



Neutral Citation Number: [2017] EWCA Civ 181

Case No: B3/2015/1023

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SHEFFIELD COMBINED COURT CENTRE
HIS HONOUR JUDGE MOORE
3LS90715

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2017

Before:

Lord Justice Jackson
Lord Justice McCombe
and
Lord Justice Sales

Between:

Willmott
- and -
The Rotherham NHS Foundation Trust

Appellant

Respondent

Simeon Maskrey QC and Richard Baker (instructed by Heptonstalls LLP) for the Appellant
Charlotte Jones (instructed by DAC Beachcroft LLP) for the Respondent

Hearing dates: 15 Wednesday 2017

Approved Judgment

Lord Justice Sales:

1. This is an appeal from the decision of HHJ Moore QC in which he dismissed a claim by the appellant for damages for injury and loss allegedly sustained as a result of negligent treatment by the respondent NHS Trust ("the Trust"), acting by Mr Ali, a consultant knee surgeon employed by the Trust.
2. The appellant was born in 1963. She has a relatively complex medical history. From about 2000 or before, this included developing problems with her knees. In 2002 she was diagnosed with mild osteoarthritis in her right knee. In early 2007 the appellant's symptoms worsened, with growing pain now in her left knee. An arthroscopy in June 2007 by another surgeon revealed grade 3 osteoarthritis in the medial and patellofemoral compartment with chronic synovitis, with no indications of inflammatory arthritis reported.
3. In October 2007 the appellant was seen by Mr Ali, who arranged an MRI scan and also performed another arthroscopy in November 2007, which indicated the presence of osteoarthritis in the knee but no sign of inflammatory arthritis. There was no sign in the joint of red inflammation which would indicate the presence of inflammatory arthritis. Mr Ali did a biopsy of synovial fluid extracted from the knee, but it contained no rice-like seeds in it which might indicate inflammatory arthritis. At this stage, however, the appellant's symptoms were aggravated by chronic pain syndrome, or reflex sympathetic specific dystrophy ("RSD"), and Mr Ali considered that she had to recover from this before he could operate on the knee. In the meantime the appellant was provided with pain relief.
4. In June 2008, Mr Ali reviewed the appellant's case with the benefit of information from a consultant rheumatologist, Dr Fauthrop, who had arranged for an X-ray and blood test. Dr Fauthrop did not suggest that she could find any sign of inflammatory arthritis, as distinct from osteoarthritis. The blood test ruled out sero-positive inflammatory rheumatoid arthritis, but not sero-negative inflammatory arthritis; however, on Mr Ali's understanding Dr Fauthrop would have indicated if she considered that swelling in the appellant's knee was due to inflammatory arthritis, and she did not.
5. Therefore, by this stage, the arthroscopy in June 2007, Mr Ali's own examination of the knee and the professional opinion of Dr Fauthrop appeared to indicate that the appellant's knee was affected by osteoarthritis, and not inflammatory arthritis.
6. This was of significance for Mr Ali in relation to his assessment of the treatment which might be suitable for the appellant. Inflammatory arthritis would be a contraindication for employing a cementless knee replacement (using a kind of hydroxyl superglue) rather than a cemented one, since with inflammatory arthritis a cementless replacement is more likely to fail. Mr Ali considered that, absent such a contraindication, it would be best to use a cementless knee implant for the replacement, in particular because such an implant could last longer than a cemented implant and the appellant was a comparatively young patient to have a knee replaced.
7. In July 2008 the multi-disciplinary team dealing with the appellant's case made the assessment that her RSD had settled and she was referred back to Mr Ali, going on his waiting list for an operation.

8. On 10 September 2008 Mr Ali performed knee replacement surgery on the appellant's left knee. When he opened the knee, he found severe osteoarthritis throughout the knee which necessitated a full knee replacement. His evidence, which was accepted by the judge, was that he again found no sign of inflammatory arthritis in the course of the operation. This was in line with the evidence up to this point, so Mr Ali decided to use a cementless implant knee replacement.
9. In the course of the operation Mr Ali took some soft tissue from the knee and sent it to the Trust's histopathology department for analysis after the operation. The clinical details which Mr Ali provided for the histopathologist to consider read, "Soft tissue knee; Painful; ?Inflammatory arthritis". In a report prepared on about 22 September 2008 ("the histopathology report"), the histopathologist reported back that to the effect (in summary) that there was "mild focal inflammation and focal reactive features", but giving no indication that there was inflammatory arthritis present. In other words, Mr Ali's query whether there was inflammatory arthritis present was answered in the negative in the histopathology report.
10. About six weeks after the knee replacement operation, Dr Fauthrop discharged the appellant as her patient, which again suggested that she did not think she was dealing with a case of inflammatory arthritis.
11. The appellant had a CT scan of her knee in about 2009, which appeared to show that the cementless implant had integrated properly.
12. However, in 2011 the implant was found to have loosened, the replacement had failed and a further operation had to be performed in 2013. These proceedings were commenced in March 2013. Also in 2013, inflammatory arthritis in the form of sero-negative rheumatoid arthritis was diagnosed as present in the appellant's knee.
13. The histopathology report emerged at a late stage in the course of preparation for the trial. As the judge found, it was not available at the time the orthopaedic surgeon expert witnesses on each side (Prof. Atkins for the Trust; Prof. Fairclough for the appellant) prepared their expert reports; nor when they prepared their joint statement.
14. Mr Ali was cross-examined about the histopathology report. The suggestion was that his question, "?Inflammatory arthritis", as set out in the text of the report, showed that when he performed the knee operation he thought there was or might well be inflammatory arthritis in the joint (since otherwise, why bother asking this question?); and that this in turn showed that on his own evidence, in which he accepted that the presence of inflammatory arthritis was a contraindication for use of a cementless implant, he had been negligent in using such an implant for the appellant's knee replacement. Mr Ali's answer, however, was that he had sent the biopsy from the operation to be checked by the histopathologist just as a final cross-check to make sure that his own diagnosis that there was no inflammatory arthritis in the joint was correct, because the patient had an unusual presentation with pain symptoms. The histopathology report confirmed for him that his diagnosis had been correct. The judge accepted this explanation (para. [121]), and Prof. Atkins' evidence was that it was good practice to double check in this way.

The hearing at first instance

15. The appellant complains in this appeal that the judge gave an appearance of bias or predetermination of issues by the way in which he conducted the hearing, so it is necessary to consider what happened during the trial. At the trial, the appellant was represented by Mr Baker, acting alone, and the respondent by Miss Jones. The trial commenced on Monday 2 March 2015 and finished on Thursday 5 March 2015. Judgment was given on 6 March 2015.
16. It was agreed at the outset that the trial should proceed as a trial on liability alone. The appellant's pleaded case included (a) a case that Mr Ali should not have undertaken a total knee replacement at all and (b) a case, put in general terms, that he should not have used an uncemented replacement. The appellant's skeleton argument for trial included the claim that if Mr Ali was reasonable in undertaking a knee replacement at all then he should have used a cemented prosthesis, "given the suspicion that the [appellant's] symptoms were caused by inflammatory arthritis and the lack of any benefit in using an uncemented prosthesis in place of a cemented one." The judge, therefore, appeared at first to be presented with a case in which the appellant was going to argue as one aspect of it that there was a lack of benefit attached to use of an uncemented prosthesis, so that even absent any suspicion of the presence of inflammatory arthritis it could not be said that any body of reasonable medical opinion would support the use of such a prosthetic implant.
17. Yet, as the judge pointed out during Mr Baker's opening, Prof. Fairclough agreed that a body of orthopaedic surgeons agreed with Mr Ali that there are benefits to using cementless implants (see in particular para. 11.9 of the experts' joint statement), so it would seem that Mr Ali and the Trust would have a defence according to the test in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 58. In response, Mr Baker explained that the appellant's case was that she had inflammatory arthritis, which Mr Ali should have detected or realised was possibly present in her knee, and that the experts agreed that this was a contraindication to using a cementless implant. The judge correctly pointed out that inflammatory arthritis had only been diagnosed in 2013; in other words, there was an issue whether it had been present in 2008. So by this exchange in opening the real issues in the case were identified and narrowed down.
18. The judge explained to the parties during the course of the opening that he had had a resurfacing procedure on his own knee and hence was very familiar with the science of knees and the thought processes behind it. In my view, it was not incumbent on the judge to recuse himself simply because he had some background knowledge about the area under debate, so long as he took care to ensure that he tried the case on the evidence he heard, as he said during the trial that he would do and as he confirmed in his judgment (para [4]).
19. During Mr Ali's cross-examination, towards the end of the first day of the trial, Mr Ali was cross-examined about the histopathology report. This had not been referred to in the expert reports or joint statement, so the judge sensibly asked that the experts consider overnight whether they had seen it when those documents were prepared.
20. When Mr Ali's cross-examination resumed the next day, he gave evidence that he considered that the histopathology report definitively ruled out inflammatory arthritis.

The judge noted, fairly, that in the light of the report there would be an issue whether the diagnosis of inflammatory arthritis in 2013 could be related back to the time of the operation in 2008, so that the expert witnesses were on notice that this was a topic of relevance in the trial.

21. Mr Ali then gave evidence that, based on his own reading and attendance at academic conferences, he believed that cementless knee replacements had stood the test of time and that the technology had also improved, supporting his view that use of a cementless implant in the appellant's knee was appropriate. He was then asked by counsel for the appellant a number of times which studies he relied on for his view, and managed to refer to a couple.
22. The judge observed, "I am not sure that this is taking us anywhere" and said that it appeared peripheral. I consider that this was a fair comment. The joint statement of the experts referred in section 11 to the advantages of cementless replacements as claimed by the Trust; said that neither of the experts was convinced of the evidence for the benefits of an uncemented prosthesis (in particular at paras. 11.5 and 11.8); but at para. 11.9 continued, "Nevertheless the experts accepted that there is a body of orthopaedic surgeons who undertake uncemented joint replacement, particularly in younger patients because of the perceived advantages outlined above". Mr Ali had agreed that a cementless implant should not be used if there was inflammatory arthritis. Therefore, it seemed that, subject to the issues of whether inflammatory arthritis was present at the time of the operation in 2008 and whether Mr Ali appreciated or should have appreciated that it might be, on the agreed evidence of the experts there could be no finding of liability according to the familiar test in *Bolam*. The question whether Mr Ali could refer to studies to support his view in favour of use of a cementless knee in a younger patient without inflammatory arthritis did indeed appear to be peripheral to the real issues requiring determination.
23. The judge, again in my view fairly, made an observation to the effect that if the general question of whether cementless implants might reasonably be thought in some circumstances to be preferable *was* a matter which needed to be investigated, then what the experts had stated in bald terms in the joint statement (in particular at para. 11.8) was unhelpful, as they had not produced any detail of their own about studies which would support their views (i.e. as against those of Mr Ali and the body of orthopaedic surgeons referred to in para. 11.9). I note that this comment was directed at the experts on each side, and did not involve any indication of bias against either one.
24. In this context, the judge said that his own experience of treatment and his own reading outside the case showed that there is a lot of evidence that cementless implants could be more beneficial than cemented, although he noted that this was "a big generalisation" and was not one that he would bring into the case unless and until he had to, and that if he felt the need to, he would give the experts a chance to address him on it. I think it might have been better if the judge had simply looked to Mr Baker for an explanation of why he was going into this area at all in cross-examination. However, I do not consider that what the judge said gave any indication of bias or predetermination of issues in the case. He made it clear that he had an open mind on this issue in so far as it was relevant to the case at hand, and gave fair notice that if it was to be treated as a significant issue he would expect the experts on each side to provide him with more assistance on it.

25. In the course of these exchanges, the judge correctly noted that Mr Ali's evidence had throughout been that he thought that a cementless implant was better and that if that assessment was to be challenged the expert witnesses should have produced research papers which could be put to Mr Ali for him to have a fair opportunity to comment on them. The judge also said that cementless "certainly appears to be the future with hips" so that "it seems logical ... that cementless will eventually be the future for knees". These comments provoked the appellant's expert, Prof. Fairclough, who was sitting in court, to shake his head in disagreement. The transcript then continues:

"The judge: [...] I do not care for your witness shaking his head, either, Mr Baker. Thank you very much. He will have his chance in a while but the point is it begs the question. The purpose of this issue is to establish whether you can prove that this gentleman applied the correct judgments in his mind in 2008.

Mr Baker: Yes

The judge: What the position is now is of interest but does not really help us and that is why it is important that we do not go off at a tangent.

Mr Baker: I am grateful your honour. The key question is whether a reasonable ... the key issue is a question of fact, whether this witness did reliably conclude or could reliably conclude this patient did not have inflammatory arthritis.

The judge: Well, I do not think that is the key issue but we can talk about that later. It is certainly relevant to the key issue but, at the moment, his evidence to me is that every single indicator, including the one that he did postoperatively just to check, indicated to him that there was [no] inflammatory arthritis at the material time. Now, I have not heard the professors on that yet and they may seriously undermine that but that is his evidence at the moment."

26. In context, the judge's reference to the key issue was to whether it could even be said, on the evidence adduced by that stage, that the appellant was in fact suffering from inflammatory arthritis in 2008, as according to Mr Ali's evidence all the procedures and indications, including the histopathology report in particular, seemed to rule that out (and the experts did not appear to have addressed that report yet in their reports or the joint statement). In my view, the judge was entitled to give an indication that the proper course was for Prof. Fairclough to wait until he was in the witness box before seeking to express his views, rather than trying to do so by a pantomime of shaking his head when sitting in court. I also consider that the judge was entitled, indeed right, to seek to ensure that a proper focus was maintained in the cross-examination of Mr Ali upon what the case against him really was, rather than going off at a tangent. In that regard, I note that Mr Baker himself formulated the issue in the case, in line with what he had said in opening, as depending on whether Mr Ali should have appreciated in 2008 that the appellant had inflammatory arthritis, rather than giving rise to any more general issue whether apart from that factor Mr Ali could not properly have

chosen to use a cementless implant because research papers showed that such an implant was generally worse than a cemented implant.

27. Again, in my view, these comments do not give any objective impression of bias against the appellant's case or against her expert, Prof. Fairclough. The judge was entitled to try to maintain a proper focus on the relevant issues at trial and upon evidence being given in the proper way, and to indicate that he would expect more assistance from the experts if it was to be said that wider issues should be gone into. The judge made it clear that the views he was expressing were subject to any later relevant evidence which might be given and further submissions which might be made.
28. Mr Ali's evidence concluded shortly after this. At that stage counsel for the appellant made an application to the judge that he should recuse himself on grounds of apparent bias or predetermination, because the judge's background knowledge about knee replacements might lead him to decide the case other than on the evidence heard in court and Prof. Fairclough fundamentally disagreed with views the judge had expressed, and also because the judge had criticised Prof. Fairclough for shaking his head in the course of exchanges with counsel. The judge dealt with this application in a perfectly courteous and proper way. In my opinion he was right to dismiss the application. A judge is not precluded from hearing a case just because he knows more about the general area than another judge might do, so long as he makes sure that he genuinely tries the case on the evidence heard in the course of the trial and explains his reasons by reference to that evidence. The judge again emphasised that it would be necessary for him to consider Prof. Fairclough's evidence dispassionately and properly and that he had not expressed any definitive views on any aspect of the evidence.
29. Prof. Fairclough was then called to give his evidence. He had not sought to adduce additional research literature in support of his views. The exchanges between the judge and Prof. Fairclough in the course of giving his evidence were perfectly courteous. The judge gave every impression of listening with care and attention to Prof. Fairclough's evidence, as I am sure he did, in a sincere effort to understand and assess it. It can perhaps be said that the judge took up rather too much time discussing his own knee problem with the witness. Also, the judge did ask a lot of questions himself, rather than leaving that purely to counsel. But the overall impression given is that this was all done with a view to the judge making completely sure that he understood what the witness was saying. It gives rise to no objective appearance of bias or predetermination on the part of the judge. Prof. Fairclough apologised for his earlier behaviour (i.e. shaking his head) and the judge assured him he did not need to worry about that.
30. Prof. Fairclough was cross-examined at length by Miss Jones. He said that his views were informed, in part, by reviewing the literature on cemented and uncemented implants. In this context, the judge expressed surprise that he had not been provided with any up-to-date literature, but only two old studies from 1998. Prof. Fairclough confirmed that more recent literature existed and apologised for not providing it, at which the judge pointed out that this point could be made in relation to both experts and also in relation to the appellant's legal team, in deciding what evidence to ask for, so it was not entirely Prof. Fairclough's fault. The judge fairly pointed out that the absence of references to supporting literature could cause difficulties for the court in

deciding which evidence to accept, if there were differences of view between medics. In my view, nothing said in these exchanges gave any appearance of bias or predetermination on the part of the judge.

31. Mr Ali was recalled to give some supplementary evidence to deal with new matters raised by Prof. Fairclough, and was cross-examined on that. Then the Trust's expert, Prof. Atkins, was called. In response to the judge's comments and to deal with considerable amplification and additional evidence by Prof. Fairclough orally, going beyond his report and the very terse and comparatively uninformative paragraphs in the joint statement, Prof. Atkins had produced supporting literature for his views. The judge granted a short adjournment as requested by Mr Baker to allow him time to consider this material with Prof. Fairclough, before cross-examining Prof. Atkins. Part of this material was research literature which supported Mr Ali's evidence, against the evidence of Prof. Fairclough, that inflammatory arthritis tends to be associated with rice-seed like substances in knee fluid of a kind which Mr Ali said were absent when he carried out the arthroscopy in November 2007.

32. Prof. Atkins' evidence was that he had not seen the histopathology report when he wrote his report and agreed the joint statement. His evidence was to agree with Mr Ali that the histopathology report excluded the presence of sero-negative arthritis, the remaining type of inflammatory arthritis which was not excluded by other tests, in disagreement with Prof. Fairclough on that point. Prof. Atkins gave evidence that the histopathology report meant "we can exclude a major component of inflammatory arthropathy", i.e. in 2008, and that (as recorded by the judge and confirmed by the witness):

"Coming back to when she started with rheumatoid [i.e. inflammatory] arthritis, it is not necessary for her to have had rheumatoid arthritis at the time of the total knee replacement because the later loosening may not have been caused by rheumatoid arthritis. It is possible that there was an automimmune process going on but it did not show at all clinically until much later."

33. In light of the histopathology report, therefore, Prof. Atkins qualified what had been said in the joint statement, that "on balance in 2008, the seronegative process was present ...". Prof. Atkins emphasised that while it could still be said that it was more likely than not that an underlying process was present, which might "eventually" cause generalised seronegative arthropathy, it could not be said that on the balance of probabilities this was something which affected the appearance in the joint at the time of the operation. The histopathology report showed nothing of a rheumatoid process.

34. The judge asked detailed questions of Prof. Atkins when he was in the witness box in much the same way as he had of Prof. Fairclough when he was giving his evidence. In my view, a fair-minded observer would have regarded his treatment of them both as even-handed. Looking at the judge's performance overall throughout the trial and in giving judgment, a fair-minded observer would not have considered that he gave any appearance of bias or of having predetermined the issues in the case.

The judgment

35. In dismissing the appellant's claim, the judge gave a detailed judgment. He made the following points which are particularly relevant for present purposes:
- i) He again reminded himself that he had to try the claim on the basis of the evidence, and should be scrupulous to avoid relying on his own opinions ([4]);
 - ii) He accepted parts of Prof. Fairclough's evidence (e.g. at [51], and see [127(ix)]);
 - iii) However, he was critical of the way in which Prof. Fairclough was prepared to be scathing and dismissive regarding Mr Ali's evidence about the significance of "rice seeds" in knee fluid, in the light of literature produced by Prof. Atkins suggesting that their presence was in fact a classical symptom of inflammatory arthritis ([49], [94], [126]);
 - iv) He also preferred the evidence of Mr Ali and Prof. Atkins regarding the relevance of what was shown in an MRI scan, as he was entitled to do ([54]);
 - v) There had been a shift in Prof. Fairclough's position from the time when he approved the particulars of claim ([59]);
 - vi) Prof. Fairclough had been cross-examined with reference to the fact that he had not said in his original report that Mr Ali was negligent because he had failed to look properly into the question of inflammatory arthritis, i.e. had not originally supported the case as opened at trial, but had attempted to say in the course of his evidence that it was in fact covered by a paragraph in that report (para. 2.27) which actually had nothing to do with it. In relation to this, the judge accepted the submission of Miss Jones, resulting from her cross-examination of Prof. Fairclough about this, that he was "disingenuous" in this part of his evidence ([62]). This was a criticism which the judge was entitled to make of this part of Prof. Fairclough's evidence;
 - vii) Prof. Fairclough had not discussed in his report the fact that the appellant had had a replacement of her right knee in 2012, even though this tended to call in question the evidence in his report that it was illogical to do any knee replacement on the appellant and also whether it was likely that the left knee was inflamed in 2008 ([64], [79]-[80]);
 - viii) Generally, the judge preferred the expert evidence of Prof. Atkins as being a better guide of the standards to be expected of a surgeon engaged in a busy practice ([60]-[61], [65], [127(xi)]);
 - ix) There were inconsistencies between Prof. Fairclough's characterisation of how the appellant presented in 2008 and the facts as found by the judge ([68], [71], [77]-[78]);
 - x) The judge found that Prof. Fairclough was evasive in parts of his evidence ([69]-[70]);

- xi) He also found that Prof. Fairclough continued to give general evidence orally about the superiority of cemented implants without properly supporting that with research literature ([73]-[74]);
 - xii) The judge was critical of Prof. Fairclough who, unlike Prof. Atkins, failed to call attention to the literature setting out the criteria for inflammatory arthritis, to provide a clear objective framework for evaluating whether Mr Ali should have identified that the appellant might have inflammatory arthritis in her left knee in 2008 ([114]-[116]);
 - xiii) The judge found that the experts had not seen the histopathology report when they prepared their reports and drew up the joint statement, and preferred the evidence of Prof. Atkins and rejected that of Prof. Fairclough about its significance ([127(viii)]);
 - xiv) The judge carefully reviewed Prof. Atkins' evidence at paras. [82] and following, which he found supported the case for Mr Ali and the Trust regarding absence of negligence by Mr Ali in the assessment he made in 2008;
 - xv) The judge accepted Mr Ali's explanation of why he had raised his query for the histopathologist ([121]).
36. At para. [127] the judge then set out his principal findings of fact. He found amongst other things that:
- i) Mr Ali's assessment at the time of the operation was that all the available evidence matched an analysis of osteoarthritis ([127(v)]);
 - ii) Such evidence as there was of inflammatory arthritis being present in 2008 was neither credible nor reliable, and he accepted Prof. Atkins' explanation that the joint statement had been compiled without reference to the important histopathology report and could not be treated as definitive ([127(viii)]);
 - iii) Mr Ali saw no signs of inflammatory arthritis in 2008 because there were none, and his diagnosis of osteoarthritis was correct ([127(xiv)-(xv)]);
 - iv) Even if the judge was wrong about the correctness of Mr Ali's diagnosis, there was no material available to him to consider inflammatory arthritis and his diagnosis of osteoarthritis was a reasonable one to make ([127(xvi)]);
 - v) Mr Ali's decision to use a cementless implant was a reasonable one, which was in line with what a reasonable body of orthopaedic surgeons would have done ([127(xvi)]);
 - vi) Accordingly, the appellant had failed to prove her case and her claim was dismissed.

Discussion

37. The appellant submits: (1) there were serious procedural irregularities in the way that the judge conducted the trial, involving unfairness to the appellant and an objective appearance of bias or predetermination of issues in the case; (2) the judge wrongly

rejected the agreement of the experts that the appellant was suffering from sero-negative rheumatoid arthritis at the time she underwent the knee surgery on her left knee in 2008; and (3) the judge was wrong to accept the explanation given by Mr Ali for his question to the histopathologist about inflammatory arthritis, and should have taken this as evidence that he did in fact suspect at the time of the operation that the knee was affected by inflammatory arthritis.

38. I do not accept these submissions and I will explain shortly why that is so. However, before doing so, I should say that I think it was unwise for the judge to refer so extensively to his own experience of knee treatment and to his background reading on the subject. This gave rise to a concern that the judge might not be confining his approach to the evidence adduced before him. The concern was in fact unjustified, but it fuelled the application for recusal and has fuelled this appeal. However, on full analysis, what the judge did and said did not give an objective appearance of bias or predetermination of matters addressed in the evidence.
39. In relation to (1), I have in large part dealt with the criticisms of the judge in the account I have given above. In my view, nothing the judge did or said gave an objective appearance of bias or predetermination. The judge was right to reject the appellant's application that he recuse himself. At all stages during the trial he made it clear that he had expressed no definitive views about any aspect of the case and that he retained an open mind in relation to the expert evidence. On a fair and objective view, the judge's conduct while the evidence was given in the case showed that he was anxious to understand fully and to give proper weight to the evidence which was being presented to him. There was no unfairness, or appearance of unfairness, in his approach.
40. The judge gave both sides and their experts fair warning at an early stage that if there were to be points of difference between the experts or between them and Mr Ali he would expect to see the experts' views backed up by relevant literature. Contrary to the appellant's submission in this appeal, it was not the case that literature was not particularly helpful, as was borne out by the literature produced by Prof. Atkins in response to the judge's concerns and referred to by the judge in his judgment. The literature relied upon by Prof. Atkins was produced in the course of the trial at a time when it was open to the appellant to seek to recall Prof. Fairclough to deal with it, had she wished to do so. No such application was made.
41. Where the judge was critical of Prof. Fairclough's evidence in his judgment, it was in circumstances where the relevant points of criticism had been raised with Prof. Fairclough in the course of his cross-examination and in circumstances in which the judge was entitled to make the criticisms and gave proper and sufficient reasons to explain them. The appellant is particularly critical of the judge's finding that Prof. Fairclough was disingenuous in a part of his evidence. However, the substance of this had been put to Prof. Fairclough in cross-examination by Miss Jones and the judge was entitled to find that in attempting to answer criticisms of his original report by reference to para. 2.27 in that report - which was addressed to a criticism of Mr Ali that he had originally suggested a unicondylar knee replacement, rather than the full knee replacement which he eventually carried out, and did not distinctly deal with the issue of inflammatory arthritis nor with the reason why that should have precluded a full knee replacement using an uncemented implant - Prof. Fairclough had been disingenuous, as Miss Jones submitted he had been. That conclusion was also

supported by other criticisms of the way in which Prof. Fairclough's evidence was given, as set out in the judgment.

42. Generally, the judge was entitled to prefer the expert evidence given by Prof. Atkins to that given by Prof. Fairclough.
43. In relation to (2), the judge gave both sides and their experts fair warning at an early stage that he required assistance about the significance of the histopathology report. Prof. Fairclough had a fair opportunity to deal with the issue, because he had heard Mr Ali give evidence (to which, moreover, the judge called attention before Prof. Fairclough gave his evidence) to the effect that the histopathology report showed definitively that the appellant was not suffering from inflammatory arthritis at the time of the operation in 2008. In view of all the evidence which Mr Ali assembled before the operation, including from his own personal observation of the joint during the arthroscopy in November 2007 and again during the operation in September 2008, which tended to indicate that there was no presence of inflammatory arthritis in the knee, combined with the histopathology report and Mr Ali's and Prof Atkins' evidence about its importance, the judge was entitled to find that the appellant had failed to show on the balance of probabilities that at the time of the operation in September 2008 she had inflammatory arthritis in her left knee.
44. In any event, the judge was clearly entitled on the evidence he heard to make his alternative finding, also fatal to the appellant's claim, that even if inflammatory arthritis may in fact have been present there was no evidence of it which ought to have led him to suspect that it was present, contrary to Mr Ali's assessment on the available evidence that the swelling of the knee and pain were due to osteoarthritis. On a reasonable diagnosis of osteoarthritis, there was no negligence on the part of Mr Ali to choose a cementless implant.
45. As to (3), the judge was plainly entitled to accept the evidence of Mr Ali as to why he had raised his query about inflammatory arthritis for the histopathologist. The explanation was in line with the central thrust of Mr Ali's evidence throughout, that his assessment in 2008 was that there was no inflammatory arthritis in the appellant's knee and that if he had thought there was, he would not have operated using a cementless implant. It was also supported as a reasonable explanation by Prof. Atkins in his evidence.
46. On the evidence he had heard, the judge was entitled to make the findings which he set out at para. [127], which afforded a full answer to the claim brought by the appellant.

Conclusion

47. For these reasons, I would dismiss the appeal.

Lord Justice McCombe:

48. I agree.

Lord Justice Jackson:

49. I also agree.

