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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
[2024] EWHC 1351 (KB)



No. KA-2024-000038

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 2 May 2024

Before:

MRS JUSTICE COLLINS RICE

B E T W E E N :

EMILIA IDZIAK

- and -

MERLIN ENTERTAINMENTS PLC

Defendant

MR W CHAPMAN appeared on behalf of the Claimant.

MR H LAMBERT appeared on behalf of the Defendant.

J U D G M E N T

MRS JUSTICE COLLINS RICE:

Introduction

- 1 This is the Claimant's application for permission to appeal, and the Defendant's cross application for permission to appeal, certain provisions in an order of HHJ Maloney, dated 1 and 7 March 2024, dealing with amendment of the Claimant's pleadings.
- 2 These matters come before me on a rolled-up basis, that is, to consider the applications for permission to appeal along with, if appropriate, each appeal on its merits.
- 3 This is, at least in part, because, with the pleading of the claim still in issue, the trial of this matter is listed to commence next week, that is to say in a few days' time.

Background

- 4 There has already been considerable litigation history over what is, on the face of it, a relatively modest claim for damages for whiplash injuries said to have been sustained on a fairground roller coaster ride in August 2016.
- 5 The claim, or originally pleaded, outlined a factual basis to the effect that an accident had occurred: the Claimant's car on the fairground ride had proceeded at excessive speed before '*it suddenly came to a halt*', leaving the Claimant trapped in the car at height, from which predicament she had had to be rescued.
- 6 The claim alleged and particularised causative negligence in a number of respects. These included that the Defendant had failed in general to operate the ride with reasonable care and skill; had caused a foreseeable risk of injury; and had caused or permitted the ride to operate with faulty brakes and with a known overspeed problem. The claim pleaded that as a result of this accident the Claimant had been caused particularised pain, injury, loss and damage.
- 7 The defence as pleaded denied the brakes were faulty, admitted limited car overspeed and denied negligence and causation. As to what it described as the "*emergency stop*", it put the Claimant to proof as to "*the cause of the emergency stop*" and pleaded a factual basis as follows:

"The Emergency Stop is designed to, and does, occur in a slow and controlled fashion and the g-forces to which a passenger is exposed on Dragon's Fury [the ride in question] are within acceptable limits. Indeed, the ride is designed to *guard against injury to passengers by rapid deceleration of the device during emergency stopping or as the result of any failure*. [That is a quotation from an HSEC report.] It is therefore denied that it is possible to be injured by reason of a 'normal' emergency stop."

- 8 The defence put the Claimant to proof as to any injury and loss and as to their cause.
- 9 The claim went to trial in the County Court at Cambridge on 14 June 2022. Judgment was entered for the Claimant and damages assessed and awarded for reasons given in an *ex tempore* judgment.
- 10 That decision was appealed by the Defendant. Jacobs J, having heard the appeal, handed down a careful and detailed reserved judgment on 28 June 2023, in which he gave his reasons for allowing the appeal. These centred principally on failures of reasoning in the *ex*

tempore judgment. It had not adequately explained why the Claimant succeeded and the Defendant failed.

- 11 In the first place, the Appeal Judge considered there to be inconsistency between the Trial Judge's acceptance of witness evidence that there was an error in the recording of the car's speed (because the external speed sensors had been placed too close together) and a finding that material and causative overspeed was nevertheless established. He considered that was a sufficient ground in itself for allowing the appeal.
- 12 The Judge also allowed the appeal on a further ground. This had to do with the operation of the braking system on the ride. It had been the oral evidence of a defence witness at trial that there had been a defect in the airline to the brake – the airline was “*blown*”. The Trial Judge recorded the witness as saying that this was “*related to the stoppage experienced by the claimant*”. The witness had described the blown airline as the main contributing factor to the emergency stop. This had not appeared in the witness's written evidence, nor in the pleaded defence.
- 13 The Appeal Judge considered this significant for the trial because it raised a causation issue potentially helpful to the Defendant. If the cause of the stop was the brake airline rather than any overspeed issue, then as the Claimant's case had been developed at trial it had not addressed this as a specific head of negligence.
- 14 The Appeal Judge considered that the Trial Judge had failed to deal with this issue altogether; that the judgment accordingly did not enable the Defendant to know “*why they lost on this point*”; and that “*the recorder needed to deal with the point and make relevant factual findings*”.
- 15 Jacobs J ordered a retrial of the claim in its entirety.
- 16 A CCMC was held in preparation for the retrial on 6 October 2023 before HHJ Walden-Smith sitting in the County Court at Cambridge. Among other things, she ordered, at para.6 of her order dated 12 and 19 October 2023, that “*the claimant shall, if so advised, find and serve any application to rely on amended particulars of claim, no later than 4 p.m. on 3 November 2023*” and “*the defendant shall, if so advised, file and serve any application to amend its defence no later than 4 p.m. on 1 December 2023*”. The parties served applications to amend their pleadings accordingly. The trial date itself was fixed shortly afterwards for three days beginning on 8 May 2024.
- 17 The hearing of the applications to amend was fixed for 12 December 2023. But that date was vacated at the Defendant's request, for reasons to do with counsel availability, and refixed for 23 February 2024 before HHJ Maloney. It is the order made at that hearing which is the subject of the present applications.

The decision challenged

- 18 The Judge's decision was to permit some, but not all, of the changes to pleadings the Claimant wanted to make.
- 19 He *permitted* the particulars of claim to be amended to set out particulars of the cause of the emergency stop relating to the sensors having been, negligently, set too close together. The pleadings accordingly state that, but for this, the emergency dead stop would not have happened.

“It was this sudden deceleration, whether there was true overspeed or not, that caused the Claimant’s injury. For the avoidance of doubt, the deceleration forces the Claimant experienced in the emergency stop were foreseeably injurious. They would have been avoided had the Defendant taken reasonable care to maintain the ride.”

20 The Judge *refused* to permit the particulars of claim to be amended to set out particulars of the emergency stop relating to the airline to the brake having been blown. The Claimant had wished to plead, further or alternatively to her case on overspeed, that the Defendant had been negligent by “*failing to maintain an adequate system of inspection, maintenance and replacement of the air lines*” and by “*failing to identify and fix a faulty air line before it blew in the index ride*”. She had further wished to plead that:

“Had the defendant fixed the problem with the air line and the sensors before the index ride, the Claimant would not have been subjected to an emergency dead stop at speed when she least expected it and was spinning in her car. It was this sudden deceleration, whether there was true overspeed or not, that caused the Claimant’s injury.”

The Judge refused to permit all these amendments.

21 The Judge granted the Defendant’s application to amend its defence.

22 His reasoning for his decisions is set out in a judgment, and supplemental judgment, given orally at the hearing.

23 The principal, or first part of the, judgment identifies the Judge’s view that the amendments the Claimant wanted to make introduced “*two key novelties*” into her particulars of claim. These were: (a) the concept that the emergency stop itself was the cause of the injury, whether or not that was triggered by actual overspeed or merely a defective recording of overspeed, and (b) the concept that the cause of the stop was negligence in the maintenance of the air-line rather than the speed sensors. He said that neither of these matters had been in issue before in the litigation.

24 The principal judgment sets out a view that the amendments sought were late, or very late, and should have been raised immediately after the appeal or by application at the CCMC, rather than merely by permission to apply; and that allowing the amendment would imperil the trial date. The judgment reaches its conclusion at para.17 as follows:

“I take into account the prejudice to the claimant in being refused leave to advance what may be weighty points in her favour. But the considerations of the interests of justice and procedural fairness to both sides, which are implicit in the principles referred to above, clearly outweigh them in the present case, especially when considering the limited seriousness of the alleged injuries, and the fact that this case has, or should have, been thoroughly litigated already.”

25 The supplemental judgment, given shortly afterwards, records that the *primary* reason for *refusing* the amendments the Judge had *not* permitted was that those amendments could have been put forward before the CCMC the previous October, and the secondary reason was the prejudicial effect on trial preparation and date.

- 26 But the principal reason for revisiting the *refusal* by way of a supplemental judgment had to do with the matter of vacating the hearing date on 12 December 2023 and the relisting of the hearing of the applications on 23 February 2024, i.e. the date of the judgment.
- 27 As I have already noted, this had been the Defendant's request, on grounds of Counsel's unavailability. The designated civil judge at the time had explained the decision as follows: "*while it is plainly unfortunate that Counsel are not available, the history of this litigation is such that I need to be assured that no issues are missed and given the importance of this application by the Claimant I will adjourn the hearing.*"
- 28 The supplemental judgment records what the Judge describes as an "*unseemly squabble*" about an apparent lack of frankness on the part of the Defendant's solicitors, in that the adjournment had been made on the basis of the court having been told defence Counsel was unavailable, whereas it transpired, including (in the moment) from the Defendant's costs schedule, that Counsel had already been briefed and was ready to attend on the original date. The supplemental judgment describes this (twice) as "*unfortunate*". The supplemental judgment concludes as follows:

"This is a rather complex case compared with the run of whiplash claims. I have found myself continually going over it. In those circumstances, though on one hand there is a real possibility that had I dealt with the matter in December I might have reached a different decision on the late amendments, I do not think the adjournment was obtained on a materially false basis, and therefore my proposed order will stand. I am however minded to disallow counsel's fee claimed for the vacated hearing. This is partly because it is not something that should be imposed on the other side or, alternatively, it may be regarded as a sanction for a want of frankness, though not one intended to deceive."

He said he did not think full candour would have changed the DCJ's decision.

The present applications for permission to appeal

- 29 The Claimant wishes to be able to appeal the refusal to permit amendment to particularise the air-line matter on three grounds:
- 1) the Judge wrongly visited all the delay on amending the pleadings at the door of the Claimant;
 - 2) the Judge failed to revise his conclusion on delay after he had given his (principal) oral judgment when it was confirmed that the Defendant had provided on 8 December 2023 a "*less than frank*" reason for the adjournment of the hearing listed for 12 December; and
 - 3) The Judge failed to achieve the overriding objective or otherwise correctly balance the factors set out at para.10 in *Pearce v. East and North Hertfordshire NHS Trust* [2020] EWHC 1504 (QB).
- 30 As explained to me by Mr Chapman of Counsel, the outcome the Claimant ultimately seeks by these applications is, in effect, the quashing of the Judge's refusal to amend, the substitution of a grant of permission to amend, the vacation of next week's trial date, and the remission of the litigation to the trial judge to give revised directions, including as to disclosure and evidence, towards a later trial date.

- 31 The Defendant wishes to be able to appeal the permission of amendment to particularise the speed sensors issue, on grounds covering failure of reasoning and internal logic, disregard of the case law on applications to make late amendments, and unfairness. The Defendant objects that the Claimant's amendments that *were* allowed permitted her to advance a novel issue which she had not advanced at trial, contrary to the indication given at the CCMC that any changes should be confined to "*what the issues really were at trial*"; that it was inconsistent with the decision of Jacobs J; and that it introduced a late and novel issue at considerable prejudice to the trial and the interests of justice.
- 32 As explained to me by Mr Lambert of Counsel, the outcome the Defendant ultimately seeks is the quashing of the Judge's permission to amend, the substitution of refusal of permission to amend, and for the case to proceed to trial next week.

Legal framework

- 33 As I have already noted, this case comes before me as a rolled-up application.
- 34 There is no dispute about the test I am to apply to the question of *permission* to appeal. Permission will not be granted, under the Rules of Court (CPR 52.6), unless a court considers that the appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard. That is the threshold test I must apply to these applications.
- 35 Under the Rules of Court (CPR 52.21), an appeal court will allow an appeal only if the decision of the lower court was either wrong or unjust because of a serious procedural irregularity. "Wrong" in this sense does not mean just that the Judge *could* have come to a different view, or even that it might have been better if he had. It means that the Judge made a decision that it was not properly open to him to make at all; for example, because it proceeded on the basis of an error about the law, or because it relied on an evaluation of fact and evidence, or an exercise of discretion, which was off the scale of what a reasonable judge could conclude on the materials properly before him, or because of a failure of reasoning.

Consideration

- 36 The focus of my task is, therefore, scrutiny of the two-part judgment under challenge. In himself refusing permission to appeal, the Judge pointed out that it is a case-management decision I am looking at, and I do bear in mind, as I approach my task, that a judge's discretion in relation to case management issues is a very broad one.
- 37 Both parties criticise the overall fairness of the Judge's exercise of his discretion and the sustainability of his reasoning. The parties' submissions before me focused on the judgment's handling of two issues in particular: the novelty or otherwise of the Claimant's proposed amendments, and delay or chronology in the procedural history.
- 38 But I start with the issue of reasoning, and with the critique of reasoning made by Mr Lambert. This sets out an analysis which goes as follows. The Judge identified two aspects of "*novelty*" in the amendment of pleadings the Claimant sought. He went on to identify these amendments as "*late*" or "*very late*". But he did not then *expressly* apply the relevant legal tests for late amendments set out at para.10 of *Pearce* and elsewhere in the authorities. Instead, having canvassed the issue of timetable, he concluded that the prejudice to the Claimant in "*being refused leave to advance what may be weighty points in her favour*" was clearly outweighed by considerations of justice and procedural fairness to both sides.

However, he then went on to allow some amendments and refused others without explaining the relevant difference between them which lead him to that decision. Mr Lambert says the ruling is accordingly impossible to understand.

- 39 I see force in that analysis. It seems to me to be at the root of the submissions made by both parties before me. The logic of the decision under challenge is elusive, and consequently the momentum of that logic, in terms of where it should have led the Judge, is also elusive.
- 40 I reiterate that I have not lost sight of the fact that the Judge was engaged on a limited exercise in case management, in which his discretion was a broad one. An appellate court should properly be very hesitant to interfere with case management decisions on their merits, or to over-analyse *ex tempore* judgments like this one. But in saying that, it is impossible at the same time to ignore the antecedent litigation history of this matter, which was itself a key step in the issue of amendment to pleadings arising in the first place. The careful judgment of Jacobs J is required, detailed, reading for any judge subsequently dealing with it.
- 41 Jacobs J went to some trouble to set out why although, as I have said, this is on the face of it a whiplash claim of modest value, the issues of negligence and causation it engages are not straightforward. Jacobs J felt it necessary in these circumstances to take the trouble to record his reflections on the undesirability of the previous Trial Judge's decision to attempt an *ex tempore* judgment. And while the logic of those observations does not read across directly from trial judgments to case management decisions, the lessons for this case of Jacobs J's judgment do have to be learned. Specifically, the complexity of the negligence and causation issues has to be taken fully on board as he identified and, consequently, the importance of giving clear reasons at all stages of this retrial process is of the essence in ensuring its fairness.
- 42 I have read the brief two-part judgment under challenge carefully. I agree that it is not easy to understand here why the Trial Judge accepted some of the Claimant's amendments but not others. The "novelty", delay and timetabling issues cited appeared to apply to both sets without distinction. The timetabling issues clearly weighed particularly heavily with the Judge; I note that in refusing permission to appeal, the Judge himself cited the role the issue of timetable had played in his decision: "*the application could and should have been made at the CCMC but came on 6 months later and only 3 months before trial*". But there is no explanation, or basis for inference, as to how that led to a differential outcome for the various amendments. The Judge's overall analysis of the balance of fairness also made no distinction between the two sets of amendments.
- 43 It might – and I say this with necessary and great hesitation – be speculated that the Judge's instinct could have been that the air-line amendments had more of a quality of "*novelty*" than the speed sensor amendments. Or perhaps that they were less significant for the parties' cases. Or with fewer procedural consequences. Alternatively, it might be speculated that the Judge thought the speed sensor amendments more important to ensure the retrial proceeded smoothly and fairly. But all this is just that: speculation. It is not what he said. And so we are left guessing altogether at the reasons for the differential outcome. And the reasons matter: they potentially have consequences for the management of the trial.
- 44 There is a further problem. I also see force in Mr Chapman's submissions that having identified novelty and timetable as the key issues, it is not clear why either issue was handled as it was.

- 45 Novelty, properly, needed to be considered by way of close attention to the original pleadings. The issues of the causality of the emergency stop and of defective braking certainly featured in the proposed amendments and were, in that sense, undoubtedly “new” in the text that they sought to insert. But on an application to amend, the task was to consider to what extent these were either (a) points of detail or particularisation of the *existing* pleading of the causality of the sudden stop and the defective braking, or alternatively (b) the attempted insertion of entirely new and separate heads of liability and causation. No such analysis appears. Novelty in this important pleading sense appears to have been assumed rather than reasoned.
- 46 As to delay, the absence of a point-by-point application of the tests set out in the authorities, if not fatal, does not help the parties understand if or how the Judge factored in the following considerations:
- the implications of Jacobs J’s judgment for the entire process of applying to amend the pleadings in this case;
 - the delay between June and October 2023 for which the Claimant accepts she was responsible;
 - the setting at that point of a timetable for amendment applications to be made, with which both parties complied in full;
 - the unexplained setting of a trial date before those applications were due to be heard;
 - the vacation of the December hearing date, for which the Defendant was responsible, whether or not lack of candour was a material factor; and
 - the Judge’s indication that a December hearing, as opposed to a February hearing, might have produced a different decision on the permission to amend.
- 47 All of this, together with the complete lack of explanation for the differential treatment of the amendments, in my view, vitiates this judgment in its entirety. It does not explain itself; it is a puzzle. I do not agree with Mr Lambert that it has an inherent logic which must properly have led to the rejection of the entirety of the Claimant’s application. I do not consider it to have an inherent logic at all. We have no explanation of the decision to (a) distinguish between amendments and (b) permit some while rejecting others. That was an important decision in its own right. We can only guess at the logic of that decision and its potential implications. So it is impossible to be confident in these circumstances of the logic of any part of it; and the handling of the issues of novelty and delay are themselves insufficiently reasoned to generate inferred logical momentum.
- 48 The real issue on this appeal is not, after all, in my judgment whether and why some parts of this decision can or should stand and others be quashed. The judgment does not work as a whole. It fails for want of reasoning. Neither party can understand why it failed to the extent it did and, in my view, that is at the root of both the appeal and the cross-appeal before me: each party seeks to resolve the puzzle by relying on the logic of one or other part of a decision whose internal and overall logic is not apparent.
- 49 I should say that that is a conclusion I reach with more than the usual degree of reluctance and regret, given the litigation history of this matter. But it is not to be avoided.

- 50 The immediate question on these appeals is about the consequences of that conclusion. That is not a difficult question in its own terms. In my view, the decision on the Claimant's application to amend her pleadings needs to be re-taken in its entirety. As the designated civil judge said, the history of this litigation is such that we all need to be reassured that no issues are missed. But I do not for a moment underestimate the consequential problems of delay and expense occasioned by this outcome. It means that on any basis this case is not trial ready and it is inevitable that the trial cannot begin next week.
- 51 I have reflected, therefore, on whether there is any further step within my remit which would help the parties and serve the interests of justice beyond simply remitting the Claimant's application in its entirety back to the County Court. I will listen to any representations the parties might want to make to me about that, but my preliminary conclusion is that there is no satisfactory alternative. The issues were not aired before me as they would have been on a fresh consideration of an application for permission to amend further to Civil Procedure Rule 17.3, and the application properly needs to be looked at again as a whole. It needs to be looked at in the context of the overall case management of a County Court trial.

Next steps

- 52 I am minded, therefore, to proceed as follows.
- 53 I would formally grant both parties permission to appeal the judgment below, allow both appeals and set aside the judgment and order challenged in their entirety insofar as they relate to amendment to the particulars of claim.
- 54 I would remit the Claimant's application for permission to amend her pleadings to the County Court for determination on its merits. As I say, the failure of next week's trial date is inevitable as, therefore, is the need for fresh directions to a later trial.
- 55 But I would be minded to remit with the following neutral observations arising out of my consideration of the parties' submission on appeal. These observations would be intended simply in the spirit of such assistance and guidance as they may be considered to provide to the parties, and the court, in trying to achieve a measure of expedition and efficiency going forward, and are not intended in any way to offer a view on the merits of either party's position or to limit the trial judge's discretionary decision-making further to CPR 17.3.
- 56 My observations would be as follows.

Observations

- 1. The particular features of this application which appear to require or merit close attention are (a) the extent to which the proposed amendments do or do not extend beyond the four corners of the claim as originally pleaded; (b) the extent to which the evolution of the parties' positions at and since the previous trial do or do not fairly need to be recognised by way of consequential amendment of pleadings; and (c) whether and how the procedural history of this litigation should be weighed more generally as a matter of fairness for and against each party's position on the application.*
- 2. The first of these issues engages the question of whether, as the Defendant maintains, the amendments propose entirely new heads of negligence and causation, or whether, as the Claimant maintains, they are simply an exercise in particularising the heads of negligence and causation already pleaded – for example by the general references to negligence in operating the fairground ride and causation by deceleration, and by the particular references to defects in speed regulation and braking mechanism.*

3. *The second engages in particular the matter of the blown air line: the extent (or otherwise) of its appearance in pleading, evidence and disclosure before the previous trial, its emergence in the course of oral evidence from a defence witness at the trial itself as a potentially key issue of causation; the indication in the judgment of Jacobs J that it was a matter the trial judge ought to have dealt with and made relevant factual findings about; and the question of how that could have been, or could be, achieved in a way which was fair to both parties.*
4. *The third engages with the parties' respective responsibilities for delay in the timetable and the degree of culpability, if any, for that delay. That in turn engages with the question of whether or not a fresh assessment is needed of the extent to which, now that the Claimant's application falls to be considered in advance of the fixing of a trial date, it is right to regard these as late amendments and, if so, the application of the approach indicated in the authorities to such an application. It also engages with the question of how far successive successful appeals in this case, and the malfunctions of the justice system to which they relate, themselves must fairly be regarded as causative of the long delay in the resolution of this claim – and the consequences of that delay, and the forward timetable, on any basis.*

57 Although, of course, I await and will listen to any submissions on the matter of costs, it may assist if I indicate that I am minded to reserve the costs of these appeals to the trial judge. That is in part because it seems to me that the conduct issues raised before me, and potentially engaged by consideration of the litigation history, would benefit from being considered in the round in cost terms in the context of the final resolution of these proceedings. It is also because it is very much in the interests of both parties, and in the overall interests of justice, for the parties to redouble, and redouble again, whatever efforts they have made to date to compromise and resolve this matter by agreement and without the need for the delay and expense of yet further litigation and a second trial. If the matter does, nevertheless, ultimately proceed to trial, the trial judge will undoubtedly in the end want a very full explanation from both sides as to why it was impossible to avoid that.

CERTIFICATE

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This transcript has been approved by the Judge