Neutral Citation Number: [2020] EWCA Civ 1015

Case No: B3/2019/2166

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT LIVERPOOL
HHJ Graham Wood QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2020

Before:

LORD JUSTICE LEWISON
LORD JUSTICE COULSON
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

Mr Barry Cable	**Appellant**
- and -	
Liverpool Victoria Insurance Co Ltd	**Respondent**

Simon Browne QC and Mark James (instructed by **Slater & Gordon**) for the **Appellant**
Darryl Allen QC and Richard Whitehall (instructed by **Keoghs LLP**) for the **Respondent**

Hearing date: 15th July 2020

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Approved Judgment

LORD JUSTICE COULSON :

1. INTRODUCTION

1. The introduction into the Civil Procedure Rules of the revamped versions of what are commonly known as the RTA Protocol[1] and the EL/PL Protocol[2] in 2013 (together with their associated Ministry of Justice portals) quietly revolutionised the way in which certain types of low value claims were dealt with by the civil justice system. For this purpose, a low value claim means a claim worth less than £25,000. These two Pre-Action Protocols ("PAPs") provide a series of specific rules for the resolution of low value claims which parties are required to follow in order to achieve a quick and proportionate result, often without the need for formal court proceedings at all. Where liability is agreed but quantum disputed, a CPR Part 8 claim form must be issued, and the dispute is resolved in the county court at the so-called Stage 3 hearing. Hundreds of thousands of low value claims are resolved through these two PAPs every year.

2. But what happens if, following the making of a claim under the RTA Protocol, Part 8 proceedings are started and then immediately stayed on the false premise that the claim is or remains a low value RTA claim, when it is (or should have been) obvious to the claimant's solicitors that the claim was worth almost a hundred times more than £25,000? That is the question raised in this appeal. In the light of the many failures on the part of the appellant's solicitors, the district judge declined to lift the stay and transfer the claim to CPR Part 7. In consequence, she struck out the claim altogether. The circuit judge upheld her order. The issue for this court is whether she was right to have done so.

3. I set out the relevant parts of the PAPs and the CPR in Section 2. As with all cases where things have gone wrong during the progress of a case, it is necessary to set out the factual background in some detail (Section 3) and to summarise the judgments below (Section 4). Thereafter, in Section 5, I summarise the applicable law. In Section 6, I set out what I consider to be the right approach to an application to lift a stay of proceedings (imposed so that the parties can comply with a PAP despite limitation constraints) and/or to transfer the claim to Part 7 and/or to strike out the claim, where there are underlying allegations by the defendant of serious procedural failure or abuse of process.

4. Thereafter I apply that approach to the facts, in order to identify whether there was an abuse of process in this case (Section 7) and, if so, the appropriate sanction in all the circumstances (Section 8). At Section 9, I address the separate issue involving the failure by the appellant's solicitors to comply with the order for service of the amended claim form in August 2018, and their application for relief from sanctions. The court is very grateful to both leading counsel (neither of whom appeared below) for their comprehensive written and oral submissions.

2. THE RELEVANT PAPs, RULES AND PRACTICE DIRECTIONS

2.1 The Relevant PAPs

[1] Its full title being "The Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents".
[2] Its full title being "The Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public liability) Claims".

2.1.1 The RTA Protocol

5. For the purposes of this judgment, it is unnecessary to set out large parts of the RTA Protocol. It is, however, necessary to identify some of its salient features.

6. The RTA Protocol operates in conjunction with the MOJ portal. It provides a structured methodology in which the emphasis is on the resolution of low value RTA claims in a proportionate and cost-effective way.

7. The RTA Protocol involves three stages. Stage 1 is concerned with liability. If liability is admitted, the process moves to Stage 2, where the parties seek to agree quantum. If liability is disputed, the claim drops out of the RTA Protocol altogether and proceedings must be commenced under Part 7.

8. Many claims are settled at Stage 2 when, following service of the Stage 2 Settlement Pack containing the claimant's evidence and any account of the accident by the defendant, the parties agree the quantum of the claim. But where that does not happen, the process moves to Stage 3, which is the resolution of the quantum of the claim at a court hearing. For that purpose, the claimant is obliged to issue a claim pursuant to Part 8, and the process laid down by Practice Direction 8B. No PAP process stops time running for limitation purposes.

2.1.2 The Pre-Action Protocol for Personal Injury Claims ("The PI Protocol")

9. If a PI claim (whether arising out of an RTA or not) is for more than £25,000, the RTA Protocol is inappropriate. Instead, the PI Protocol applies. That involves a rather different approach. Paragraph 2.1 of the PI Protocol states that its objectives are to:

> "a) encourage the exchange of early and full information about the dispute;
>
> b) encourage better and earlier pre-action investigation by all parties;
>
> c) enable the parties to avoid litigation by agreeing a settlement of the dispute before proceedings have commenced;
>
> d) support the just, proportionate and efficient management of proceedings where litigation cannot be avoided; and
>
> e) promote the provision of medical or rehabilitation treatment (not just in high value cases) to address the needs of the Claimant at the earliest possible opportunity."

10. Paragraph 4 of the PI Protocol stresses the importance of rehabilitation, requiring the parties (at paragraph 4.1) to consider "as early as possible whether the claimant has reasonable needs that could be met by medical treatment or other rehabilitative measures. They should discuss how these needs might be addressed."

11. Since in her judgment, the district judge made a particular point about the potential agreement of joint experts under the PI Protocol, it is worth noting that, at paragraph 7.2, "the joint selection of, and access to, quantum experts" is encouraged, "save for cases likely to be allocated to the multi-track" (ie larger claims).

2.2 CPR Part 8

12. The Part 8 procedure is appropriate where a party seeks the court's decision on a question "which is unlikely to involve a substantial dispute of fact" or where a rule or Practice Direction may "require or permit the use of the Part 8 procedure". Rule 8.1(3) provides:

> "(3) The court may at any stage order the claim to continue as if the claimant had not used the Part 8 procedure and, if it does so, the court may give any directions it considers appropriate."

2.3 The Relevant Practice Directions

2.3.1 Practice Direction 8B

13. This Practice Direction is expressly linked to claims under the low value RTA Protocol and EL/PL Protocol, where liability is admitted but there is a continuing dispute about quantum. In those circumstances, the PD requires the issue of Part 8 proceedings. It also deals with what happens where there is at least a risk of a claim becoming statute-barred before the process under these PAPs has been completed. Paragraph 16 provides:

> "16.1 Where compliance with the relevant Protocol is not possible before the expiry of a limitation period the claimant may start proceedings in accordance with paragraph 16.2.
>
> 16.2 The claimant must –
> (1) start proceedings under this Practice Direction; and
> (2) state on the claim form that –
> (a) the claim is for damages; and
> (b) a stay of proceedings is sought in order to comply with the relevant Protocol.
>
> 16.3 The claimant must send to the defendant the claim form together with the order imposing the stay.
>
> 16.4 Where a claim is made under paragraph 16.1 the provisions in this Practice Direction, except paragraphs 1.2, 2.1, 2.2 and 16.1 to 16.6, are disapplied.
>
> 16.5 Where –
> (1) a stay is granted by the court;
> (2) the parties have complied with the relevant Protocol; and
> (3) the claimant wishes to start the Stage 3 Procedure,
> the claimant must make an application to the court to lift the stay and request directions.
>
> 16.6 Where the court orders that the stay be lifted –
> (1) the provisions of this Practice Direction will apply; and
> (2) the claimant must –
> (a) amend the claim form in accordance with paragraph 5.2; and
> (b) file the documents in paragraph 6.1.
>
> 16.7 Where, during Stage 1 or Stage 2 of the relevant Protocol –
> (1) the claim no longer continues under that Protocol; and

> (2) the claimant wishes to start proceedings under Part 7,
> the claimant must make an application to the court to lift the stay and request directions."

14. It is to be noted that this procedure envisages the claimant making an *ex parte* application to the court for a stay of the court proceedings as soon as they are issued, to allow the PAP procedure to be completed. That is unique to these low value PAPs and is explicable on grounds of cost-effectiveness; whilst other PAPs envisage the need for a claimant to start proceedings and seek a stay if there is a limitation issue, that is on the basis that the defendant would be given notice of the application, and would therefore have the opportunity to object before any stay was granted.

2.3.2 Practice Direction – Pre-Action Conduct and Protocols

15. This PD deals generally with pre-action conduct and the PAPs. It was amended following the Jackson Costs Review. It can be found at page 2571 of the 2020 White Book. It has a lengthy section dealing with the importance of compliance with PAPs, and states:

> "16. The court will consider the effect of any non-compliance when deciding whether it should impose any sanctions which may include -
> a) an order that the party at fault pays the costs of the proceedings, or part of the costs of the other party or parties;
> b) an order that the party at fault pay those costs on an indemnity basis;
> c) if the party at fault is a claimant who has been awarded a sum of money, an order depriving that party of interest on that sum for a specified period, and/or awarding interest at a lower rate than would otherwise had been awarded..."

3. THE FACTUAL BACKGROUND

16. The appellant, Mr Cable, was injured in a road traffic accident on 1 September 2014. At the time he was employed in a job with a salary of £130,000 per year. He instructed a well-known firm of solicitors, with offices all over the UK and a particular reputation for personal injury work. His symptoms at that stage could fairly be summarised as a whiplash injury, but with some uncertain features. At that time, it would not have been apparent that the claim was obviously worth more than £25,000.

17. On 24 September 2014, the appellant's solicitors submitted a claim notification form ("CNF") to the respondent insurer, pursuant to Stage 1 of the RTA Protocol. An admission of liability was made by the respondent on 2 October 2014.

18. On 28 November 2014, the appellant's appointed medical expert, Dr Saeed, produced a report. It did not give a definitive prognosis, and recommended that a report be obtained from a neurologist. The appellant's symptoms included headaches, dizziness and disorientation. The report also confirmed that the appellant had been off work since the accident, although other evidence shows that he was still being paid. Although it is not clear when, it appears that this report was provided to the respondent during the RTA Protocol process.

19. Following the admission of liability, the claim should have progressed to Stage 2 of the RTA Protocol. However, because of the dilatory conduct of the appellant's solicitors, that did not happen. Although an interim payment of £1,000 was made in accordance with the RTA Protocol, thereafter, throughout 2015, 2016 and the first part of 2017, progress was non-existent. It appears that the respondent continually chased the appellant's solicitors about the progress of the claim, seeking information as to whether the appellant was off work and whether there was a loss of earnings claim, and asking other questions relevant to quantum. The respondent also sought the appellant's medical notes. But no replies to any of these chasers were forthcoming. The lack of communication was so poor that, in December 2015, when the appellant's employment was unfortunately terminated, his solicitors did not inform the respondent.

20. In January 2016, unbeknownst to the respondent, a consultant neurologist, Dr Kidd, provided a first report to the appellant's solicitors, although it arose from an examination the previous April. That report noted that some aspects of the appellant's condition had deteriorated, that he was struggling with light and high pitched tinnitus and was unable to work. As DJ Campbell subsequently said, "all of that would make a claimant's solicitor think about the value of this case" [29]. On the other hand, Dr Kidd said that he thought that the appellant's condition would improve such that he would become symptom-free, and that "no lasting neurological damage will have arisen".

21. On 19 April 2016, after further chasing emails had met with no response, the defendant made a Part 36 offer in the sum of £10,000.

22. The respondent's solicitors continued to chase for information but, despite their understandable frustration at the lack of progress, this was not forthcoming. They learnt of the existence of Dr Kidd's report in September 2016, but they were not provided with a copy. They were not told that, on 26 January 2017, Dr Kidd had produced a second report which identified a deterioration in the appellant's condition and referred for the first time to his migraine disorder. Contrary to his earlier optimism, Dr Kidd did not now think that the appellant's condition was going to improve significantly in the future; on the contrary, he thought it had become chronic, describing the appellant as being in "a severe neurological state". The claimant approved the amended version of this report in November 2017 but in the event neither of Dr Kidd's reports were provided to the respondent's solicitors until August 2018.

23. Accordingly, after the appellant's solicitors had had time to reflect on the much gloomier prognosis in Dr Kidd's second report, and therefore no later than the spring or early summer of 2017, it can be said with confidence that they knew or ought to have known that the claim was worth far in excess of £25,000. They therefore needed to rethink their PAP strategy and they needed to tell the respondent what had happened. For reasons which are not explained, they did neither of those things.

24. Instead, on 25 July 2017, the appellant's solicitors issued a Part 8 claim form. As previously noted, for claims which progress through Stages 1 and 2 of the RTA Protocol process, but where quantum cannot be agreed, the issue of a Part 8 claim form is required, in order to lead on to a Stage 3 hearing in the county court. But in this case, the appellant's solicitors had not even begun the Stage 2 procedure, because they had not provided the Stage 2 pack (ie the relevant documents in respect of quantum) to the respondent. The claim form did not provide any relevant information. On the contrary, it simply said:

> "The claimant expects to recover damages in respect of pain, suffering and loss of amenity in excess of £1,000. Part 8 CPR applies to this claim. A stay of proceedings is requested as compliance with the RTA Protocol is not possible before expiry of the limitation period. A stay of proceedings is sought in order to comply with the RTA Protocol. Practice Direction 8B applies, see paragraph 16.1 – 16.7 of the same."

The claim form was accompanied by a statement of truth signed by the appellant's solicitor.

25. In my judgment, this claim form was misleading in a number of important respects. Although the RTA Protocol process had ostensibly been going on for almost three years, the reason that Stage 2 had not started, let alone finished, was because of the delays on the part of the appellant's solicitors. More fundamentally, by August 2017 the appellant's loss of earnings was already in excess of £200,000, and the appellant's solicitors knew or ought to have known that this claim was therefore suitable neither for the RTA Protocol nor Part 8.

26. On 31 July 2017, the Part 8 claim form and the accompanying application for a stay were considered *ex parte* by DJ Baker at Birkenhead County Court[3]. He granted a stay to 20 August 2018, by which date an application had to be made to lift the stay, or the claim would be struck out. He also stipulated that the order for the stay and the claim form should be sent to the respondent by 20 August 2017.

27. Up until this point, it should be noted that, no matter how dilatory the appellant's solicitors' conduct might be said to have been, the delays had occurred within the limitation period. That does not and cannot excuse those delays, but it does put them in their proper context. From 1 September 2017, the position was different because from then on, the limitation period had expired.

28. The appellant's solicitors failed to comply with DJ Baker's order and did not send the claim form or the order to the respondent until 15 February 2018. That coincided with the file at the appellant's solicitors being transferred to their multi-track team. That was doubtless because they had belatedly appreciated that this was indeed a multi-track case. Again, however, that vital information was not shared with the respondent's solicitors.

29. It was not until 16 August 2018, four days before the expiry of the stay, that the appellant's solicitors emailed the respondent to tell them, for the first time, about the termination of the claimant's employment and his inability to work. The email said baldly: "clearly this matter can no longer proceed under the MoJ portal process". The next day, 17 August, the report of Dr Saeed and the two reports of Dr Kidd were served on the respondent, together with a statement from the appellant. Not unreasonably, the respondent expressed concern about the appellant's conduct in view of the dates of those reports and the proximity of the expiry of the stay. They said, with a certain amount of understatement, that they had been put in "a very difficult position".

[3] All the orders in this case were made at Birkenhead County Court, which – due to its efficiency and considerable experience – deals with low value RTA claims from all over the country.

30. On 18 August 2018, two days before the expiry of the stay, the appellant's solicitors issued an application to lift the stay and for the matter to proceed as a Part 7 claim with appropriate and consequential directions. On 21 August, DJ Doyle made an *ex parte* order lifting the stay and requiring the amended claim form and particulars of claim to be served by 4 September 2018. The appellant's solicitors failed to comply with that order[4], but the respondent's solicitors learned of its existence and, on 6 September, they issued an application to set aside DJ Doyle's order, thus keeping the stay in place, and to strike out the claim. The amended claim form and particulars of claim were not served until 26 September 2018. Those documents set out a damages claim in the order of £2.2 million.

4. THE DECISIONS BELOW

4.1 The Judgment of DJ Campbell

31. The hearing before DJ Campbell took all day on 17 October 2018, after which she gave an admirably full *ex tempore* judgment. The first part of that judgment dealt with a preliminary point, taken by the appellant, to the effect that, because the defendant had not applied to set aside the *ex parte* order of DJ Doyle within 7 days of receipt, as set out in r.23.9(3) and r.23.9(4), the order lifting the stay and transferring the claim to Part 7 should stand. She resolved this point against the appellant, first on the facts (because DJ Doyle's order was only received and date stamped at the correct solicitor's address on 30 August, so the respondent's application was made within 7 days of receipt); and, in the alternative, on the ground that she would have extended time to cover the necessary two additional days in any event, because of the court's failure to attach a notice under r.23.9(3) to the order of DJ Doyle, informing the defendant of its unqualified right to challenge such an *ex parte* order within 7 days.

32. Although it plays no further part in this appeal, I am bound to note that, after their performance over the preceding four years, it is unfortunate that the appellant's solicitors first response was to take this meritless technical point. It does them no credit whatsoever. I have no doubt that this false start influenced DJ Campbell's approach to the applications before her, a view with which I have considerable sympathy.

33. DJ Campbell went on to set out the background at [15] – [43] of her judgment, before setting out the relevant parts of the CPR and the law. She concluded at [52], without clearly saying why, that there had been an abuse of process. At [53] – [61] she dealt with the prejudice suffered by the defendant which she found included: a) the fact that the insurers were unable to set a proper reserve [54]; b) the delays [55]; c) the fact that, by keeping this case in the RTA Protocol, the claimant's solicitors "have bypassed any obligation to comply with the PI Pre-Action Protocol, to provide the disclosure of the medical evidence promptly, to provide any valuation or schedule of loss, to give the defendant an opportunity to have a say in the selected experts…" [57]; d) the denial to the defendant of any opportunity to have the claimant examined by their own expert, the denial of the opportunity to suggest other or different treatment and no opportunity to offer the claimant rehabilitation under the Rehabilitation Code [57] – [58]; e) the denial to the court of the opportunity properly to case manage the case [59]; and f) that

[4] This failure gives rise to the separate application by the appellant for relief from sanctions, dealt with in Section 9 below.

the issue of the Part 8 claim form had deprived the defendant of a limitation defence [61].

34. By contrast, at [62], DJ Campbell dealt with the prejudice that would be suffered by the claimant if the claim was struck out in very short order.

35. From [63] - [73] there is a lengthy section in her judgment under the heading 'Conclusion'. I refer to some of these paragraphs below when I consider the specific issues raised in this appeal.

36. The final part of the judgment, from [74] onwards, dealt shortly with the appellant's application under r.3.9 for relief from sanctions, as a result of their failure to serve the amended claim form and particulars of claim until 26 September 2018. DJ Campbell concluded that, if she had allowed the transfer to Part 7 and had not struck out the claim, she would, in all the circumstances of the case, have still refused relief from sanctions. Accordingly she said that, even if the respondent's application to set aside the order of DJ Doyle had failed, she would have refused the appellant relief from sanctions and so would have been left "with no option" but to strike out the claim in any event.

4.2 The Judgment of Judge Wood QC

37. In a judgment dated 15 July 2019, and handed down on 9 August, Judge Wood QC refused the appellant's appeal from the decision of DJ Campbell. Having set out the facts and the relevant law, the judge summarised the appellant's arguments at [46] – [59], and the respondent's arguments at [60] – [69]. His determination of the issues was at [70] – [77].

38. At [70], Judge Wood QC identified what he considered to be the applicable principles:

> "70. Although there is no clear mechanism provided in the relevant rule or the practice direction as to what should happen if a stay imposed in accordance with 8BPD paragraph 16 is not lifted, the only logical conclusion is that the action cannot proceed by any process. Paragraph 16.7 does not allow Part 7 proceedings to be commenced whilst there is an extant Part 8 claim which has been stayed. Whilst it has been described as being a claim "in limbo" and in so far as it is not disputed that a judge has a discretion in determining whether or not to lift the stay under this paragraph, it seems to me that there must be a power to strike out. In fact this is not really challenged by either counsel. It would be a concomitant part of the process involved, when the judge exercises such a discretion. For this reason it seems to me that a judge is entitled to take into account any question of abuse of process without the need for a formal application to that effect. The discretion is clearly a broad one which will require consideration of a number of factors, and I do not believe that it is necessary for the court to follow the stepped approach which might arise if there had been a challenge made under CPR 3.4. Accordingly, the judge cannot be criticised for seeking to determine whether or not the claimant's solicitors had abused the process of court as one the relevant factors."

39. At [71], the judge said that "categories of abuse of process, which are not defined anywhere within the rules, are many and various and not closed… the essential question is whether or not the party which has been accused of the 'abusive' conduct has acted

in a way which is unfair to the other party." At [72] he said that a finding of concealment or underhand conduct was never a prerequisite for a conclusion that the court's procedures were being abused. He said "the question here was as much about effect as it was about motive…"

40. At [73] he rejected the appellant's suggestion that DJ Campbell had found prejudice where there was none, and he affirmed the various elements of prejudice which she had found. At [74] he dealt with the overall effect of the failures by appellant's solicitors on the fairness of the process. And at [75] he said:

> "75. In summary, I am satisfied that the learned judge not only applied the correct test to determine whether or not the Claimant should be entitled to proceed with his claim notwithstanding the abuse of process attributable to his solicitors, but also came to a conclusion which was within the reasonable and generous ambit of her discretion. In fact, it is difficult to contemplate any other outcome in the circumstances with which she was faced. I agree entirely with the conclusion that the Claimant's solicitors' conduct was more significant and serious than that which was considered by His Honour Judge Pearce in the *Lyle* case. In any event, it does not seem to me that the learned judge regarded herself as bound by that decision, but considered it persuasive."

41. Finally at [77], Judge Wood QC dealt with that appellant's application for relief from sanctions. He disagreed with the approach of DJ Campbell, saying that if the respondent's application to reinstate the stay had failed, there would have been no finding of abuse of process and that, in those circumstances, it would have been disproportionate to refuse relief from sanctions.

5. THE LAW

5.1 Abuse of Process

42. Although we were referred to a large number of authorities on abuse of process, the relevant principles can be summarised shortly. The classic summary of abuse of process can be found in the speech of Lord Diplock in *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 536C:

> "My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any Court of Justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, it would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute amongst right-thinking people. The circumstances in which abuse of process can arise are very varied… it would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limited to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power"

This passage has been cited many times since, most recently by the Supreme Court in *Summers v Fairclough Homes Limited* [2012] UKSC 26, [2012] 1 WLR 2004, a case where the claimant had greatly exaggerated his long-term disabilities.

43. A working definition of abuse of process, adopted by both leading counsel in this appeal, was set out by Lord Bingham, then Lord Chief Justice, in *Her Majesty's Attorney General v Paul Evan John Barker* [2000] 1 F.L.R. 759. At paragraph 19 he defined an abuse of the process as "a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".

44. Thus a failure to comply with the CPR or its Practice Directions can constitute an abuse of process: see for example *Lewis v Ward Hadaway (a firm)* [2015] EWHC 3503 (Ch), and *Liddle v Atha & Co Solicitors* [2018] EWHC 1751 (QB), [2018] 1 WLR 4953. These cases involved the deliberate understating of the value of the claim on the claim form in order to avoid paying higher court fees. In both cases, it was found that this amounted to an abuse of process.

45. A claim must be clearly shown to be an abuse before it can be struck out: see *Stuart v Goldberg Linde* [2008] EWCA Civ 2, [2008] 1 WLR 823 at [65]. The striking out of a claim is a draconian remedy and one that should be seen as a last resort. In *Summers*, Lord Hope said:

> "48. It is in the public interest that there should be a power to strike out a statement of case for abuse of process, both under the inherent jurisdiction of the court and under the CPR, but the Court accepts the submission that in deciding whether or not to exercise the power the court must examine the circumstances of the case scrupulously in order to ensure that to strike out the claim is a proportionate means of achieving the aim of controlling the process of the court and deciding cases justly.
>
> *The exercise of the power*
>
> 49. As noted at para 42 above, the court has a wide discretion as to how to exercise its case management powers. These include the power to strike out the whole or any part of a statement of case at whatever stage it is made, even if it is made at the end of the trial. However the cases stress the flexibility of the CPR: see eg *Biguzzi* per Lord Woolf MR at p 1933B, *Asiansky Television v Bayer-Rosin* [2001] EWCA Civ 1792; [2002] CPLR 111 per Clarke LJ at para 49 and *Aktas v Adepta* [2010] EWCA Civ 1170, [2011] QB 894, where Rix LJ said at para 92:
>
> > "Moreover, it should not be forgotten that one of the great virtues of the CPR is that, by providing more flexible remedies for breaches of rules as well as a stricter regulatory environment, the courts are given the powers and the opportunities to make the sanction fit the breach. That is the teaching of one of the most important early decisions on the CPR to be found in *Biguzzi v Rank Leisure plc*."
>
> The draconian step of striking a claim out is always a last resort, a fortiori where to do so would deprive the claimant of a substantive right to which the court had held that he was entitled after a fair trial. It is very difficult indeed to think of circumstances in which such a conclusion would be proportionate. Such circumstances might, however, include a case where there had been a massive attempt to deceive the court but the award of damages would be very small."

46. Despite the findings of abuse of process, in neither *Lewis* nor *Liddle v Atha* were the claims struck out, although in *Lewis* the finding of an abuse of process meant that the claim had not been brought within the limitation period, so the defendant was entitled to summary judgment. That result has subsequently been criticised and was expressly not followed by Turner J in *Liddle v Atha.*

47. This court's reluctance to countenance striking out the claim save as a last resort can be seen in *Alpha Rocks Solicitors v Alade* [2015] EWCA Civ 685*,* [2015] 1 WLR 4535. The claim was originally struck out as an abuse of process because it relied on false and deliberately exaggerated claims and fabricated documents. The Court of Appeal concluded that there had been an abuse of process but reversed the striking out order. Vos LJ (as he then was) said at paragraph 24:

> "24. The cases I have mentioned were right to emphasise in the context of striking out what is effectively factor (a), namely the need for litigation to be conducted efficiently and at proportionate cost. The need for compliance with rules and orders is equally important. But it must be remembered that the remedy should be proportionate to the abuse. In the context of this case, it is also worth emphasising before I turn to the particular circumstances that litigants should not be deprived of their claims unless the abuse relied upon has been clearly established. The court cannot be affronted if the case has not been satisfactorily proved. This aspect is obviously inter-related with whether or not a fair trial remains possible. Moreover, the fact that solicitors have signed bills that appear to be inaccurate or worse is obviously a matter for concern, but that concern does not abrogate the need for the issue of whether the bills were indeed inaccurate to be fairly resolved between the parties, if that remains possible."

48. Mr Browne QC referred to a number of abuse of process cases in which a second claim had been started following the disposal of the first set of proceedings, and where applications to strike out were then made in respect of that second claim. In my view, those principles are not directly relevant to the present appeal. I do, however, note that at page 59D of *Johnson v Gore Wood & Co* [2002] 2 AC 1, Lord Millett said that refusing to allow a citizen to litigate for the first time required particular justification because it was, on the face of it, a denial of the citizen's right of access to the courts.

5.2 Lifting or Maintaining the Stay

49. This claim started under Part 8 and a stay was sought and obtained by reference to Practice Direction 8B. An issue before DJ Campbell was whether the claim should be permanently stayed or whether it should be transferred to Part 7. As both DJ Campbell and Judge Wood QC note in their respective judgments, the only authority directly on that point is *Lyle v Allianz Insurance PLC* (2017), unreported, a decision of HHJ Pearce noted at 8BPD.16.1 (page 510) of the 2020 White Book. That was a case in which the accident had occurred in 2010 and where there had been lengthy delays after the expiry of the limitation period under the RTA Protocol, and a stay of court proceedings that had lasted in excess of two years.

50. The first issue in *Lyle* was whether or not the court had the power to direct that proceedings issued pursuant to Part 8, to protect the appellant's position on limitation, which had then been stayed to allow compliance with the RTA Protocol, could be directed to continue as Part 7 proceedings. It appears that the defendant in *Lyle* took the

point that the court could not in principle allow a transfer to Part 7. Judge Pearce explained, at paragraphs 13 – 22 of his judgment, why he concluded that the wide discretion granted by the CPR 8.1(3) (paragraph 12 above) meant that it was open to a claimant to apply to lift the stay so that directions could be sought for the further conduct of the claim under Part 7.

51. In my view, Judge Pearce was right to reach that conclusion. Even though the original proceedings might have been started under Part 8, and the stay was ordered under Practice Direction 8B, r.8.1(3) was designed to ensure that, in an appropriate case, there could be a transfer to Part 7. It is not difficult to imagine a claim which seems at the outset to fit within the RTA Protocol and Part 8, only for a relapse or an unexpected worsening of the claimant's condition substantially to increase the value of the claim and thereby make it unsuitable for the RTA Protocol and, by extension, Part 8. In those circumstances, a transfer to Part 7 would *prima facie* be appropriate.

52. The second issue that Judge Pearce had to deal with in *Lyle* concerned whether or not, on the particular facts of that case, the stay should be lifted so as to allow the transfer to Part 7 to take place. Having set out the facts, at paragraph 36 of his judgment, Judge Pearce concluded that "this conduct of proceedings lies far outside the expectation of the pre-action protocol. It is not an acceptable way to conduct proceedings under the CPR. The District Judge was right to be highly critical of the conduct of the claim on behalf of the claimant". He agreed with the District Judge's conclusion that the history of the case "offends against every aspect of the CPR and the overriding objective". He went on at [48]:

> "But in my judgment the claimant's significant and persistent failures and the consequent delay, includes expense and prejudice to the defendant, amply justified the District Judge's refusal to lift the stay and his consequent order striking out the claim. The prejudice to the defendant through this manner of conducting the claim could simply not be properly compensated with a costs order because of the potential for the delays to have contributed to persistent symptomatology and/or a lack of rehabilitation, thereby increasing the value of the claim."

He therefore refused to lift the stay.

53. Two elements of this conclusion fall to be considered on this appeal. The first is Judge Pearce's approach to the substantive issue where, rather like Judge Wood QC in the present case, he stressed the discretionary nature of an application to lift or retain a stay. I deal with that in greater detail in Section 6 below. The second is Judge Pearce's assumption that the principles of abuse of process (a concept which he does not mention by name but which, from his language, it seems that he had well in mind) applied to the RTA Protocol process. In his skeleton argument, Mr Browne QC suggested that this was wrong in principle, and that a failure to comply with the RTA Protocol did not amount to an abuse of process because, like all PAPs, it was concerned with pre-action events, and not proceedings before the court.

54. I should make it plain that, for the reasons set out in Section 7 below, this is an issue which arises only tangentially here: on my analysis, the primary abuse of process in this case was an abuse of the court process itself. But given the respondent's reliance on *Lyle*, and given that, when considering abuse of process in a case like this, it is not

always possible to distinguish neatly between the conduct of an RTA Protocol process, on the one hand, and the conduct of any parallel court proceedings, on the other, it might be helpful if I set out my conclusions on that point of principle.

5.3 Abuse of Process and the RTA Protocol

55. I consider that Judge Pearce was right to assume that the principles of abuse of process can apply to the procedure governed by the RTA Protocol. There are four interlinked reasons for that.

56. First, the Practice Directions and the Rules themselves make plain that the court expects the parties to comply with the PAPs. Thus the Practice Direction concerned with Pre-Action Conduct and Protocols at paragraph 13 states that "the court will expect the parties to have complied with the relevant pre-action protocol or this Practice Direction. The court will take into account non-compliance when giving directions...". Similarly, CPR r.3.1(4), dealing with the court's general powers of case management, provides that "where the court gives directions it may take into account whether or not a party has complied with any relevant pre-action protocol".

57. These provisions are a reflection of the importance given to PAPs generally by the CPR. Lord Woolf MR said in the Access to Justice Final Report (2006) at Chapter 10, paragraph 6, that PAPs were "an important part of the system" and were to "set out codes of sensible practice which parties are expected to follow when faced with the prospect of litigation". The court expects parties to comply with these rules, so it seems to me to follow that non-compliance can, in an extreme case, amount to an abuse of process.

58. Secondly, the RTA Protocol is a detailed set of rules designed to streamline the civil justice process and to ensure that many of these claims never even reach the stage of a formal commencement of proceedings. It would be counter-intuitive if non-compliance with those rules could be dismissed as being irrelevant to the court's overall control of civil business (including the ability to strike out for abuse of process) simply because they related to a period before the formal commencement of court proceedings.

59. Thirdly, the RTA and EL/PL Protocols are expressly interwoven into the CPR themselves. Claims under these low value protocols are the subject of specific provisions in Section II of CPR Part 36, concerned with offers to settle, and Section III of CPR Part 45, concerned with fixed costs. In addition, of course, Practice Direction 8B is expressly referable to these low value PAPs. They cannot therefore be divorced from the CPR, and the process of the court.

60. Fourthly, the overlap between the jurisdiction of the court and the PAPs was considered by this court in *Jet 2 Holidays Limited v Hughes and Another* [2019] EWCA Civ 1858, [2020] 1 WLR 844. That was a case concerned with contempt of court and false statements of truth included in statements provided during the PAP process. This court found that, even though the statements were made in pre-court proceedings, the rules relating to contempt of court applied to those statements. The explanation for that can be found in the judgment of the court at [36] - [45]. Although it might be said that contempt of court proceedings are different to, and generally more serious than, allegations of abuse of process, I am not persuaded that there is any significant difference between the two as a matter of overarching principle. In my judgment,

depending on the facts, just as a failure to comply with a PAP can in principle give rise to contempt of court, so too can it give rise to an abuse of process.

6. THE CORRECT APPROACH TO DISPUTED STAYS, TRANSFERS AND APPLICATIONS TO STRIKE OUT

61. In a case of this kind, a defendant may become aggrieved at the claimant's conduct during the RTA Protocol process itself, or during or at the end of any stay sought and imposed by reference to Practice Direction 8B. The defendant can then raise his or her concerns by, for example, opposing the lifting of the stay or opposing any transfer to CPR Part 7. Mr Allen QC was anxious to point out that this was the focus of the enquiry before DJ Campbell, and that continuing the stay or transferring the claim was a single discretionary decision, in which the allegations of abuse of process were just one factor to be considered. It is right that Judge Pearce appeared to approach the issue in *Lyle* on the same basis, as did Judge Wood QC in the present case.

62. In my view, this emphasis on the discretionary power to lift or maintain the stay (or to transfer the claim to Part 7 or refuse the transfer) risks avoiding the reality of the situation which has arisen. In this sort of case, if a permanent stay is maintained, or an otherwise valid claim is not transferred to Part 7 where it belongs, then the defendant will have achieved his/her aim, because the proceedings will, to all intents and purposes, have come to an end. But since it is accepted that the proceedings cannot remain in a sort of legal limbo, this approach presents the striking out as an act of kindness, putting useless proceedings out of their misery. I consider that such an approach puts the issues the wrong way round. If the defendant is seeking to prevent a valid claim from going further, then no matter the mechanism by which that debate comes before the court, the judge must grapple with the central dispute: should the claim be allowed to proceed, or should it be struck out? That issue will be informed (but not decided) by the answer to the prior question: has there been an abuse of process?

63. In the recent case of *Asturion Foundation v Alibrahim* [2020] EWCA Civ 32, [2020] 1 WLR 1627, this court was considering a unilateral decision by the claimant not to pursue its claim for a period of time whilst maintaining an intention to do so at a later date. The court found that this may well constitute an abuse of process, but did not necessarily do so (see paragraph 61 of the judgment of Arnold LJ). More importantly for present purposes, the court set out the correct approach to an application to strike out for an abuse of process. It said that it was a two-stage test. First the court has to determine whether the claimant's conduct was an abuse of process. Secondly, if it was, the court has to exercise its discretion as to whether or not to strike out the claim (see paragraph 64). It is at that second stage that the usual balancing exercise, and in particular considerations of proportionality, becomes relevant.

64. Furthermore, it seems to me that applying this two-stage test in circumstances like this not only provides clarity and simplicity, but it also avoids the sort of confusion that was identified by Turner J in *Liddle v Atha.* In that case the judge noted at paragraph 20 of his judgment that, in the lower court, the parties had agreed that, if there was an abuse of process, the application to strike out would automatically succeed. The judge was not satisfied with that, saying that he remained to be persuaded that the finding of abuse automatically gave rise to the striking out of the claim. As *Asturion* has subsequently

demonstrated, Turner J was right to be doubtful: they are different questions and the finding of abuse of process does not lead inexorably to the striking out of the claim.

65. Did DJ Campbell adopt the correct two-stage test? In my view, she did not. Judge Wood QC did not believe that she had, because he upheld her decision on the express (but incorrect) basis that the two-stage test (what he called "the stepped approach") did not apply to the applications before her. In addition, having assumed an abuse of process, it seems to me that DJ Campbell then proceeded, rather like the parties in *Liddle v Atha*, on the erroneous basis that this would, at the very least, give rise to a *prima facie* right to strike out the claim. There is no reference in her judgment to some of the basic principles which I have outlined above (doubtless because the relevant authorities were not cited to her and because *Asturion* had not even been decided in October 2018). I am left with the impression that, just as Judge Pearce did in *Lyle,* DJ Campbell concentrated on her overall discretionary powers as to whether or not to lift the stay or transfer to Part 7, rather than focussing first on the issue of abuse and then considering the proportionate sanction.

66. The consequences of this flawed approach can be seen most obviously at [67] and [68] of her judgment. At [67] she said that, in all the circumstances, it would not be a proper exercise of her discretion to allow the appellant's solicitors to transfer this case to Part 7, "so I'm not going to exercise that discretion". As she recognised at [68], "that leaves that claim form in limbo. The stay has expired. I have not granted permission to lift that stay and therefore the court has no other option but to strike a claim out".

67. For the reasons that I have given, I do not think that that was the right approach. The striking out of a claim should never become the sort of administrative afterthought which DJ Campbell describes in these passages. For that reason, therefore, I have concluded that it is necessary for this court to consider afresh the two stages of the test identified in *Asturion*. Was there an abuse of process and, if so, what is the appropriate sanction for that abuse? In particular, was it proportionate to strike out the claim?

7. WAS THERE AN ABUSE OF PROCESS IN THIS CASE?

68. In the judgment of DJ Campbell, the 'Conclusion' section contains this paragraph:

> "65. When I look at the entire history of this case and the way in which this claim has suddenly been presented against the evidence that was available in November 2014, January 2016 and early 2017, all before proceedings were issued and, despite that evidence, the claimant's solicitors went ahead and sought a stay because they "intended to comply with the portal protocol", in a case that never, ever at the time they issued the claim form could it be said would have a value of £25,000 or less. That, to me, is an abuse of process and the abuse comes from using the procedure that is available to portal claims in a case that could not be said, on any stretch of the imagination, to be a portal claim. That is why I am so critical of the claimant's solicitors, because the way in which they have done that meant that a further twelve months went by before they had to do anything substantial and in those twelve months they did not even get any further medical evidence. They just strung it out, continued to fail to properly correspond with the defendant's solicitors and then at the eleventh hour, two days before the stay due to expire, they make an application to transfer to part 7. That is against a background of a claimant agreeing his medical evidence during that twelve-month

> period, the file being transferred to the multi-track team, somebody transferring the file up and down the country (although I cannot see why that was going on when the claim form says 'Liverpool' for service) and finally getting to grips with the case, a case that should have been got to grips with years earlier. It is more than just 'do not get a grip'. I find that they have utilised that part 8 stay option in a case where they should never have used it. They should have done the right thing and dropped it out of the portal."

69. Unpicking that paragraph a little, it seems to me that it identifies three separate abuses of the process. These were:

a) At the point when the appellant's solicitors issued the claim under Part 8, they knew (or ought to have known) that this was not a Part 8 claim. They should have issued a claim under Part 7;

b) The appellant's solicitors sought a stay so as to comply with Stage 2 of the RTA Protocol when they knew (or ought to have known) that the RTA Protocol was inapplicable to this claim;

c) The appellant's solicitors did not intend to and did not in fact use the stay of proceedings for the purposes for which it was sought and granted.

70. This evaluative judgment as to the consequences of the appellant's solicitors' conduct was clearly open to DJ Campbell. Although she made a number of other criticisms, I consider that these three failures were much the most serious, and are more than sufficient to demonstrate an abuse of process in this case. As foreshadowed in paragraph 54 above, I consider that a) and c) were abuses of the court proceedings themselves, whilst b) is better categorised as an abuse of the RTA Protocol process.

71. The only real attack by the appellant on this part of DJ Campbell's judgment is the suggestion that she was wrong to find an abuse of process because she did not find that these failures had caused the respondent "manifest unfairness" (as per *Hunter*). That criticism was also maintained in respect of the judgment of Judge Wood QC, because it was said that, although he dealt with the issue of unfairness, he did not apply the test of "*manifest* unfairness".

72. In my view, there is nothing in these criticisms. An abuse of process can occur regardless of whether or not there is unfairness, let alone manifest unfairness, to the other party. Nobody suggested in *Lewis, Liddle v Atha,* or *Alpha Rocks* that the defendant had been caused manifest unfairness by the deliberate undervaluing of the claims on the claim form or the exaggerated claims for fees, but that did not prevent a finding of abuse of process in each case. In my view, questions of unfairness are relevant to the second part of the test, namely the balancing exercise to be undertaken when considering the proportionate sanction. They are not relevant to whether or not there has been an abuse of process in the first place.

8. THE EXERCISE OF DISCRETION

8.1 Introduction

73. Having established that there was an abuse of process, the second step for the court is the usual balancing exercise, in order to identify the proportionate sanction. Striking out the claim is an option, but as we have seen, it is not the only, or even the primary, solution. As noted in paragraph 15 above, striking out is not one of the options identified in the Practice Direction concerned with compliance with the PAPs, although that does not mean that, in an exceptional case, it will not be the appropriate sanction.

74. When considering this aspect of the appeal, I remind myself that this court will only interfere if it considers that the first instance judge has erred in principle, or if she has left out of account a feature which should have been considered or taken into account a feature which should not have been considered, or failed to balance the various factors fairly in the scale: see *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647 and *AEI Rediffusion Music Limited v Phonographic Performance Limited* [1999] 1 WLR 1507.

75. I have already said that, in my view, DJ Campbell failed to apply the two-stage test. She dealt with all aspects together, as part of an overall exercise of her discretion, which ran the risk of downplaying the proportionality of bringing the claim to an end. In addition, she wrongly assumed that striking out the claim was the primary solution. Moreover, in reaching her conclusions, I consider that she made findings as to the prejudice suffered by the respondent which were not in the evidence and which were unjustified, and failed to give any proper weight to the consequences of striking out the claim and depriving the appellant of his Article 6 rights. I explain my reasons for these conclusions below.

76. At the outset, however, it is important to focus on the prejudice to the respondent which undoubtedly did arise here. By July 2017 at the latest, the appellant's solicitors knew or ought to have known that this was a large claim which was completely unsuitable for the RTA Protocol and Part 8. They should have issued a claim form under CPR Part 7 and sought the respondent's solicitors' agreement to a stay whilst the parties complied with the PI Protocol. On that basis, the respondent would have been in receipt of a fully detailed claim by the autumn of 2017 at the latest and been able to utilise the PI Protocol from then on. In the event, the respondent did not have that fully detailed claim until the autumn of 2018. It is that delay of one year which is the principal consequence of the abuse of process.

77. Usually, such delays are capable of being compensated for in costs or by way of other financial sanctions, although that will always depend on the facts of the individual case. What was the evidence of any wider prejudice to the respondent in this case which could only be met by striking out the claim?

8.2 The Prejudice to the Respondent

78. The first way in which it is said that the respondent was prejudiced arose from the failure to use the PI Protocol. As both DJ Campbell and Judge Wood QC made plain, the PI Protocol is very different from the RTA Protocol. It requires a completely open approach in respect of medical treatment, experts and rehabilitation, none of which is

reflected (for obvious reasons of proportionality) in the RTA Protocol[5]. It is said that the respondent was deprived of these benefits because the PI Protocol was not used.

79. There are two answers to that. First, for the reasons that I have given, I consider that the focus must be on the lost year between autumn 2017 and autumn 2018. Prior to that, the use of the 'wrong' Protocol was much more debateable (because it was not apparent at the outset or for some considerable time thereafter that the claim was obviously unsuitable for the RTA Protocol), and the process was taking place within the limitation period anyway. So the best that the respondent can say is that, if a proper Part 7 claim had been made in the summer/autumn of 2017, as it ought to have been, they might have agreed to a stay so that the matter could have proceeded under the PI Protocol from then on.

80. Secondly, I do not accept that, if the PI Protocol had been followed a year earlier, the evidence suggests that anything significant would have been done differently. By reason of the size and complexity of the claim, the parties would always have had their own experts. This was a multi-track claim and as such, as paragraph 7.2 of the PI Protocol suggests (paragraph 11 above), it would not have been appropriate for a single joint expert. It has not been suggested that any other aspect of case management (save in respect of experts) might have been done differently if a Part 7 claim had been made in autumn 2017 under the PI Protocol.

81. The respondent makes a fair general point about medical examinations and rehabilitation. Earlier compliance with the PI Protocol would have led to an earlier examination of the appellant by the respondent's experts. But there was nothing to suggest that this would have made any difference to the appellant's medical treatment. Neither was there any evidence that rehabilitation might have been possible if the appellant had been examined by the respondent's experts a year earlier. On the evidence, DJ Campbell could not conclude, even on the balance of probabilities, that there had been any prejudice to the respondent in this respect.

82. Further, not only is it not suggested that Dr Kidd's reports were anything other than clear and comprehensive, but it appears that the appellant himself sought the advice of various specialists, and utilised his own private medical insurance cover to do so. There is nothing to suggest that some critical point was missed in the examinations that did take place, or that sufficiently different treatment was available or should have been recommended.

83. Accordingly, I conclude that although, potentially, there could have been some prejudice because of the failure to switch to the PI protocol in the autumn of 2017, there was no evidence of any actual prejudice at all.

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[5] Thus, by way of example, paragraph 2.1 of the PI Protocol identifies its objects as, amongst other things, encouraging the exchange of early and full information about the dispute, encouraging better and earlier pre-action investigation by all parties, supporting the just, proportionate and efficient management of proceedings, and promoting the provision of medical or rehabilitation treatment to address the needs of the claimant at the earliest possible opportunity.

84. The second way in which it is said that the respondent suffered prejudice is the suggestion that the abuse of process allowed the appellant's solicitors to avoid the consequences of the Limitation Act. I confess that I do not follow that argument at all.

85. The abuse of process identified at paragraph 69 above did not affect the limitation period. The appellant issued his claim form under Part 8 within the 3-year period. If there had been no abuse of process, he would have issued the claim form in time but under Part 7 instead. The appellant's use of the wrong Part of the CPR has not bypassed the relevant limitation period or deprived the respondent of a limitation defence. A claim form was issued in time. Furthermore, that claim had been admitted even before the claim form was issued. Thus, there has been no loss of a defence which would otherwise have been available. As my Lord, Lord Justice Lewison, put it during the course of argument, there has been delay, but not deprivation.

86. Thirdly, DJ Campbell said that the respondent was unable to set a proper reserve in this case because it was misled as to the proper value of the claim for a period of four years. She said that "Insurers work very precisely. In years of claims… they would want to have a reserve set aside for damages and costs. But they have not been able to reserve against this claim in 2014, 2015, 2016, 2017 and most of 2018…" [54].

87. DJ Campbell is an experienced PI judge and, up to a point, she was entitled to have regard to her own knowledge and experience when considering the prejudice to the respondent. But she was not entitled to find prejudice where it was not alleged. If there had been a failure to set a proper reserve in this case, or if the misrepresentation that this was a low value RTA claim had given rise to particular issues or difficulties for the respondent insurer, then there needed to be specific evidence of that before she could make the finding she did. There was no such evidence. In my view, this was not a matter to which the DJ should have had any regard.

88. For all these reasons therefore, I conclude that there was no evidence of prejudice to the respondent, beyond the delay of one year noted above. That delay required some form of sanction, but there was nothing to suggest that a more conventional form of sanction in costs or in respect of interest would not have met the justice of the case.

8.3 Prejudice to the Appellant

89. As with any balancing exercise, the court also has to consider the position of the appellant and, in particular, the consequences for him if the claim was struck out. In the light of the principles set out at paragraphs 42 - 48 above, and given that this is an admitted claim where the highest that it can be put is that a fully detailed claim was provided a year later than it should have been, I do not consider that striking out was an appropriate or proportionate sanction.

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.

91. None of those matters were considered by DJ Campbell. Lord Millett's simple statement of the need for a particular justification before a claim was struck out first time round was not cited to her. If it had been, or if the other authorities noted in paragraphs 42 – 48 above had been referred to, I am confident that a different result would have eventuated. As a result, I consider that DJ Campbell erred in law in striking out the claim. That was a disproportionate remedy in all the circumstances.

8.4 The Appropriate Sanction

92. As I have already indicated, I consider that there are two appropriate sanctions which would reflect the abuse of process in this case. First, I consider that the appellant should pay the respondent's costs on an indemnity basis up to and including 17 October 2018 (the day of the hearing before DJ Campbell). Secondly, I consider that the claimant should recover no interest on his special damages for the period up until 17 October 2018.

93. Although, at [69] of her judgment, DJ Campbell identified these two possible sanctions, beyond saying that she did not think that they went far enough, she did not explain why they were inappropriate. In my view, if she was proposing and then rejecting particular sanctions, in order to conclude – as she did – that striking out was the only proper course, then she needed to explain why lesser sanctions were not proportionate. In my view, they were, for the reasons I have given.

94. Mr Allen QC complained that an order for indemnity costs was not an appropriate sanction because the respondent's costs were not very high. I reject that submission: as I put to him in argument, the fact that the respondent's costs were not as extensive as they might have been cannot mean that an order entitling them to all of those costs up to and including 17 October 2018 was inappropriate. Otherwise, taken to its logical conclusion, it would mean that only if the respondent's costs were unreasonably high would such an order be made. That cannot follow as a matter of logic or as a matter of principle.

95. Accordingly, on the applications in respect of the stay, the transfer and the strike out, I would lift the stay, transfer the case to Part 7, with the two sanctions as to costs and interest to which I have already referred. I would not strike out the claim. That then leaves the separate debate about the appellant's application for relief from sanctions, arising out of the failure to comply with the order of DJ Doyle.

9. THE APPLICATION FOR RELIEF FROM SANCTIONS

96. The application for relief from sanctions involved a consideration of the three stages identified in *Denton v TH White* [2014] EWCA Civ 906, [2014] 1 WLR 3926. The first stage would be to consider whether the failure to comply with DJ Doyle's order (ie the service of the amended claim form and the accompanying documents on 26 September 2018 rather than 4 September, as ordered) was serious and significant. The second stage would be to consider why the default occurred to see if there is a good reason for it. It is, however, unnecessary to go further into stages 1 and 2 for the purposes of this appeal because, on behalf of the appellant, Mr Browne QC properly accepted that the default

was serious and significant and that, although there was an excuse, there was no good reason for it.

97. The final stage of the *Denton v White* approach involves a consideration of all the circumstances of the case. The judges below took contrasting attitudes to this: at [78] of her judgment, DJ Campbell concluded that, if she acceded to a request for relief from sanctions in a case with this background, "I might as well just throw the White Book out of the window and say 'anything goes'". Judge Wood QC disagreed with that, but approached the application on the basis that, if the claim had not been struck out it would be because there had been no abuse of process, and it would follow that relief from sanctions ought to be granted.

98. With great respect to both judges, I do not agree with either approach. DJ Campbell was entitled, at the end of a lengthy *ex tempore* judgment and a long day in court, to home in on the default of the appellant's solicitors over a lengthy period when considering all the circumstances of the case. But as I have already pointed out, the overall consequence of their default was the one year's delay in the presentation of a fully particularised claim. Both that default, and the delay in serving the amended particulars of claim for three weeks in September 2018, could have been met by appropriate sanctions from within the White Book, rather than by its defenestration. On the other hand, Judge Wood QC was also wrong to consider that the abuse argument determined everything else: as I have explained, it was quite possible for this to be an abuse of process but for the claim not to be struck out and instead to be allowed to continue under Part 7.

99. It seems to me that, when looking at the case in the round, the failure to comply with the order of DJ Doyle, was a significant default, which is only exacerbated by the unhappy history. As Lord Sumption stressed in *Barton v Wright Hassall LLP* [2018] UKSC 12, [2018] 1 WLR 1119, the service of proceedings is a critically important step. He said at paragraph 9(2):

> "9. (2) Service has a number of purposes, but the most important is to ensure that the contents of the document are brought to the attention of the person to be served (para 37). This is therefore a "critical factor". However, "the mere fact that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under rule 6.15(2)" (para 36)."

100. But in my view, the failure to comply with that 'critical factor', together with the claimant's solicitors' other failures, must be weighed in the balance against two particular elements of the factual background. The first is that liability for this claim has been admitted by the respondent. That makes this a very different situation to the normal dispute about defective service, where a possible limitation defence to a disputed claim might result if the original service is set aside. The second is that, on 17 August 2018, the heart of the detailed amended claim (and certainly the reason why this was now a large multi-track claim) was provided to the respondent in the form of the medical reports and the claimant's statement. Although that plainly did not obviate the need for proper service of the amended claim form, which was then accompanied by many of the same documents, it inevitably lessened the effect of the delay in service of those documents from 4 to 26 September 2018.

101. In those circumstances, I am persuaded that this is an appropriate case to grant relief from sanctions. Like Judge Wood QC, therefore, albeit for different reasons, having lifted the stay and allowed the transfer to Part 7, I would grant the appellant relief from sanctions following his solicitors' failure to comply with the order of DJ Doyle.

10. CONCLUSIONS

102. I am conscious that, in arriving at my conclusions, I have come to different views to those of judges with considerable experience of this type of litigation. I am satisfied that that is primarily due to the different arguments and more extensive authorities which were deployed by leading counsel on this appeal. So, for the reasons that I have given, I would allow the appeal; lift the stay; and transfer the case to CPR Part 7. I would order the appellant to pay the respondent's costs on an indemnity basis up to and including the hearing on 17 October 2018, and order that the appellant is disentitled to any interest on his special damages up to 17 October 2018.

LADY JUSTICE NICOLA DAVIES

103. I agree.

LORD JUSTICE LEWISON

104. I also agree.