

## High Court denies relief from sanctions

In *Magee v Willmott* Browne Jacobson successfully appealed on behalf of the Defendant a lower court decision to allow the Claimant relief from sanctions to rely upon expert evidence served after the deadline had passed for exchange and not to strike out part of the Claimant's case which was unsupported by the Claimant's breach expert and where no case on causation had been pleaded.

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### The facts

The Claim was initially brought against three Defendants for the alleged delay in diagnosing bowel cancer. The Claim was discontinued against the First Defendant and the Second Defendant. The Second Defendant obtained an Order for wasted costs on the basis that the Claimant had brought the Claim against the Trust without the relevant expert evidence.

The allegations against the remaining Defendant (Appellant) spanned three consultations; two in August 2012 and one in April 2013. Expert evidence was exchanged in July 2019 and upon review, the Appellant noted that the Respondent's evidence did not appear to support many of the pleaded allegations of breach of duty and that no oncology causation evidence had been served. The Respondent's solicitor advised that he had made an error and not all of the evidence in his possession had been served and made a late Application seeking permission to rely upon further expert evidence, all of which post-dated the date of exchange of expert evidence. The Appellant issued a cross Application to strike the Claim out making it clear to the Court that the Respondent's Solicitor's explanation in respect of the error regarding expert evidence was not accepted. The Trial date was lost as a result of the Claimant's Application.

The lower Court granted the Application made on behalf of the Claimant (Respondent), which was accepted to be a relief from sanctions Application, despite it being accepted that the breach was serious and there was no good reason for it. The Recorder dismissed the cross Application to strike out the Claim despite the Claimant's (Respondent's) advocate accepting that they could not succeed on the April 2013 consultation irrespective of whether permission to rely upon the 'new' evidence was allowed as the breach expert did not support the allegations.

The Claimant's Solicitors were ordered to pay the Defendant's costs of and occasioned by the Application for relief from sanction on a wasted costs basis and no order as to costs was ordered in respect of the strike out Application.

### The High Court decision

## Application for Relief from Sanctions

The Appellant appealed the decision of the court of first instance to grant the Respondent relief from sanctions on the basis that rather than applying the proper approach under CPR 3.9 and following *Denton*, the Recorder had treated the test as a simple balance of prejudice, weighted in the Respondent's favour because of Article 6. It was argued that the Recorder did not give any proper weight to the two factors specifically referred to in the CPR and failed to explain why the loss of the Trial date had not proved decisive in the circumstances of the case.

Yip, J concluded that the grounds of appeal were well-founded and the Recorder did err in his approach to the application for relief from sanction. Yip J commended the approach of Ms Jackson, the Appellant Solicitor stating that her conduct was *'exemplary and demonstrated a genuine desire to deal with the matter fairly, efficiently and within the timetable set by the court'* but that in contrast, Mr Anwar, the Respondent's solicitor was *'not frank with Ms Jackson or with the Court'* and that despite seeking to *'give the impression that the problems with the Respondent's evidence arose through his oversight in serving the 'wrong' evidence but that he was in possession of evidence supporting the pleaded allegations of breach of duty and causation...the reality was that after Ms Jackson had taken the trouble to identify the real weaknesses in the case, Mr Anwar set about trying to put the case in order'*.

Yip J criticised the Respondent Solicitor's conduct, acknowledging that the Respondent was not personally responsible for her solicitor's failings. The Respondent Solicitor had persistently failed to deal frankly and openly with the parties. The Respondent Solicitor failed to exchange expert evidence in accordance with the procedural timetable and lost the trial date as a consequence. Yip J held that *'it is simply not good enough for a claim for professional negligence to be pleaded and maintained without proper expert support and for a late attempt to be made to furnish evidence to support a claim just before trial'* Yip J concluded that *'to allow the application for relief would not only fail to do justice between the parties but would serve to discourage the sensible, pro-active and efficient approach to litigation exemplified by the Appellant's side'*.

## Strike out Application

Yip J accepted that in light of her decision on the appeal relating to the relief from sanctions application, she then needed to consider the Appellant's strike out Application as the Recorder's decision to dismiss that application had been founded on the grant of the application for relief from sanctions which had now fallen away.

Yip J concluded that the April 2013 allegations ought to have been struck out as it was clear that on the face of the pleadings there was no basis for maintaining the alleged breach of duty was causative of any loss and it was apparent that the Respondent did not have any admissible expert evidence to support the allegations of negligence. Yip J also concluded that it was an abuse of process, in the sense described by Coulson J in *Pantelli* to put forward a claim for professional negligence that was not founded on appropriate expert evidence.

Yip J did not strike out the totality of the Claim as she considered that there was expert evidence that was *'just sufficient to mount a claim'* but made clear that *'taking into account matters raised in the Defence coupled with the absence of any causation evidence in relation to the August 2012, this claim no longer has any realistic prospect of success'*.

## Impact of the High Court decision

In denying relief from sanction, the Respondent is now only permitted to rely on the evidence served in accordance with the procedural timetable, which counsel for the Respondent has accepted will mean that the case cannot succeed. This severe consequence is a result of the Respondent Solicitor's failure to ensure that the Respondent had the correct expert evidence to support her pleaded case prior to the exchange of expert evidence, failure to be frank and open about the nature of the evidence obtained and a failure to make the application for relief from sanction promptly.

This case serves as a reminder that, *"all practitioners must take care to ensure that the pleadings properly reflect the expert opinion and do not contain unfounded allegations"*.

Louise Jackson of Browne Jacobson was instructed by MPS and MDU.

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