Claim No: HQ15C00054

Neutral Citation Number: [2016] EWHC 443 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
HIGH COURT APPEAL CENTRE
ORDER OF MASTER COOK DATED 29 OCTOBER 2015
APPEAL REFERENCE: QB/2015/0531

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/03/2016

Before :

THE HON. MR JUSTICE SWEENEY

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Between :

CLAIR SELLAR-ELLIOTT	**Claimant / Respondent**
- and -	
DR SARAH HOWLING	**Defendant/ Appellant**

- -
- -

Edward Bishop QC (instructed by **Hempsons**) for the **Defendant / Appellant**
Simon Dyer (instructed by **Penningtons Manches LLP**) for the **Claimant / Respondent**

Hearing date: 15 December 2015

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Judgment

Mr Justice Sweeney :

Introduction

1. On 15 December 2015 two applications in this clinical negligence claim were listed before me in the Interim Applications Court, as follows:

    i) An application by the Defendant/Appellant (hereafter "the Defendant") for permission to appeal an order made by Master Cook on 29 October 2015 that the Defendant make an interim payment of £100,000 to the Claimant/Respondent (hereafter "the Claimant") by 12 November 2015.

    ii) An application by the Claimant to set aside an Order made by Singh J on 16 November 2015, by which he granted a stay of Master Cook's Order until the determination of the appeal.

2. Having heard argument in relation to the first application I refused permission to appeal but, given that it was suggested that the proposed appeal raised an important question for practitioners in the clinical negligence field, reserved my reasons for doing so. Given that outcome, there was no need to consider the second application.

3. Before setting out my reasons it is necessary first to deal with the background, the Grounds of Appeal and the arguments advanced on each side.

Background

4. On 8 August 2008 the Defendant, a consultant radiologist, carried out a CT scan on the Claimant and failed to report on a mass on the left lobe of the Claimant's liver. In early 2012 the mass was identified as a malignant tumour - in consequence of which the Claimant has had extensive, distressing and debilitating treatment.

5. The Claimant's detailed Letter of Claim (dated 14 March 2014) alleged, amongst other things, that the Defendant had been negligent in failing to identify and to report on the mass; in failing to undertake a Contrast Enhanced CT study once the mass had been identified; and in failing to inform the Claimant's GP. It was further alleged that detection of the mass in 2008 would have occasioned further investigation; that on the balance of probabilities, a diagnosis of (benign) hepatocellular adenoma ("HCA") would have been made; and that the lesion would have been managed with surgical resection which was likely to have been successful.

6. The Defendant's Letter of Response, dated 1 December 2014, indicated that breach of duty was admitted - on the basis that there had been a failure to identify and to adequately report on the mass and that, had it been identified, further investigation should have been carried out with a Contrast Enhanced CT. The Letter also indicated that the Defendant was in the process of obtaining further expert evidence in relation to causation.

7. On 17 December 2014 the Claimant requested an urgent interim payment of £100,000 from the Defendant who, on 6 January 2015, declined the request – indicating that she was still obtaining further expert evidence as to causation and was therefore not in a

position to consider the request, but would reconsider once the evidence became available.

8. The Claim Form was issued on 7 January 2015, and was served on 2 March 2015. The Particulars of Claim make clear that, as to causation, it is alleged that had the mass been identified on the CT scan further investigation would have led to surgical resection of an HCA (i.e. a benign mass); that the mass would not have undergone a malignant transformation; and that the claimant would not have developed a hepatocellular carcinoma ("HCC"). The Preliminary Schedule of Loss and Damage indicates that damages of at least £636,702.55 are sought.

9. In the Defence, dated 15 April 2015, the Defendant's admissions as to breach of duty were repeated. At paragraph 20, it is stated that:

> *".....For the avoidance of doubt, it is denied that the Claimant's mass underwent a malignant transformation after 8 August 2008. It is averred that by 2008 the tumour was already a well differentiated carcinoma. Causation is the subject of continuing investigations and the Defendant reserves the right to plead further upon receipt of expert evidence."*

10. In correspondence thereafter the Claimant sought an interim payment in the sum of £10,000, but that was also refused upon the basis that causation was still being investigated.

11. By an Application Notice dated 7 May 2015 the Claimant made an application for an interim payment. The application was made under the provisions of CPR 25.7 – (1) (c) which provides that:

> *"The court may only make an interim payment where any of the following conditions are satisfied - .....*
>
> *(c) it is satisfied that, if the claim went to trial, the Claimant would obtain judgment for a substantial amount of money (other than costs) against the Defendant from whom he is seeking an order for an interim payment whether or not that Defendant is the only Defendant or one of a number of Defendants to the claim....."*

12. By virtue of CPR 25.7 – (4) the Court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment. At that stage, the sum sought was £65,000.

13. In due course, the hearing of the application was fixed for 5 June 2015. Shortly before that, however, the Defendant agreed to make an interim payment in the sum of £17,500 – which was reflected in a Consent Order dated 4 June 2015. In consequence, the hearing of the application itself was adjourned generally.

14. On 23 September 2015 the Claimant served the 23 page report of Professor Middleton, her expert on causation. The following day, the Claimant issued an Application Notice seeking the restoration of her application of 7 May 2015 and an

order for an interim payment (now in the sum of £100,000). On 6 October 2015 the Court gave notice that the application would be heard by Master Cook on 29 October 2015.

15. In the meanwhile, on 2 October 2015, the Defendant's solicitors had sent Professor Middleton's report to Professor Price (the Defendant's expert on causation) and had asked her to comment upon specific aspects of it. Professor Price responded in two letters – both dated 12 October 2016. In the first letter (headed "NOT FOR DISCLOSURE") she commented upon the specific aspects to which she had been referred, and opined that nothing that she had read in Professor Middleton's report had caused her to alter her opinion. She also referred, in passing, to the existence of her own report. In the second letter she outlined the reasons why she was of the view that evidence from an expert histopathologist was required.

16. On 15 October 2015 Master Cook held a Case Management Conference in the case. He considered and refused an application by the Defendant, supported by Professor Price's second letter, that the parties be permitted to rely on the evidence of a histopathologist. He ordered, amongst other things, that both parties give standard disclosure of documents relevant to causation by 4pm on Friday 30 October 2015; that the report of Professor Price be served by 11 December 2015; that joint discussions between Professors Middleton and Price take place by 22 January 2016 – with a joint statement to be produced by 5 February 2016; and that there be another Case Management Conference on 19 February 2016.

17. At the hearing of the application for an interim payment before Master Cook on 29 October 2015 the Claimant relied upon her own witness statements (respectively made and approved in May and October 2015); the report of Professor Middleton; and three witness statements by her solicitor Stephanie Code - dated 22 May 2015, 14 October 2015 (which attached Professor Middleton's report) and 28 October 2015. It was asserted that, even on the Defendant's best case, the Claimant was entitled to significant damages on the basis of the additional pain and suffering that had been caused.

18. The Defendant relied upon two witness statements, dated 3 June 2015 and 27 October 2015, by her solicitor Catherine Fox. Professor Price's first letter of 12 October 2015 was not produced. At paragraphs 8-20 of her second statement Ms Fox variously indicated that:

    i) The Defendant's position was that the Claimant's clinical natural history was compatible with the tumour being a well differentiated HCC in 2008 and not an HCA.

    ii) Professor Price's preliminary view was supportive of the Defendant's pleaded case and she advised that the change in size of the lesion in the period between 2008 and 2012 was compatible with a very slow growing, well differentiated, HCC and that the evidence suggested that it was already a well differentiated HCC by 2008.

    iii) Professor Price had been provided with a copy of Professor Middleton's report and had confirmed that it did not alter her view as to the nature of the Claimant's tumour at the time of the admitted negligence in 2008. Thus

causation was unlikely to be resolved prior to the joint statement by the experts - which was due to be served by 6 February 2016.

iv) The Defendant was not yet in a position to serve Professor Price's report, as it had not been finalised – in part because of the perceived need for evidence from a histopathologist, and in part because of problems with disclosure of the Claimant's medical records.

v) The Defendant's position was that it was not accepted that, had there been earlier diagnosis, the extent of surgery and follow up treatment would have been much reduced. On that basis the damages that the Claimant was likely to recover were likely to be extremely limited and far less than the £100,000 requested as an interim payment – particularly in the light of the earlier voluntary payment of £17,500.

vi) It was premature to ask the Court to consider an application for a further payment, and the application should be adjourned until the Case Management Conference on 19 February 2016.

19. In her witness statement dated 28 October 2015 (referred to above) Ms Code, the Claimant's solicitor, described what had happened in relation to histopathology at the hearing before Master Cook on 15 October 2015. She also explained that on 24 June 2015 she had, in effect, informed the Defendant that, on the basis of her instructions, there were no missing GP records and that therefore the absence of such records was unlikely to impact on the Defendant's ability to finalise her expert evidence.

20. During the course of the hearing of the application on 29 October 2015 Master Cook drew the attention of the parties to the decision in *Smith v Bailey* [2014] EWHC 2569 (QB); [2015] R.T.R. 6 ("*Smith*"). In that case Popplewell J decided, amongst other things, that on an interim payment application there was an evidential burden on the Defendant to put before the court material raising an issue of contributory negligence, and that the task of the court was to apply the relevant legal test to the evidence before it.

21. Mr Dyer (appearing then, as now, on behalf of the Claimant) accepted that, before ordering an interim payment of this kind, the court must have a high degree of certainty that the Claimant will succeed in recovering substantial damages. He submitted that:

i) The Defendant had had ample time to investigate the core issue of whether or not, in 2008, the mass that was identified was already a well differentiated HCC; the Defence must have been pleaded on the basis of some expert evidence; and Professor Price had been able to put a letter in relation to histopathology before the Court on 15 October 2015.

ii) Professor Middleton's report was coherent, logical and presented a powerful justification for his conclusion that the mass that was identified in 2008 was not malignant.

iii) In particular, his evidence that the lesion was simply too big to be an HCC; that its rate of growth in the period from 2008 to 2012 was too slow for it to be

an HCC; and that the median survival rate for untreated HCC was about three months, with no patient being alive after three years, was compelling.

iv) Therefore it was close to inconceivable that the Claimant would still be alive in January 2012 (at the time of her initial HCC diagnosis) if the tumour had been malignant as early as 2008.

v) Hence, in the absence of any evidence to the contrary, the Court could be satisfied that the Claimant would receive substantial damages at the conclusion of the case.

22. Mr Bishop QC (appearing then, as now, on behalf of the Defendant) submitted that:

i) The Defendant had pleaded a defence, which was based on the opinions of her experts; was not in breach of any court order or rule; and was not required to serve the evidence of Professor Price until 11 December 2015.

ii) An interim payment application should not effectively be used as a vehicle to force the defendant's hand and require her to produce her expert evidence at a point before the court had ordered its exchange.

iii) The evidence that the Defendant would be serving in due course would be supportive of the averments in the Defence and of the relevant aspects of Miss Fox's second witness statement (above).

iv) The letter from Professor Price that had first been placed before the Court on 15 October 2015 provided further support for the contention that there was a fully arguable defence.

v) In all those circumstances, the court could not come to the conclusion that the Claimant would succeed in recovering substantial damages.

23. Master Cook variously observed that Miss Fox's witness statements did no more than simply restate the position that was stated in the Defence; that Professor Price's letter failed to address the issues (the rate of growth, the size of the tumour, and studies in relation to survival rates) relied upon by Professor Middleton; that the effect of Mr Bishop's submissions was to assert that the court could be satisfied that, in due course, evidence to support the Defendant's contentions would be forthcoming (which threw into sharp focus the test that the court had to apply on such an application); and that CPR 25.7─(4), permitted the payment of no more than a reasonable proportion of the likely amount (assessed on a conservative basis) of the final judgement. He then cited [8] of the judgment of Popplewell J in *Smith* (above), as follows:

> *"The legal and evidential burden of proving contributory negligence at trial is on the defendant. On an interim payment application there is an evidential burden on the defendant to put before the court material raising an issue of contributory negligence. The task of the court is to apply the relevant legal test to the evidence before it. There may be cases in which such material cannot reasonably be expected to be available to a defendant at the time of the application. This is not one of*

them. No suggestion of contributory negligence has been raised in the two years since the accident and prior to the service of the defence"

24. Master Cook then continued:

"18) In that particular case the judge went on to hold that the Master was entitled, on the basis of the evidence before him, to discount the defendant's argument that there was likely or might likely be a substantial reduction in damages due to contributory negligence, notwithstanding the fact that the contributory negligence had been pleaded in the defence.

19) It seems to me that approach of the judge in relation to arguments of causation is comparable. Whilst the Claimant must prove his case, to me there must be, at the stage of an interim payment application, an evidential burden on a defendant to raise matters, on the basis of evidence, which would justify the court in concluding that a Claimant would not succeed in obtaining substantial damages. In other words, in my judgment, a defendant must go further than simply saying: we have pleaded it, it is there in the pleading and verified by a statement of truth when faced with compelling evidence from the Claimant. In particular, I take into account the fact that the defendant has had a considerable period of time to consider the application that is put before me today.

20) The application was issued in May 2015, and I note the first witness statement from the defendant in response was in June 2015. Whether or not a defendant needs to serve its entire expert evidence or its expert reports in final form, it seems to me that a defendant who is maintaining a causation defence such as this should be in a position to provide particulars of that defence, and to counter any formidable argument that is made against them on an application such as this.

21) In my judgment the two arguments that have been raised by Professor Middleton are indeed formidable. In my judgment, such arguments require reasoned criticism before they can be rejected or discounted or before it can be assumed that such evidence might be forthcoming in the period up to trial. On the basis of the material before me, no such criticism has been put forward by the defendant.

22) What then is the position of the court? I have to judge these matters on the basis of the evidence as it is before me. Based on that evidence I must consider what a trial judge might do. If this is the state of the evidence before a trial judge, I think I can be satisfied that the claimant will succeed in obtaining a substantial award of damages. I fully appreciate that the defendant may well in due course serve expert evidence which goes to undermine the conclusions of Professor Middleton. But, it seems to me, if the defendant is in a position to do that, she is in a position today to put forward arguments either in summary form or supported by letter which would go to undermine the two very powerful pillars of Professor Middleton's argument to which I have already referred.

23) *In these circumstances, the amount of an interim payment not seriously being in dispute between the parties, I make an order for a payment on account of damages in the sum of £100,000. That is in addition to the £18,000 that has already been paid.*"

25. In November 2015, against the background of the stay ordered by Singh J, and in order to assist the Claimant to deal with any immediate needs pending the determination of the application for permission to appeal, the Defendant made a further voluntary interim payment - in that instance of £20,000.

The Grounds of Appeal

26. The Grounds are that, in making his order, the Master wrongly:

i) Drew a parallel with – and relied upon – the decision in *Smith* (above), a case on the inter-relationship between interim payment applications and allegations of contributory negligence, which was different on its facts and turned on different legal principles.

ii) Penalised the Defendant for failing to provide the Court, on an interim payment application, with detailed expert medical evidence to rebut evidence unilaterally served by the Claimant in circumstances where:

a) the Defendant denied causation and pleaded a positive case in the Defence;

b) the Defendant served evidence from her solicitor (a) confirming that the Defence was supported by reputable expert evidence and (b) confirming that the Defendant's expert had seen Professor Middleton's report and that it did not alter her views;

c) the Defendant had not broken any rule or Court order and was under an obligation to disclose expert evidence by the 11th of December 2015 in any event (i.e. in about 6 weeks).

iii) Criticised the Defendant for failing to respond to the Claimant's evidence, the application for an interim payment having been made in May 2015. He did so without taking account of (or knowing) that the Claimant did not serve her evidence until 23 September 2015.

iv) Categorised the Defendant's response to the application as saying no more than "we've pleaded it"; the Defendant's evidence went further than that and established that the causation defence was supported by reputable expert opinion.

v) Concluded he could be satisfied that the Claimant's expert evidence would prevail at trial, knowing that the Defendant's expert disputed it.

vi) Failed to take into account the consequences for litigants in general if his decision is correct, i.e. that Claimant's can apply for an interim payment, unilaterally disclose supportive expert evidence and then force early disclosure

of expert evidence from a Defendant or, if it is not forthcoming, obtain an interim payment.

vii) Inferred that because the Defendant chose not to serve its expert evidence (or to provide a reasoned expert response to Professor Middleton's evidence) that the Defendant had no arguable defence.

The Arguments

27. On the Defendant's behalf Mr Bishop submitted that, for the reasons set out in the Grounds of Appeal (above) the proposed appeal had a real prospect of success and thus permission should be granted. He made clear that it was not suggested, in the terms of CPR 52.3−(6)(b), that there was "some other compelling reason why the appeal should be heard".

28. The proposed appeal, Mr Bishop nevertheless submitted, raised an important question (as implicitly recognised by Master Cook) for practitioners in the clinical negligence field – namely how a Defendant, in a case where a positive causation defence (supported by a statement of truth and a witness statement) had been pleaded, should respond to an application for an interim payment when the Claimant unilaterally served expert evidence but the Defendant was not required to serve expert evidence until some weeks after the hearing of the application. In such circumstances, a Claimant's expert evidence might appear to be compelling, but presented only one side of the story. The question thus arose as to whether, in order to deal with such an application, a Defendant had to serve expert evidence (whether in the form of a letter or report from an expert) before the date upon which exchange of expert reports was otherwise due to take place, or whether (as here) a Defendant could rely on the pleaded defence and evidence given by a solicitor that there is expert evidence, which will be disclosed in due course, that will support the defence.

29. Mr Bishop submitted that, in such circumstances, it was wrong to require the Defendant to serve expert evidence because, if that practice was followed in other cases, Claimants would acquire a weapon to force early exchange of expert evidence when the court had otherwise set a considered timetable for exchange. In this case the Defendant had now served Professor Price's detailed report, which was supported by extensive medical literature and rebutted Professor Middleton's opinions.

30. Mr Bishop submitted that *Smith* (above) did not support Master Cook's conclusions. He pointed out that, in that case, which involved a road traffic accident, both the evidential and legal burden had been on the Defendant to prove contributory negligence; that the Defendant had done almost nothing prior to the application for an interim payment to advance that defence; and that, as part of his overall conclusion that the defence was not arguable, Popplewell J had been able to analyse the facts of the accident (as gleaned from the Police Accident Report). Whereas in this case, Mr Bishop submitted, the situation was very different – the burden was on the Claimant to prove her case on causation; the Defendant had pleaded a causation defence; and had produced evidence from her solicitor that the defence was supported by a reputable expert – hence Master Cook should not have concluded that he was "satisfied that the claimant will succeed in obtaining a substantial award of damages".

31. Further, Mr Bishop submitted, Master Cook had applied the wrong test. In accordance with CPR 25.7─(1)(c) he had to be satisfied that if the claim went to trial (i.e. after expert and other evidence had been exchanged, joint statements produced etc) the claimant would obtain judgment for a substantial amount of money, rather than decide what a judge would do on the state of the evidence produced for the application. Hence he could only have drawn a conclusion favourable to the Claimant if he had thought that the Defendant could not produce supportive expert evidence, or that if such evidence was produced it would be bound (or very likely) to be rejected – and the evidence before him did not support either conclusion.

32. On the Claimant's behalf Mr Dyer argued that, against the background that CPR 16.5─(2) requires a defendant to state his reasons for denying an allegation and, if he intends to put a different version of events, to state that version, CPR 25.7─(1)(c) necessitates an evidential hearing to determine whether the court can be "satisfied" that judgment will be obtained at trial for substantial damages and, given that denial of liability is, in effect, a pre-condition of the Rule applying in the first place, a mere denial of liability (in this case causation) by the Defendant cannot be sufficient, in itself, to defeat an application for an interim payment. If a denial was enough there would be no need for 25.7─(1)(c) to exist, and CPR 25.7─(1)(a)&(b) would be sufficient.

33. Mr Dyer pointed out that Master Cook, in his judgment, had taken into account the Defence itself, the witness statements of Ms Fox, and Mr Bishop's submissions, and had acknowledged that there needed to be a high degree of certainty that the claimant would recover substantial damages. Mr Dyer submitted that such was offered by the "cogent and logical" evidence of Professor Middleton which, in the absence of evidence to the contrary, gave rise to the "highly powerful and persuasive reasons" that had underpinned Master Cook's conclusion in the Claimant's favour.

34. The relevant factual background, Mr Dyer submitted, included the following:

    i) The Defendant positively alleged in her Defence that the mass was malignant in 2008 and that the Claimant would thus have required the same treatment with the same result, even if the malignancy had been diagnosed much earlier – but had given no details as to why she said that.

    ii) Professor Middleton's report provided powerful and cogent reasons as to why the mass was not malignant in 2008 including, in particular, given that the average sufferer survives three months, 90% are dead within 2 years and no one was alive after 3 years, it was highly likely that if the mass had been malignant the Claimant would have been dead long ago.

    iii) The Defendant had had 18 months to investigate causation, and the benefit of the early disclosure of Professor Middleton's report on 23 September 2015, and there was thus no good reason why the Defendant could not provide evidence, in one form or another, for her allegation that the mass was malignant in 2008.

    iv) It was not, and could not be, suggested that the Claimant had any oblique motive in making the application, on the contrary, she had been in desperate need; nor that Defendant had been ambushed or taken by surprise, or had had

insufficient time to investigate and formulate her causation case; nor that Professor Price had had insufficient time to consider Professor Middleton's report; and nor that there was insufficient time for Ms Fox to include a reasoned response in her second witness statement.

35. Mr Dyer submitted, by reference to *Ladd v Marshall* [1954] 1 W.L.R. 1489 and CPR 52.11─(2), that (in the absence of any application to adduce fresh evidence) it was not appropriate for the Court to take into account either Professor Price's first letter of 12 October 2015 or her report. Rather, he submitted, the application should be decided upon the basis of the evidence that was before Master Cook.

36. As to the first and second Grounds of Appeal, Mr Dyer submitted that Master Cook had been right to make a comparison with *Smith* (above) given that, whilst in that case the Defendant would have been under a legal burden as to contributory negligence at trial, Popplewell J had concluded that he only bore an evidential burden (which is defined in Chapter 6 Section 1 paragraph 6.02 of Phipson on Evidence) on the application for an interim payment – i.e. a burden to adduce sufficient evidence for the issue to go before the tribunal of fact.

37. Hence, Mr Dyer submitted, Master Cook had been right to say that the Defendant must go further than simply relying on the Defence and witness statements to the effect that there was supportive evidence, without particulars – including the reason's for the expert's differing view. It was not penalising the Defendant to expect more, nor was it relevant that the Defendant had not breached any Court order Equally, in *Smith* (in which the Defendant had not been in breach of any Court order either) Popplewell J had clearly been right at [8] to state that: "*The task of the Court is to apply the relevant legal test to the evidence before it*". In this case the Claimant had simply applied on notice for an interim payment, it was routine for a Defendant to put evidence before a Master on such an application, and it was entirely a matter for the Defendant to decide what evidence she chose to adduce in reply.

38. At all events, Mr Dyer argued, the Defendant appeared to be arguing that a Master must favourably guess what the Defendant's causation evidence might be at trial - when such evidence was available but the Defendant had chosen not to use it, or even to describe the reasons within it. Rather, Mr Dyer asserted, on the evidence before Master Cook, his decision to grant the interim payment was unassailable. In any event, Masters could be expected to see subversive applications for what they were.

39. As to the third Ground, Mr Dyer submitted that it was irrelevant that Professor Middleton's evidence had been served on 23 September 2015 (five weeks before the hearing of the application) as opposed to having been served in May 2015. It had not been suggested to the Master that Professor Price had had insufficient time to consider the evidence – indeed, as had since become clear, she had actually done so and had commented upon it. The defendant had simply chosen not to tell the court what Professor Price had said in response.

40. As to the fourth Ground, Mr Dyer argued that Master Cook had been right to regard the Defendant's position as amounting to little more than saying "we've pleaded it and therefore no interim payment can be applied for or made". For the Defendant to assert that she had supportive evidence, but then neither to disclose it nor to give the

reasons for the expert's views, was not sufficient to resist an application that was supported by highly cogent evidence.

41. As to the fifth Ground, Mr Dyer submitted that Master Cook was not assuming that the Claimant's expert would prevail at trial, but rather that if the evidence made available to him on the application was the evidence at trial the Claimant would undoubtedly prevail. There was no other reasoned way to approach the determination of the application – a contrary approach would turn what is an evidential enquiry into a bun fight.

42. As to the sixth and seventh Grounds, Mr Dyer argued that there were no adverse consequences for a Defendant with a causation defence to tell the court, on an interim payment application, what that case was – whether, in this instance, by Professor Price setting out her views in outline or by Ms Fox setting out those views in a statement. In any event, Mr Dyer pointed out, Professor Price's second letter had been put before the court at the hearing on 15 October 2015 and both the failed application for a histopathologist (which had not been appealed) and the wording of that letter suggested that Professor Price was far from sure that the mass had been malignant in 2008. Indeed, on the material placed before the Master, it was impossible to determine what, if any, arguable defence the Defendant had.

Reasons

43. I had no doubt that the application for permission to appeal had to be decided upon the basis of the evidence that was before Master Cook and, accepting Mr Dyer's arguments, that none of the Grounds of Appeal had any real prospect of success. That view has been since been fortified after reading *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs (formerly Inland Revenue Comrs)(No 2)* [2012] 1 WLR 2375; [2012] EWCA Civ 57, to which I was not referred - but which is mentioned at 15-104 of the White Book (to which Master Cook was referred).

44. CPR 25.6 sets out the general procedure in relation to applications for interim payments. By virtue of CPR 25.6─(3)(b) such an application must be supported by evidence, whereas CPR 25.6─(4) & (5) make clear that there is no obligation on either the respondent or the applicant (in reply) to file evidence, there is simply the option in each case to do so. There may, of course, be cases in which a respondent chooses not to file any evidence at all, and simply relies upon argument to the effect that the evidence relied upon by the applicant does not meet the requisite test.

45. As to the requisite test, in the *Test Claimants* case (above), the Court of Appeal decided that:

    i) On an application for an interim payment the Claimant has to satisfy the court, upon the balance of probabilities, that the requisite conditions have been fulfilled [33].

    ii) On an application under CPR 25.7─(1)(c) the Claimant must therefore satisfy the court, upon the balance of probabilities, that if the claim went to trial, the Claimant would obtain judgment for a substantial sum of money from the Defendant [36].

iii) That means that the court must be satisfied, upon the balance of probabilities, that if the claim were to go to trial then, on the material before the judge at the time of the application for an interim payment, the Claimant would actually succeed in her claim and furthermore that, as a result, she would actually obtain a substantial amount of money [38].

iv) It is not enough for the court to be satisfied, upon the balance of probabilities, that it is likely the Claimant would obtain judgment, or that it is likely that she would obtain a substantial amount of money [38].

46. Whilst, no doubt, the court will always be alert to the possibility of an application being made for an improper purpose of the type feared by the Defendant, and to deal with it accordingly, that was certainly not the position in this case. The Letter of Claim was served in March 2014, the Claim Form was served in January 2015, the application for an interim payment was first made in May 2015, Professor Middleton's report was served on 23 September 2015 and the hearing of the application finally took place on 29 October 2015. There was thus ample opportunity for the Defendant's expert, Professor Price, to consider the issue of causation and to comment upon the main points relied upon by Professor Middleton. Indeed, as has now emerged, on 12 October 2015 Professor Price had considered and commented by letter upon Professor Middleton's report, but the Defendant chose not to deploy that letter - rather she chose to rely on Ms Fox's witness statement of 27 October 2015, the content of which is summarised in [18] above.

47. Hence it was clear that, as required, the Claimant had served evidence in support of the application, and that the Defendant (as was her right) had chosen only to serve some limited evidence in response to the application. It was nothing to the point that the Defendant had not broken any rule or Court order, or that she was not under an obligation to disclose expert evidence until some six weeks later, or that Professor Middleton's evidence had only been served on 23 September 2015.

48. Equally, it seemed to me to be clear that Master Cook was right to conclude that he had to decide the application on the evidence before him. It was also clear that, on that evidence, he was entitled to conclude that, absent any evidence of reasons to the contrary, the evidence of Professor Middleton was compelling, and thus to conclude, as he did, that the Claimant had proved, to the requisite standard, that the conditions in CPR 25.7─(1)(c) were met.

49. To the extent that Master Cook relied on the decision in *Smith* (above) to conclude that he had to decide the application upon the evidence before him, he was clearly right to do so. To the extent that he referred to there being an evidential burden on the Defendant he was doing no more, in the particular circumstances of this case, and given that he had to make a decision on the evidence before him, than recognising (as he was entitled to) the apparent strength of Professor Middleton's reasoned points and the consequent need for at least some reasoning from Professor Price to result in him not being persuaded that, on the balance of probabilities, the requisite test was met. He was also, in my view, clearly entitled to proceed upon the basis, again in the particular circumstances of this case, that the mere fact that the Defendant's causation case was supported by reputable expert opinion, and that the Defendant's expert would dispute the Claimant's expert evidence at trial, did not mean that, on the evidence, the Claimant had failed to persuade him that the requisite test was met.

50. It was against that background that, in the particular circumstances of this case, I concluded that the proposed appeal had (and still has) no real prospect of success.