lengthy letter to the court written by Mr Leander Fleming on the same date, an adjournment of the trial was also sought.
18. The Claimant's applications were listed to be heard on the date on which the case had been listed for trial, 24 January 2019. In the event, as recorded in an order made by Employment Judge Glennie (sitting as a DJ) on 24 January 2019, there was no judge with sufficient time available on that date to hear either the Claimant's application to adjourn the trial or the trial itself. There was also at that stage an issue concerning the capacity of the Claimant to conduct litigation. The claim was stayed until after an assessment of his capacity could be obtained from an identified consultant, and the matter was listed for further directions on 25 October 2019.
19. By the time of that hearing before DJ Kumrai, it had been determined that the Claimant did have capacity, and he had instructed counsel, Mr Maitland-Jones, to represent him (on a direct access basis). The DJ ordered disclosure of the Claimant's medical records and of his accounts, and permission was granted to rely upon the addendum report of Dr Mirza. Pausing there, the Claimant's accounts could only have been relevant to the putative claim for loss of earnings which had been intimated.

However a claim for ongoing and future losses of that nature could not be pleaded unless it was supported by medico-legal evidence. The key issue in that regard was whether the Claimant's continuing symptoms (if proven) were attributable to the index accident or to some other cause. Permission was given to rely on a report from a consultant orthopaedic surgeon, provided that it was filed and served by 4pm on 2 January 2020. Further directions were given, with a view to the trial now taking place on 15 October 2020.

20. Mr Nana Osei FRCS, a consultant orthopaedic surgeon, examined the Claimant on 5 and 10 December 2019, and provided his first report on 2 January 2020. It appears that the report was served on the same day, in compliance with DJ Kumrai's order. Mr Osei took the view that the injuries affected the Claimant's capacity for immediate work. The Claimant told him that he had not returned to his pre-accident level of working because of his injuries. Mr Osei said that in his view the decision to be selective in his work was likely to be reasonable, and gave reasons. However, as regards the cause of the ongoing symptoms, Mr Osei's report was inconclusive, pending the provision to him of further information. Among other matters, he recommended MRI scans of the cervical spine and the thoracic spine. He gave the Claimant a provisional prognosis of 24 months attributable to the accident under review, but reserved his opinion as to the attribution of any symptoms beyond that period until he had reviewed the MRI results, the results of nerve conduction studies, and other medical records. As the DDJ remarked in his judgment at paragraph 6, Mr Osei's first report "did not assist the Claimant very far".
21. Following service of Mr Osei's first report, both parties put questions to him pursuant to CPR Part 35, and he answered them. The DDJ accurately described the questions put by Mr Leander Fleming to Mr Osei as "horrendously detailed".
22. The timetable was then further disrupted by the Covid-19 pandemic. On 30 April 2020, DJ Kanwar made an order by consent staying the claim until 1 July 2020. Among the directions that he gave were a direction that an updated report of Mr Osei be served by no later than 1 July, and that an updated Schedule of Loss be filed and served by no later than 17 July 2020. The trial date was rescheduled for 14 January 2021.
23. Ensuing correspondence between the parties indicates that Mr Osei was able to provide a provisional addendum report based on certain test results which he had seen, but he could not finalise his addendum report without sight of the MRI scans. These scans had been carried out at the Defendant's expense, but there were problems in obtaining an operative password from the relevant medical agency which would enable Mr Osei to gain access to the images.
24. In the course of that correspondence, the Defendant's solicitors made it clear that if Mr Osei were to recommend any further tests or expert evidence following review of the MRI scans and the parties' questions, the Claimant would need to seek permission to adduce that further evidence. They also reminded Mr Leander Fleming on a number of occasions that the claim as currently pleaded was limited to a value of £10,000, and that if the Claimant considered the claim to be worth in excess of the pleaded amount, it was likely that an application would need to be made to increase the pleaded value.

25. On 28 July 2020, the Defendant agreed to an extension of time for service of Mr Osei's updated report to 26 August, and time for service of an updated Schedule of Loss to 11 September 2020. Prior to the expiry of those deadlines, on 13 August 2020 the Claimant made an application for an extension of time for service of Mr Osei's addendum report, and permission to obtain reports from two other experts, a psychologist and a neurosurgeon. On 1 September 2020 the Defendant agreed to a final extension of time for service of Mr Osei's report to 4pm on 11 September. On 9 September 2020, the Claimant issued a further application seeking the Court's permission to rely upon the addendum report of Mr Osei. Both the Claimant's applications were listed for a remote hearing by telephone on 30 September.
26. Meanwhile, the Claimant served an updated Schedule of Loss which included, for the first time, a claim for loss of earnings, comprising some £26,000 for past losses, and further very substantial sums for future losses, in a range of between around £230,000 and around £472,000 (reached by alternative methods of calculation set out in the Schedule). This document, which appears to have been composed either by the Claimant with the assistance of Mr Leander Fleming or by the latter alone, bears the date 14 August 2020 on its first page, but was signed by the Claimant on 11 September 2020.
27. Mr Osei's addendum report is also dated 11 September 2020, but the updated Schedule of Loss appears to have been prepared without sight of it, albeit in anticipation of what it was likely to say. The precise date on which the Schedule of Loss was served on the Defendant is unclear, but it appears to have been either on 11 September itself or very shortly afterwards. Both counsel confirmed to us that Mr Osei's report was served within the deadline set in the final extension of time agreed to by the Defendant's solicitors.
28. An updated Counter-Schedule, settled by Mr McGrath, was served by the Defendant on 25 September 2020, which specifically addressed the newly introduced head of damages for loss of earnings. It put the Claimant to proof in respect of his claims for the first six weeks after the accident and subsequent six weeks. The balance of the claim for loss of past earnings was denied, as it was alleged that "the contentions [including that the Claimant is at reduced physical capacity] are not based on any evidence whatsoever". The Defendant therefore plainly did not regard Mr Osei's first report as providing sufficient supporting evidence for the claim for ongoing loss, contrary to Mr McGrath's submission to us (and to the courts below) that it could and should have been pleaded sooner.
29. As regards the claim for loss of future earnings, the Defendant described it as "entirely speculative and without evidence to support it." The Counter-Schedule goes on to say that "even if there were some medical basis upon which to plead this claim (which is denied) the sums claimed are plainly excessive and exaggerated." At that stage, therefore, the Defendant was formally taking the stance, which it was entitled to take, that permission had not yet been granted for the Claimant to rely on Mr Osei's addendum report. It was also specifically noted in the Counter-Schedule that "the claim made dwarves the Fast Track and the stated claim value" – a further indication to the Claimant that he needed to seek the court's permission to increase the value of the claim.

30. In the addendum report, Mr Osei considered the MRI scans which he had requested, which he explained were not provided to him in a timely fashion and which he only managed to access via a working password on 28 August 2020. Having done so, he said it was apparent that the Claimant's spine was now kyphotic, i.e. convex posteriorly when viewed from the side, instead of being lordotic, i.e. concave posteriorly (as the normal spine is) or straight (as some spines are). He specifically drew attention to the fact that the Claimant's lumbar spine had appeared straight on a 2017 MRI scan, and it had now become more convex. He said that the 2020 scan fully accounted for the delay in presentation and the lack of MRI evidence of impingement in 2017.
31. Mr Osei's opinion was that this loss of lordosis in the lumbar spine may progress and result in further back and leg pain, and that it was more likely than not to be a permanent condition which would not spontaneously resolve. Importantly, he said he would attribute the reversal of the lordosis to have either been caused by, or accelerated by, the accident under review (though he did not indicate a preference between those two scenarios, nor indicate any timescale by which the condition might have been accelerated). He was satisfied that it was more likely than not that the Claimant was experiencing a lumbar radiculopathy that will affect multiple lumbar nerve roots.
32. However, Mr Osei did not attribute to the accident certain other symptoms experienced by the Claimant, particularly ongoing pain in his upper limbs. He said the kyphosis seen in the cervical spine appeared to be within acceptable limits, and there was no nerve root impingement seen on the images provided, to account for the upper limb symptoms. His only caveat was that this view might change upon provision of further dynamic MRI imagery.
33. Although the Claimant did not attend the remote hearing on 30 September 2020 (for reasons it is unnecessary to explore) DJ Kumrai granted him permission to rely upon Mr Osei's addendum report. He refused the application to rely on expert evidence of a neurosurgeon and psychologist. That refusal was understandable in the light of Mr Osei's view that he had no reason to question the results of the neurophysiology tests that had already been carried out on the Claimant, and his responses to the CPR Part 35 questions. Mr McGrath, who was present at the hearing, confirmed that the DJ either had sight of the updated Schedule of Loss at that time, or was told about it by Mr McGrath.
34. In consequence of that order, the Claimant had now been expressly permitted to rely upon an expert report which indicated that, contrary to the expectation of the original treating physician, Dr Mirza, this accident had led to long-term physical symptoms, including lower back pain, which would not resolve, and which the Claimant had told the consultant adversely affected his ability to work (as he was unable to carry heavy objects). As Judge Lethem put it, "there was a significant change both in diagnosis and prognosis with that second report from Mr Osei."
35. The Defendant and the DJ both appreciated that in order to regularise the position, it was necessary for the Claimant to make a formal application to increase the value of his claim beyond the current £10,000 limit, so as to enable him to pursue the new head of damages for loss of earnings which had been introduced in his updated Schedule of Loss. That would require an amendment to the claim form (to increase

the value of the claim) and to paragraphs 7 and 8 of the Particulars of Claim (to reflect the updated medical evidence of Mr Osei and to cross-refer to the updated Schedule of Loss). If the Claimant had been legally represented, his solicitors would undoubtedly have known about this requirement. However, despite the fact that the Defendant's solicitors had already pointed it out on a number of occasions in correspondence with Mr Leander Fleming, and hinted at it in the revised Counter-Schedule, it is far from clear that the Claimant appreciated the necessity to make such an application.

36. It appears that on 30 September 2020, either of his own motion or prompted by concerns expressed by the Defendant, the DJ decided to ensure that the matter was addressed, by making a specific direction about it. The DJ scheduled a further case management hearing for 3 November 2020 and reserved the matter to himself. Paragraph 4 of his order was in these terms:

“Any application to amend the claim or to increase the amount of the claim must be made no later than 4pm on 23 October 2020.”

37. That deadline was extended by 7 days at the hearing on 3 November, when both parties were represented by counsel. Mr Maitland-Jones explained to DJ Kumrai that the Claimant did not receive the order of 30 September 2020 and only became aware of the hearing in consequence of correspondence between the Defendant's solicitors and Mr Leander Fleming. The DJ gave directions that if the Claimant was seeking permission to amend his claim form and particulars of claim to lift the value of his claim, he was to serve and file an application notice supported by evidence by 4pm on 10 November 2020. The order made it clear that if that application was not made by that deadline, the claim would remain on the Fast Track with a limitation on the claim value of £10,000 and the trial would go ahead as planned on 14 January 2021. Moreover, in such event, the updated Schedule of Loss would be deemed struck out without further notice.
38. The Claimant complied with those directions and issued the application for permission to increase the value of his claim within that extended deadline. The application was supported by witness statements from the Claimant and his father, and from Mr Leander Fleming. There was then a telephone hearing before DJ Kumrai on 1 December 2020 at which Mr Maitland-Jones was unable to appear because of a prior professional commitment. The DJ gave the Claimant permission to proceed with his application to amend the value of the claim. He directed the application to be listed for a hearing on 6 January 2021 (exactly one week before the listed trial date) and gave further directions for the service of skeleton arguments and preparation of bundles. On that occasion the DJ also expressly dispensed with the need for the Claimant to file a draft amended claim form and amended Particulars of Claim.
39. So it was that the application came before the DDJ on 6 January 2021. The Claimant was once again represented by Mr Maitland-Jones; the application was opposed by Mr McGrath on behalf of the Defendant.
40. Significantly, it was no part of the Defendant's case that the application to increase the value of the claim was not made out on the medical and factual evidence. Its

complaint focused upon the lateness of the application and the impact on the trial date were it to be granted.

The Judgment of the DDJ

41. We have read the transcript of the DDJ's short oral judgment. As Judge Lethem said, this was the decision of a DDJ in part of a busy county court list. The available time in which to deliver the judgment was necessarily limited. I agree with Judge Lethem that it is unrealistic to expect the refinement of a polished, reserved judgment in a judgment delivered *ex tempore* immediately after the conclusion of counsel's submissions. I take those practical considerations into account. I also agree with Judge Lethem that it is evident from his judgment that the DDJ had a "round consideration of the background to the case".
42. As the DDJ noted, this was a late application being made to increase the value of the claim very significantly, from £10,000 to almost £500,000, a week before trial. Some 6½ years had passed since the accident. The claim had been issued almost at the end of the limitation period. It had been managed on the fast track for almost 4 years. Two trial dates had already been lost. The DDJ was understandably critical of the amount of paper that Mr Leander Fleming's involvement had generated, and of the disproportionate amount of court time that had been spent on the case thus far. He was acutely conscious of the practical impact of allowing the application. The amended claim would have to be transferred to the multi-track, the Claimant would have to pay an increased fee, and further case management directions would be inevitable. The case would take on a very different complexion.
43. Considering the updated Schedule of Loss, the DDJ also referred to "a very vague and triumvirate collection of alternative bases for future loss of earnings based upon the revised prognosis of Mr Osei". However, he did not suggest that the claim for loss of earnings was unarguable or exaggerated, nor that the medico-legal evidence failed to support it. His primary reason for refusing the application to increase the value of the claim was that it would prejudice the trial date. He said that there would be "huge prejudice" to the Defendant in vacating the trial because the case would effectively have to start again if the value were increased.
44. As Judge Lethem recognised, it is not possible to extract from the judgment any specific paragraph or sentence in which the DDJ counterbalances his consideration of the prejudice to the Defendant that he identified, with the prejudice to the Claimant of refusing the amendment. Judge Lethem took the view that, whilst it could perhaps have been more clearly articulated, it was possible to see from the judgment taken as a whole that the DDJ knew that this was a claim approaching £500,000 and that his decision would have the effect of closing that door in the face of the Claimant. That is fair comment, so far as it goes. I am less sanguine about being able to infer from his reasons that the DDJ truly grappled with the point made by Mr Maitland-Jones that if one proceeded on the assumption that the increase was justified by the evidence (a point which the Defendant did not challenge) there was a danger of a very great injustice to the Claimant in restricting him to only 2% of the potential value of his claim.

Discussion

45. Mr McGrath referred us to a line of authorities about the approach that an appellate court should take when reviewing a case management decision of this nature. He relied in particular on the observations in *Jalla v Shell International Trading and Shipping Co Ltd* [2021] EWCA Civ 1559 at [27] and [28], quoted by Judge Lethem at paragraph 15 of his judgment, which repeat the salutary warnings given in previous decisions of this court. These are to the effect that the Court of Appeal should not shrink from upholding robust case management decisions even if they have a significant impact on proceedings. A litigant who wishes to disturb such a decision on appeal faces the high hurdle of persuading the appellate court that the judge below had regard to a factor that was irrelevant, failed to have regard to a factor that was relevant, or reached an irrational decision.
46. Mr McGrath also reminded us that litigants in person are as much obliged to abide by the rules of court as any other litigant; were it otherwise, litigation could not be conducted efficiently and at proportionate cost. None of this was controversial. Moreover, as Mr Denham frankly accepted, the proposed amendment was very late, and thus also subject to the guidance given by Carr J (as she then was) in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) at [38].
47. In this case, after properly taking those legal principles into account and on a careful and detailed consideration of the DDJ's judgment, Judge Lethem concluded that the DDJ had in his mind the relevant matters, and that the decision fell firmly within the generous ambit of discretion afforded to him. However, for the reasons set out below, I respectfully disagree with that conclusion.
48. I have considerable sympathy with some of the sentiments expressed by the DDJ. I understand his obvious frustration that a claim emanating from a minor road traffic accident in 2014 had not yet come to trial by 2021. There had been a depressing litigation history. Yet up to the point at which on 3 November 2020 DJ Kumrai permitted the application to increase the value of the claim to proceed to a hearing, which inevitably was going to take place very shortly before the trial date, there was nothing for which the Claimant could fairly be castigated. He had, by one means or another, complied with the court's directions, and if he had been late in doing what he was supposed to do, the delay had been forgiven.
49. In fairness to the DDJ and to Judge Lethem, the argument presented to them was also clouded to some extent by a misconceived attempt by the Claimant to rely on CPR rule 16.3(7). That rule provides that the statement of value in the claim form does not limit the power of the court to give judgment for the amount which it finds the claimant is entitled to. It was argued in the courts below that the trial judge therefore had the power to award the Claimant damages in excess of £10,000 on the basis of the already admitted medical evidence, irrespective of whether the application to amend the value succeeded. But as Judge Lethem rightly held, that rule cannot be used as a bypass to circumnavigate the provisions of Rule 16.3 and 16.4.
50. Rule 16.3(7) simply means that the court is not prevented from giving judgment for a larger sum than specified in the claim form where that is justified by the evidence; it does not relieve the claimant of the obligation to plead all heads of loss claimed. For example, the trial judge might award more than £10,000 for pain, suffering or loss of

amenity in a case where the evidence justified such an award, even if the claim had been capped at £10,000. The Claimant undoubtedly required the court's permission to increase the value of his claim, by making the necessary amendments to his claim form and Particulars of Claim, though as Mr Denham submitted, that was the final step necessary to regularise what had already been permitted.

51. Even if a claim for 2 years' loss of past earnings could have been successfully introduced at an earlier juncture, there can be no doubt that until Mr Osei's addendum report, there was no medico-legal evidence to support a six-figure claim for future loss of earnings based upon a radically different prognosis from that of Dr Mirza and from the provisional prognosis of Mr Osei himself. The lordosis of the lumbar spine and its consequences had not been apparent until then. The claim for a straightforward whiplash injury had been transformed into a claim for permanent damage, with many attendant complexities.
52. The nearest one gets to an acknowledgment by the DDJ of the seismic change brought about by Mr Osei's second report is the laconic remark that "there is an amendment to the prognosis" coupled with statements elsewhere in the judgment that the claim being formulated was a half a million pound claim and the recognition of how, in practical terms, that claim would have to be managed on the multi-track going forward.
53. Mr McGrath's submission to the DDJ, repeated before Judge Lethem, was that:

"it was clear from the way that Mr Leander Fleming has engaged with Mr Osei and the court that the Claimant has been of the view for some time that the injuries were having a long-term effect, and that the Claimant's expectation was that the claim was worth considerably more than £10,000."

Echoing this, immediately after observing that the prognosis had changed, the DDJ said:

"but the claimant has throughout this claim indicated a desire to claim over and above the minor whiplash from 2014 and if he wishes to do so, then the pleadings have to be amended, the claim would have to be revalued."

54. Judge Lethem, in paragraph 28 of his judgment, concluded that by this remark the DJ was endorsing the concerns articulated by Mr McGrath about the lateness of the application, bearing in mind "the conversations with Mr Osei in December 2019 and the Amended Schedule of Loss in August 2020". But whatever the wishes or expectations of the Claimant and his uncle may have been, without the medical evidence to support them, they could not advance such a claim. The DDJ seems to have accepted that Mr Osei's first report would not have sufficed. It appears to be implicit in his reasoning that he thought that the Claimant could and should have obtained the seminal addendum report from Mr Osei earlier than he did (see paragraph 15 of his judgment) and/or made the application to increase the value of his claim much sooner. Otherwise his criticism of the lateness of the application makes no sense. Indeed one gets the impression from reading the judgment as a whole that

the DDJ was laying the delay in progressing the claim to trial entirely at the Claimant's door.

55. If and to the extent that the DDJ was criticising the Claimant for failing to obtain Mr Osei's addendum report sooner, I do not regard that criticism as fair. In the light of the problems Mr Osei experienced with gaining access to the MRI scans, the Claimant did well to obtain the addendum report on 11 September 2020, and in any event the Defendant had agreed to an extension of time for serving it (a point which was not mentioned by the DDJ).
56. As regards the timing of the application, the fact is that from late 2018 onwards the Defendant was on notice of the possibility that a claim for loss of future earnings might be introduced, depending upon the views of an expert orthopaedic consultant who had been instructed by the Claimant with the permission of the court. That consultant examined the Claimant but then made it clear that he was unable to express a final view on the crucial issue of causation of his ongoing symptoms without seeing the MRI scans and other test results. He first expressed his final view in a formal expert report which the Claimant could not have seen until 11 September 2020. The Claimant was in no way responsible for the time it took to obtain that report.
57. The Defendant also knew that medical evidence to support such a claim was essential, as illustrated by the points made in its own Counter-Schedule which was served before permission was granted by the court to rely on Mr Osei's addendum report. Without that report, the updated Schedule of Loss was vulnerable to being struck out. On any view, it was reasonable to wait for the addendum report before making any application to uplift the value of the claim so substantially. In the meantime, disclosure of the Claimant's accounts had been sought and obtained.
58. Mr McGrath submitted that even taking account of all those matters, the Claimant could and should have made his application to increase the value of the claim when he received the addendum report of Mr Osei on 11 September 2020. However, Mr McGrath very fairly accepted that if that had happened, and even if the application had been heard with the rest of the Claimant's applications on 30 September or 3 November 2020, there was still no prospect of holding the trial date if it were granted. Indeed, that much is implicit from the directions given by DJ Kumrai at the case management hearing on 3 November 2020. It was also one of the submissions made by Mr Maitland-Jones in the courts below.
59. It seems to me, therefore, that the crucial question is whether, when he made the decision to refuse the application, the DDJ properly took stock of the following facts: (a) that Mr Osei's addendum report had brought about a seismic change in the nature of this claim for personal injury, which could not have been advanced on the current basis without it; (b) in reality, once that evidence and the amended Schedule of Loss were admitted and permitted, as they already had been, the application to uplift the value was simply a means of regularising the way in which the claim was now being advanced; and (c) even if the application for permission to rely on Mr Osei's addendum report had been accompanied by an application to amend the pleadings and increase the value of the claim, the trial date would still have been lost if the applications succeeded.

60. I can find nothing in the DDJ's judgment to indicate that he took those crucial factors into account and weighed them in the balance. In paragraph 16 of his judgment Judge Lethem approached the judgment on the premise that "where a factor was mentioned it is safe to assume that the judge has taken into account the implications of that fact." That may be so in some cases, but that assumption cannot be made safely in this one. In fact the DDJ's reasoning indicates to me that he did not take into account the implications of the changes brought about by Mr Osei's addendum report. Even on the most generous reading of his judgment, and making full allowance for the pressures of time and a heavy list, there is nothing which records, let alone addresses, Mr Maitland-Jones's key argument that his client could not have made the application to increase the value of his claim to almost half a million pounds until he received that report, and that any delay in making the application for which the Claimant might be held responsible from September to November 2020 was of little or no effect in the overall scheme of things.
61. Nor did the DDJ say anything to suggest that he appreciated that, however soon the application to amend was made, the consequence of allowing it would inevitably have been the loss of the trial date. If he had appreciated that the trial date could not have been saved by making the application at the earliest practicable opportunity, he could not have regarded the loss of the trial date as justification for refusing the application.

Conclusion

62. For those reasons I consider that the DDJ did fall into error. If he had properly taken those factors into account and weighed them in the balance with the prejudice to the Claimant of refusing the application, and the prejudice to the Defendant of allowing it, he could not have reached the conclusion that he did. I would therefore allow this appeal. Both counsel indicated that were the court to reach that conclusion, we should exercise the discretion ourselves. I would allow the application to increase the value of the claim. It accords with the overriding objective that the Claimant, who cannot be blamed for the delay in obtaining the key medical evidence from Mr Osei, should be allowed to advance his claim on the basis indicated in the updated Schedule of Loss and supported by Mr Osei's addendum report.
63. The prejudice to the Defendant caused by the loss of the trial date and the seismic change in nature and value of the claim is regrettable but inevitable. It is not unknown for a claim for personal injuries to develop in an unexpected way, and for the initial prognosis to be overtaken by a more pessimistic (or sometimes a more optimistic) one. If, as in this case, the claimant is not responsible for the delays in obtaining further medical evidence which he has been given permission to obtain, then in principle when that evidence is supportive of an increased claim, he ought to be allowed to seek what he considers to be the full extent of his true loss, and be not artificially limited to a lower sum which was claimed on the basis of a different diagnosis and a different prognosis.
64. It does not follow from this, of course, that the claim will succeed. We are not concerned with the underlying merits. Once the necessary amendments have been made, the claim will undoubtedly need further case management. I would also very much hope that the Claimant can obtain legal representation going forward. It is quite normal for experienced personal injury lawyers to work on a CFA. A case of this

complexity will be extremely difficult for a litigant in person to progress, and however well-intentioned, Mr Leander Fleming cannot take the place of a solicitor.

Lord Justice Arnold:

65. I agree.

Lord Justice Peter Jackson:

66. I also agree.