Case No: QB/2015/0556

Neutral Citation Number: [2016] EWHC 104 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/01/2016

Before :

THE HON. MRS JUSTICE MAY DBE

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Between :

Alexander Georgiev (by his mother Mrs Georgiev acting as litigation friend)	**Claimant**
- and –	
Kings College Hospital NHS Foundation Trust	**Defendant**
Appeal	

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Robert Glancy QC (instructed by **Pattinson & Brewer**) for the **Claimant**
David Westcott QC (instructed by **Kennedys**) for the **Defendant**

Hearing dates: 15 January 2016

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Judgment

Mrs Justice May:

Introduction

1. The Claimant, Alexander Georgiev ("Sasha"), is a 6-year old boy with complex mental and physical disabilities. He was born at home on 15 September 2009. He brings this action by his litigation friend, his mother Mrs Georgiev, against the King's College Hospital NHS Foundation Trust ("the Trust"). As currently pleaded, the action is for damages arising from alleged breaches of duty to provide appropriate care during labour and delivery.

2. Sasha is Mrs Georgiev's first child (she has since had a daughter). During her pregnancy in 2009 Mrs Georgiev and her husband planned a home birth. In the later stages of labour Sasha suffered circulatory collapse lasting 30 minutes, relieved ultimately by his delivery and resuscitation. After delivery he had to be resuscitated by the midwives before being rushed to hospital. He survived, but was left with brain damage and associated disabilities including four-limbed cerebral palsy. Sasha will require care 24/7 for the rest of his life.

3. These proceedings were commenced by Claim Form and Particulars of Claim issued on 25th October 2013. A Defence was served on 30 July 2014, putting liability (breach of duty and causation) and damages in issue. Standard directions for disclosure, service of witness and expert evidence and preparation for trial were made by order of Master Cook dated 27 January 2015. A trial window for a 7 day trial was identified in that order and the trial date was subsequently fixed for 5 April 2016.

The application to amend and this appeal

4. By an application dated 6 October 2015 Sasha's representatives applied to amend the Particulars of Claim to add a claim for breach of a duty to obtain informed consent in connection with risks associated with a home birth ("the informed consent case"). The Trust resisted the application, which was heard by Master Cook on Friday 30 November 2015. In a reserved judgment handed down the following Monday 3 December 2015 Master Cook refused permission to amend. It is that decision which is under appeal before me.

5. I granted leave to appeal on the papers by order dated 21 December 2015, making this observation:

   (i) This was a finely-balanced decision; it is recognised that it was one which involved the exercise of discretion by the Master.

   (ii) However in circumstances where a claim in respect of the "informed consent" allegations is within time and could yet be brought, there are important considerations of likely duplication of evidence/trial time in the event of separate proceedings. Whilst the factual scenarios bearing on duty/breach are very different as between the pre- and peri-natal factual scenarios, the causation issues will overlap, so that similar evidence is likely to be heard at two different trials unless the amendments are allowed. It is not clear whether this point was drawn to the attention of Master [Cook], or fully developed before him; it seems unlikely, as his otherwise full and careful judgment does not mention it.

6. For the reasons which I give below I propose to allow this appeal and to permit the amendment.

The appeal jurisdiction

7. I was rightly reminded of the role of an appeal court when considering an appeal from the exercise of discretion in relation to a case management decision. Mr Westcott QC referred in his submissions to a number of passages from the White Book and to this passage from the judgment of Lawrence Collins LJ in the case of *Walbrook Trustee (Jersey) Ltd v, Fattal* [2008] EWCA Civ 427 at paragraph 33:

> "I can deal with the contentions on the substance of the appeal shortly. These were case management decisions. I do not need to cite authority for the obvious proposition that an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

I have had such warnings well in mind in deciding this appeal.

Principles to be applied to applications to amend

8. The task of a court faced with an application to amend has changed. Gone are the days when amendments were nodded through on the basis that there was no prejudice to the other side which could not be compensated in costs. Today prejudice to the administration of justice generally is a consideration equally to be taken into account. The exigencies of listing and the demands of other litigants are such that courts now carefully case-manage the cases before them and require litigants to keep to the timetables which are set. Where the parties seek adjustments to those timetables the overriding objective dictates whether, and if so what, adjustments may be permitted.

9. In the first-instance decision of *Qua Su Ling v. Goldman Sachs International* [2015] EWHC 759 (Comm) Carr J reviewed the recent authorities on applications to amend and drew the following conclusions:

> "Drawing these authorities together, the relevant principles can be stated simply as follows:
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> a) Whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
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> b) Where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and

why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

c) A very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) Lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) Gone are the days when it was sufficient for the amending party to argument that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) It is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

g) A much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

10. There is no question but that Master Cook correctly identified and sought to apply these principles to Sasha's application to amend. Mr Glancy QC for the Claimant says, however, that in applying them the Master failed to give proper weight to certain matters and failed to have any or any sufficient regard to others, and thereby fell into error in exercising his discretion to refuse the application. I deal with each of the separate grounds of appeal below.

Grounds of appeal – discussion and conclusions

11. *Ground 2*: the first of the criticisms made by Mr Glancy is that the learned Master failed to give sufficient weight to the change in the law relating to informed consent brought about by the decision of the Supreme Court in *Montgomery v. Lanarkshire Health Board* [2015] AC 1430. In my view there is nothing in this ground, the Master referred to the decision and concluded that it took the matter he had to decide no further. I cannot see that he was wrong to do so.

12. *Grounds 3, 4 and 5:* I shall take these grounds together as they are all founded in the exchange between the parties in July following service of witness statements, starting with the letter from the Claimant's solicitors dated 7 July 2015 referring to their intention to amend the pleading. The complaint is that Master Cook failed to

have proper regard to the fact that the Claimant had notified the Trust in July of the proposed new claim, that the Trust was not therefore "completely in the dark" (cf Master Cook's judgment at para 30) about the new claim, and that the Master failed properly to take into account the fact that the Trust could and should themselves have progressed the preparation of the case following notification of it in July and should have asked for further details of the informed consent claim if they required them in order to do so. The result was, submitted Mr Glancy, that the Master placed too much weight on the delay between the letter in July and service of the amended pleading in October.

13. In my view the learned Master was justified in the conclusions he reached. This was an entirely new claim said to arise from a pre-natal breach of duty. Until October when the amended pleading was served, there was no indication of how the informed consent case was going to be put. It is true that there were 3 paragraphs in Mrs Georgiev's statement dealing with what advice she was given and what advice she said she ought to have been given, but in subsequent letters the Claimant's solicitors said in terms that they needed to consult experts about the claim before finalising it, indeed in Mr Glancy' submissions for this hearing in relation to a later ground he pointed out that the experts' input was crucial and was not dealing simply with "matters of refinement". The impression given by the letters from the Claimant's solicitors in my view was that they could not say definitely whether any claim would be made until experts had been consulted, it was not until October that they confirmed that there would indeed be an amendment and it was not until 15 October that that amendment was actually served. One has only to compare the case as now pleaded, involving several detailed paragraphs, with the allegation made in very general terms in Mrs Georgiev's witness statement last year to see the extent to which further details were required to be given so as to understand and deal with the new case being made. In my view the Master's judgment, read as a whole, properly reflected the position of the Defence up to October when the amendment was served and the application made. Moreover in circumstances where the Defendant was being told that experts were required to be consulted before confirmation could be given and the amendment served, I do not consider that the Defendant's duty to cooperate and to promote the overriding objective extended to an obligation to make enquiries itself or to chase the Claimant's solicitors for details of a case that had not yet been made.

14. *Grounds 6, 8 and 9*: I take these grounds together as they all seek to criticise the Master's approach to and/or treatment of the time left to trial in April. Mr Glancy submitted that the Master gave too much weight to the lateness of the application in October, characterising it wrongly as a "very late application" of the kind referred to by Carr J in *Su-Ling*, when there was at that time over 5 months left before trial in April. Indeed Mr Glancy suggested that there was even now (mid-January) sufficient time for the parties to prepare the informed consent case so as to be ready for trial in April.

15. I remind myself that my task on this appeal is not to substitute my own view but to consider whether it was open to the Master to reach the conclusion he did about the inevitability of the trial date being lost. Master Cook is highly experienced in dealing with cases of this kind, has managed this case from the start and clearly had regard to relevant considerations such as time to find and proof new witnesses on a case involving entirely new allegations deriving from a time well before the birth

itself. His conclusion that the trial date would inevitably be lost was plainly one that it was open to him to reach.

16. Mr Glancy argued that the Master should instead have imposed a tight timetable for the preparation of the new case to trial, including filing further particulars of the amended claim, following the approach taken by Green J in the case of *Jones v. Royal Wolverhampton NHS Trust* [2015] EWHC 2154. He submitted that the Master was wrong to distinguish that case. In my view the Master was right to take the view he did about *Jones*: the amendment in *Jones* sought to plead a new case based on facts already pleaded whereas the informed consent case here arises from very different facts (as to duty and breach) which form no part of the existing case. Once the Master had arrived at his view that the trial date would inevitably be lost, notwithstanding that there were then 5 months left before trial, there was no point in imposing a timetable which, on the view he took, could never be met.

17. *Ground 7*: In her summary of the principles set out in the *Su-Ling* case (above), Carr J refers to the strength of the case as a consideration. She concluded that the case to be put by the proposed amendment in *Su-Ling* appeared weak. Mr Glancy argued that the informed consent case here is, by contrast, a very strong case and that the Master wrongly failed to take that into account. Mr Westcott responded that the strength or otherwise of a case sought to be made by way of amendment was no more than what he termed a "threshold condition", meaning that once a case reaches a certain level of strength other considerations take over, whilst a late amendment to make case that is demonstrably weak (as it was in *Su-Linn*) will fail without more. I am reluctant to formulate or apply any general principle; it seems to me that each case will depend very much on its own facts, "strong" and "weak" being relative concepts. Focussing on this appeal, I am not prepared to find that the Master was wrong in making no explicit evaluation of the strength of the informed consent case, or in omitting any reference to the strength of the case when considering and applying the overriding objective.

18. *Ground 10*: This ground alleges error on the part of the Master in failing to take account, when considering the extent of the prejudice to the Trust, that the Claimant had given notice of its intended claim as early as July yet the Trust had apparently done nothing to obtain further information, find witnesses or obtain statements prior to October. In my view this ground is a re-statement of the criticism founding grounds 3 to 5 which I have dealt with above.

19. *Ground 11*: The final substantive ground of appeal concerns the Master's treatment of the special position occupied by Sasha as a minor and as a person with a disability for the purposes of limitation. At paragraph 37 of his judgment the Master referred to the possibility that a new claim could be brought before concluding:

> "..that is an option open to the claimant, but it is not an option that should unduly influence the court's view of the factors applying to the timing and consequences of this application to amend."

20. Mr Glancy submitted that the Master was wrong in setting aside in this way considerations arising from the extended limitation period (Sasha being a minor and s.28 of the Limitation Act 1980 ("s.28") therefore being engaged) when deciding whether or not the amendment should be allowed. There were two principal

considerations, Mr Glancy argued, each of which impacted very importantly on the decision whether or not to permit Sasha to bring the informed consent case by amendment of the existing claim. The first concerned the cost and expense associated with duplication of evidence. As the injury which Sasha sustained occurred during the last stages of delivery, issues of causation arising in a trial of breach of duty during the birth (the existing claim) will be very similar to those arising during a trial of breach of duty to advise of risks prior to the birth (the informed consent claim).

21. Mr Westcott pointed out in response that the causation issues were not just similar but identical, with the result that provided there was a causation finding in the first trial, it would be binding in the second and that in those circumstances there would be no duplication. He explained that the issue concerned prodromal variations in Sasha's heartbeat in the period immediately before the injury, whether or not these variations would have been present and/or identifiable and whether delivery would have taken place before the occurrence of the event causing injury (the event being occlusion or near-occlusion of the umbilical cord restricting blood supply to Sasha's brain). Mr Glancy responded that, although similar, the evidence would not be identical as causation in the first case would necessarily be examined against a situation where mother and baby were taken to hospital during the course of labour, whereas the second contemplated Mrs Georgiev being in hospital from the start of labour.

22. Although I understand and appreciate, having read the pleadings and the expert reports served to-date, the point that Mr Westcott makes, I cannot at this stage rule out the possibility that there may be factual differences, or at least differences of emphasis, in the causation evidence as between the two scenarios, one where Mrs Georgiev was moved to hospital towards the end of her labour and the other where she was there from the start. Without studying full pleadings, statements and expert reports bearing on the informed consent claim, I am not sure that a finding on causation in the first trial, even assuming that the court made one (it might not were it to decide there was no breach, for instance), would necessarily be binding in the second. I am left with the real concern about a possible duplication of evidence that informed my grant of permission for this appeal. This possibility – of duplication of causation evidence – was not a point raised at the hearing before the Master.

23. The second consideration arising from the special limitation position became apparent during the course of submissions before me. Having now seen the transcript of the hearing in front of the Master, it is apparent that, whilst there was discussion about what options would be open to the claimant if the amendment was not allowed, and what the defence response to those options might be, no one sought to set out for the Master's benefit the full implications of a refusal, in terms of the prejudice which the claimant might sustain, or the future burden that the administration of justice might have to bear.

24. The law in relation to the consequences for parties to a negligence claim of the application of s.28 is clear and remains unaffected by the changes to the CPR. Cases such as *Birkett v. James* [1978] AC 297, *Turner v. Malcolm* (1992) SJLB 236, *Hogg v. Hamilton* [1992] PIQR 387 and *Headford v. Bristol and District Health Authority* [1995] PIQR 180 all emphasise that, absent exceptional circumstances amounting to abuse, a claimant under a disability may not be prevented from bringing a (properly pleaded) claim within the continuing limitation

period. Prejudice to a defendant from delay or indeed anything else, short of abuse, is immaterial. Glidewell LJ made the point in *Turner v. Malcolm* that striking out or imposing conditions on an existing claim serves only to prolong the period of time before the claim is finally resolved. This approach cannot and should not be regarded as a charter for delay or mismanagement of s.28 cases by parties or their representatives, or as an excuse for such: the setting of a timetable for preparation of the issues to trial, and the use of peremptory orders to compel compliance with it, are the means by which the court and the parties may ensure proper diligence, as Lord Diplock emphasised in *Birkett v. James,* at 321B-D.

25. There is no suggestion that the proposed amendment sought in this case is an abuse, nor could there be. Absent any such consideration, in the context of an application to amend, the effect of s.28, in my view, is to skew the balance very considerably in favour of permitting amendment, provided of course that the case is one that is sufficiently arguable and properly pleaded. That is particularly so where the new claim will involve many of the same witnesses and much of the same evidence, as the informed consent claim does in this case. There is, on the other hand, no prejudice to the Trust by allowing the amendment, beyond the ordinary time and trouble associated with having to respond to new allegations, even if it means delaying the trial by a few months.

26. The position vis a vis the administration of justice, other litigants and other cases, must of course also be considered. It is the impact upon this important "third party" of a vacated trial date which generates the need for the robust approach to late amendments exemplified by decisions such as that in *Su-Ling.* However, the balancing exercise which the proper application of the overriding objective requires may, in some cases where an amendment is sought, lead to the conclusion that the amendment should be allowed even if the unavoidable result is the loss of a trial date, on the basis that such a course would result in the least prejudice not only to one or other (or both) of the parties but to the administration of justice also. The possibility of such a conclusion is implicit in the following passage from the judgment in *Su-Ling:* "the risk to a trial date *may* mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission" (my emphasis).

27. Mr Westcott told me that if the Claimant in this case, having had his amendment refused, decided to take the course either of discontinuing and starting afresh, or seeking a trial of the informed consent issues after the first trial had finished, the Defendant would resist either course of action under *Henderson v Henderson* principles. It takes no very great stretch of the imagination to see the vista opening up of years of satellite litigation, taking up court time and thereby impacting other court users, as well as delaying the final outcome for Sasha very considerably. All this because he did not have his informed consent claim, which s.28 secures for him the right to bring against the Trust indefinitely, heard promptly at the same time as an existing claim arising from the same facts. In the balance which is to be struck "between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted" (per Carr J in *Su-Ling)*, these considerations in my view tell very strongly in favour of permitting the amendment so that there is one trial now at which all claims are heard, even if that means losing the trial date currently fixed for April.

28. These were all considerations which were raised and developed at some length before me on appeal. Having seen the parties' skeleton submissions prepared for the hearing before the Master, and having read the transcript of that hearing, whilst I acknowledge that there was passing reference to some of these matters, it was in the briefest of terms and none were developed at any length in argument. It is unsurprising, therefore, that the Master took the approach that he did at paragraph 37 of his judgment. In that respect, and that only, he fell into error when exercising his discretion to disallow the amendment and his decision must be set aside.

29. Having done so, I must exercise the discretion afresh. Mr Westcott suggested that the Supreme Court decision in *Montgomery* did not in fact change the position so as to render an informed consent case available now when it had not been before; he submitted that on the Court of Appeal authority of *Pearce v. United Bristol Healthcare NHS Trust* [1999] PIQR P53, referred to in *Montgomery,* it was always open to Sasha's advisors to bring such a case. Viewed in that light, he argued, the new amendment came very late indeed. As to this, even if Mr Westcott is right, the effect of the cases discussing the impact of s.28 is that, unless I were satisfied that it amounted to an abuse to bring the informed consent claim now, then the Claimant has a right to bring it, irrespective of any delay, or inconvenience or prejudice that might be caused to the defendant.

30. Exercising my discretion in this case therefore, it will be obvious from what I have said above that when considering and applying the overriding objective in this case, in the context of the right given to Sasha pursuant to s.28 indefinitely to pursue his informed consent claim, the amendment ought to be allowed even at the risk of the trial date in April being lost. As I see it, the consolidation of all claims to be heard at one trial is so much more practical and economic in terms of time, trouble and cost both to the parties and to the court system generally than the alternative of sequential trials with possible duplication of evidence and/or prolonged satellite litigation that the amendment ought to be allowed now and a new timetable to trial should be set to prepare for the informed consent case to be heard at the same time as the existing claim. I have asked the parties to address me further as to whether all the issues could be prepared in time for the existing trial date in April, but if they really cannot then I propose to vacate that date with a view to the trial being re-fixed in a new window later this year.