



Neutral Citation [2020] EWHC 2362 (Admin)

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
APPEALS (ChD)**

**On appeal from the order of Her Honour Judge Howells dated 4 October 2019, sitting in
the County Court at Cardiff**

Sitting remotely at:
The Cardiff Civil Justice Centre
2 Park Street
Cardiff CF10 1ET

Date: 14 September 2020

Claim No: 2YL69939
Appeal No: CF095/2019/CA

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

J

Appellant
(Claimant in the proceedings below)

-and-

A SOUTH WALES LOCAL AUTHORITY

Respondent
(Defendant in the proceedings below)

Mr Justin Levinson (instructed by **Hugh James Solicitors**) for the Appellant
Mr Steven Ford, QC (instructed by **Dolmans Solicitors**) for the Respondent

Hearing date: 17 July 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

A. INTRODUCTION

1. This appeal concerns proceedings brought in the County Court at Cardiff by the Claimant, **J**.¹ In order to preserve J's privacy, both his name and that of the Defendant (who I shall refer to as the **Local Authority**) have been anonymised.
2. The appeal is of an order of Her Honour Judge Howells dated 4 October 2019 (the **Order**), pursuant to which the Local Authority was permitted to withdraw three admissions of liability made by the Local Authority to J. These admissions were made in two letters written by the Local Authority's solicitors to J's solicitors (respectively dated 5 April 2012 and 3 May 2012) and in the Local Authority's Defence to J's claim, dated 5 December 2012. In the Order, the Judge gave permission to the Local Authority to withdraw its admissions and to amend its Defence. The essence of the draft Amended Defence was to put liability in issue.
3. Although the Judge refused permission to appeal the Order, I gave permission to appeal by my order dated 29 May 2020, and the appeal was heard on 17 July 2020. I reserved my judgment. This is that reserved judgment.

B. THE FACTS AND THESE PROCEEDINGS

4. J was born on 28 August 2000. He was, at the time of the hearing of this appeal, just short of his twentieth birthday. These proceedings were commenced on 22 August 2012 on J's behalf by his litigation friend, who continues to act for J. The essence of J's claim against the Local Authority is that in breach of its duty, the Local Authority failed to remove J from the care of his mother and his mother's foster parents in the first month of his life and place him for adoption.² As well as setting out in detail the Local Authority's alleged breach of duty,³ the Particulars of Claim referred to two letters in which it was said the Local Authority had – through its solicitors – admitted liability.⁴
5. The admission of liability was maintained in the Defence that was served by the Local Authority. Paragraph (5) of the Defence pleads as follows:

“As to paragraphs 4 to 54 of the Particulars of Claim:

- (a) It is admitted for the purposes of this claim only that the [Local Authority] was in breach of a duty of care owed to [J].

¹ The terms used in this Judgment are listed in Annex 1 hereto. Annex 1 identifies where each term is first used in this Judgment.

² See paragraph 52 of the Particulars of Claim.

³ It is unnecessary to go into detail: but it is important to note that the case against the Local Authority was pleaded extremely fully.

⁴ These are pleaded in paragraphs 53 and 54 of the Particulars of Claim.

- (b) In particular, it is admitted that the [Local Authority] was in breach of duty to [J] in not ensuring that [J] was removed from the care of his birth mother within the first month of life and, thereafter, placed for adoption.
 - (c) In the circumstances, it is neither necessary nor proportionate for the [Local Authority] to plead specifically to the facts and matters set out at paragraphs 4 to 50 of the Particulars of Claim. In so far as necessary, the [Local Authority] will refer to the records relating to [J] for full particulars of the matters alleged therein.
 - (d) Further, in the circumstances, in view of the admission made in this Defence (and prior to the issue of these proceedings), it is neither necessary nor proportionate for the [Local Authority] to plead to the specific allegations of breach of statutory duty and/or negligence set out in paragraph 51 of the Particulars of Claim.
 - (e) Paragraphs 52 to 54 of the Particulars of Claim are admitted.
 - (f) Otherwise, no admission are made.”
6. Pausing there, paragraphs 4 to 54 of the Particulars of Claim set out in detail the events relevant to J’s claim and the particulars of breach of statutory duty and/or negligence alleged by J. It will be observed that, in its Defence, the Local Authority refused to plead to the allegations insofar as they were set out and pleaded in paragraphs 4 to 51 of the Particulars of Claim. Such a refusal was only proper because of the admission of liability. It should also be noted that the records referred to in paragraph 5(c) of the Defence have never been disclosed to J or his legal advisers.
7. The Local Authority did admit paragraphs 52 to 54 of the Particulars of Claim. These paragraphs plead as follows:
- “52. Had the [Local Authority] not acted in breach of duty to [J] the [Local Authority] should have allocated a social worker prior to [J’s] birth. That social worker should have undertaken a full assessment of the mother’s needs and made plans based on that assessment. Had it done so, it is likely that [J] would have been removed from the care of his mother and [the foster parents of the mother] in the first month of life and placed for adoption.
 - 53. [J] relies upon the [Local Authority’s] admission of liability in a letter from its solicitors, Dolmans, dated 5 April 2012, in which it is set out “...liability is admitted in this case, but no admissions are made as to loss or damage”.
 - 54. [J] relies upon the further admission made by the [Local Authority] in a letter from Dolmans Solicitors dated 3 May 2012 in which it was set out “...we have now received our client’s further instructions, who like ourselves do not consider that each specific breach needs a response. Having said that, the [Local Authority] admits that but for the alleged breaches of duty, [J] would have been removed in his first month of life and placed for adoption.””
8. Paragraphs 55 to 57 of the Particulars of Claim briefly plead J’s particulars of injury and special damage. Paragraph (6) of the Defence pleads as follows in response:
- “As to paragraphs 55 to 57 of the Particulars of Claim:
- (a) The [Local Authority] has care of [J] pursuant to a Care Order made by His Honour Judge Furness dated 30 October 2007.

- (b) As such, the [Local Authority] has a duty to act in the best interests of [J].
 - (c) [J] is now aged 12 years 3 months. He is at a sensitive and challenging stage in his development as he approaches puberty.
 - (d) Although [J] has made progress, he is vulnerable and there is a real risk that his condition will deteriorate if he is subjected to examinations for the purpose of this claim (as opposed to for therapeutic purposes) at this stage in his development. The [Local Authority] reasonably believes that examination(s) by expert(s) for the purpose of this claim at this stage may well have an adverse effect upon [J's] welfare.
 - (e) The [Local Authority] further believes that it is, in any event, unlikely that a final assessment of [J's] psychiatric and/or psychological condition or prognosis (whether attributable to [J's] breach of duty or other factors such as his genetic heritage) could take place at this time. The [Local Authority] believes that it is likely that a meaningful and final assessment could only take place once [J] is much older and probably not until he is at least 16 years old.
 - (f) It is unlikely that a Court would approve any settlement of the claim pursuant to CPR 21.10 until a final condition and prognosis report is available. If (an) examination(s) of [J] was/were to be undertaken by a psychiatrist and/or psychologist and/or care expert for the purpose of these proceedings at this time, it is believed that it is, therefore, likely that (an)other examination(s) would inevitably be required at a later stage in any event.
 - (g) The [Local Authority] believes that it may not be acting in the best interests of [J] having regard to [J's] welfare and/or on accordance with the [Local Authority's] continuing duty to [J] pursuant to section 33 of the Children Act 1989 and/or at common law if it consented to (an) expert examination(s) of [J] at this time for the purpose of these proceedings.
 - (h) In the circumstances, it is averred that the question of whether [J] should be subjected to examination by psychiatrists and/or psychologists and/or care experts for the purpose of this claim must be raised by [J's] Litigation Friend, the Official Solicitor, as an Application for a Specific Issue Order to His Honour Judge Furness in the family proceedings in the Newport (Gwent) County Court, Case Number NP06C00495, pursuant to section 8(1) of the Children Act 1989.
 - (i) Further, or alternatively, the claim should be stayed until [J] reaches the age of 16 (28 August 2016), at which time the question of whether it is in [J's] interests for such examination(s) to take place at that time can be reviewed.
 - (j) At present, no admissions are made as to the injury, loss and/or damage alleged and causation is not admitted.
 - (k) No Schedule of Loss was served with the Particulars of Claim. However, having regard to the matters set out above, it is not at present contended that a Schedule of Loss should be served.
 - (l) Otherwise, no admissions are made.”
9. It is difficult to overstate the importance of this paragraph in the context of the present claim, because of the conflict of interest that it so clearly articulates. The Local Authority was, at one and the same time:

- (1) The defendant to a claim brought by J. As such, the Local Authority was entitled to resist the claim, and put J to proof; and
 - (2) The entity having care of J pursuant to a care order made on 30 November 2007,⁵ with an obligation to act in J's best interests.⁶
10. Of course, a defendant is perfectly entitled – as the Local Authority did – to put in issue causation and quantum, and to advocate for a delayed assessment of quantum. However, where the defendant – as here – also owes a duty to the claimant himself, it is incumbent upon the defendant to behave with extraordinary care given the conflict of interest that arises.
11. In this case, the Local Authority chose to make a number of averments expressly on behalf of J: in particular, that it was not in J's interests that the issue of quantum be determined in short order, which is the usual approach. The Local Authority, as the entity having care of J, was in a position effectively to enforce its view as to what was in J's best interests even though it was the defendant to J's claim. Paragraph (6) of the Defence makes very clear that even if J's own advisers were of the view that the question of quantum ought to be resolved at once, that would be opposed by the Local Authority, advancing not its own interests but those of J.

C. THE STAY OF THE PROCEEDINGS

12. Given the care order in the Local Authority's favour, it would be most unlikely that the Local Authority's position as articulated in the Defence – expressly based on J's best interests – would be gainsaid. As will be seen, the Local Authority prevailed in its stance. I have no reason to doubt that the Local Authority adopted the stance that it did in good faith, having J's best interest at heart. I proceed on the basis that this was the case. But it must be recognised that, in explicitly seeking, in the conduct of the proceedings brought against it by J, to impose upon J an effective stay on the resolution of the proceedings, the Local Authority was inhibiting or limiting its ability to act in the future in its own interests and contrary to those of J. I do not say that that inhibition or limitation was total: it clearly was not, for causation and quantum were plainly put in issue. These issues were not, as liability was, conceded. But, by way of example, I consider that it would have lain, and would lie, ill in the mouth of the Local Authority subsequently to assert that J's quantum claim was weak or ill-founded because of the passage of time, when it was precisely such delay that the Local Authority was insisting upon, using its position as the carer of J.
13. Entirely unsurprisingly, J's claim was stayed by successive orders of the court. Thus:
- (1) By an order dated 14 March 2013, the case was stayed until 2 September 2013, when a further case management conference was to be scheduled.
 - (2) By an order dated 30 September 2013, the case was stayed until 3 March 2014, when a further case management conference was to be scheduled.

⁵ As expressly pleaded in paragraph (6)(a) of the Defence.

⁶ As expressly pleaded in paragraph 6(b) of the Defence.

- (3) By an order dated 19 March 2014, the case was stayed until 1 September 2016, when a further case management conference was to be scheduled for the first open dated after 23 December 2016. It will be noted that this stay – of over 2 years – was timed to coincide with J’s sixteenth birthday.⁷
- (4) By an order dated 5 January 2017, the case was stayed until 28 August 2018, when a further case management conference was to be scheduled. At this anticipated case management conference, the court expected information on J’s “capacity to provide instructions in the litigation and to manage his financial affairs”. J, as I have noted, was born on 28 August 2000 and it is clear that this stay was imposed so that J would have achieved his eighteenth birthday by the time of the next case management conference.
- (5) A directions hearing was listed for 30 August 2018.
14. I have only been shown the various orders of the various judges staying the case: I have no information as to what was said to the court on these various occasions, but I have no doubt that these stays were imposed for J’s benefit and for the reasons articulated in the Local Authority’s Defence. There can have been no other proper reason for putting off the final resolution of this dispute. Ms Melanie Standley, a solicitor at Dolmans Solicitors, the firm conducting the Local Authority’s defence of the case, says as follows in her witness statement (**Standley 1**):

“5. Prior to the claim being issued [the Local Authority] had indicated that liability would not be in issue. On 5 April 2012, my firm wrote to [J’s] advisers saying “...liability is admitted in this case, but no admissions are made as to loss and damage”. On 3 May 2012, Dolmans wrote again, saying that [the Local Authority] “admits that but for the alleged breach of duty, [J] would have been removed in his first month of life and placed for adoption”. These admissions were pleaded by [J]...and confirmed in the defence...”

6. Since then, the proceedings have been stayed awaiting the time when [J’s] treating clinicians believe it is appropriate for him to be medically examined for the purposes of the claim. Stays were imposed on 14 March 2013, 25 September 2013, 11 March 2014, 28 August 2016 ([J’s] 16th birthday) and 3 January 2017 ([J’s] 18th birthday). Thereafter, on 14 August 2018, it was stayed pending the decision in *CN and GC v. Poole BC*, [2019] UKSC 25.”

To the extent that Ms Standley is seeking to give the impression that the stays were “imposed”, in the sense that they were ordered in the face of opposition from the Local Authority, I reject that evidence as inconsistent with the Defence advanced by the Local Authority. I have no doubt that had the Local Authority, in its capacity as J’s carer, sought an earlier than anticipated resolution of the quantum issues because this rather than delay was in J’s best interests, this would have occurred. I suspect, however, that all Ms Standley is seeking to say – although the choice of language is unfortunate – is that the thinking articulated in the Defence was followed through by the Local Authority and respected by the courts. In short, the stays were imposed on J because that is what the Local Authority considered was in J’s best interests.

⁷ See paragraph 6(i) of the Defence, quoted in paragraph 8 above.

D. THE DECISION IN *CN*

15. The situation changed with the decision in *CN and GC v. Poole BC (CN)*. Decisions in *CN* – the case went up to the Supreme Court – were made at about the time J passed his eighteenth birthday and (as a result) the Local Authority ceased to be J’s carer.⁸ More to the point, the effect of the Court of Appeal’s and the Supreme Court’s decisions in *CN* was that the Local Authority came to regret the admissions it had made in these proceedings. Ms Standley describes the Local Authority’s position in Standley 1:

“7. The Court of Appeal’s decision in *CN*, [2017] EWCA Civ 2185 was handed down on 21 December 2017. The Court of Appeal held that a local authority did not owe a common law duty of care to the child when exercising statutory child protection powers and duties. On 22 May 2018,⁹ I sent to J’s solicitor drafts of an amended defence, order and witness statement and counsel’s skeleton argument, indicating an intention to apply to withdraw the admission of liability based on the Court of Appeal’s decision in *CN* and seeking [J’s] consent.

8. The parties became aware that the Supreme Court (which had granted permission to appeal in March 2018) had expedited the hearing of the appeal, and it was due to be heard in July 2018 (it was heard on 16 and 17 July 2018). As a result, in August 2018, the parties agreed that any application by [the Local Authority] should be postponed until after the Supreme Court’s judgment. Judgment was given on 6 June 2019.”

E. THE PROPOSED AMENDMENTS AND THE APPLICATION TO THE JUDGE

16. The application to withdraw the admission of liability was made at a hearing before Her Honour Judge Howells, sitting at the County Court at Cardiff. By an order dated 4 October 2019, the Judge permitted the Local Authority to withdraw the admissions of liability it had made in correspondence on 5 April 2012 and 3 May 2012 and in the Defence. As a result, the Judge permitted the Local Authority to make amendments to its Defence in order to put in issue the question of liability.

17. The draft Amended Defence (which was in this form before the Judge, and for which the Judge gave permission to amend) pleads as follows:

“(4) Paragraphs 1 and 2 ~~to 3~~ of the Particulars of Claim are admitted. Whilst it is admitted that the [Local Authority], as a public authority, was obliged to comply with the statutory duties arising under the statutory provisions mentioned in paragraph 2, if and insofar as it is alleged that those said duties or any of them could found a private law right of action for damages for breach of statutory duty that is denied.

(4A) It is denied that the [Local Authority] owed [J] any relevant common law duty of care. The particulars of claim do not allege that the [Local Authority] or its employees have themselves caused harm to [J], only that they have failed to protect him from harm caused by others. The general rule is that public authorities (like private individuals) do not owe a duty to others to protect them from harm caused by third parties. A local

⁸ At the hearing before me, Mr Levinson, J’s counsel, confirmed that the care order lapsed with J’s eighteenth birthday. J, however, continues to lack capacity, and appears by the Official Solicitor as his litigation friend.

⁹ I.e., before J’s eighteenth birthday. The letter is written in straightforward adversarial terms, and makes no reference to the duties to J pleaded in paragraph (6) of the Defence.

authority, when exercising statutory child protection powers and duties, will only owe the child a duty to protect them from such harm if the claimant can establish that the case falls within one of the recognised exceptions to the general rule. The particulars of claim do not identify any such exception and nor do they contain any factual basis on which an exception might be established or inferred. The duty of care is alleged to arise based nly upon reasonable foresight of harm, and approach which is legally unsustainable. Paragraph 3 of the particulars of claim is denied.

- (5) As to paragraphs 4 to 54 of the Particulars of Claim:
- (a) It is not admitted ~~for the purposes of this claim only~~ that the [Local Authority] was in breach of any duty of care owed to [J];
 - (b) ~~In particular, it is not admitted that the [Local Authority] was in breach of if the [Local Authority] had discharged any duty of care owed to [J] in not ensuring that [J] was~~ would have been removed from the care of his birth mother within the first month of life and, thereafter, placed for adoption;
 - (c) In the circumstances, until the nature and scope of the common law duty alleged by [J] to be owed by the [Local Authority] is identified, it is neither necessary nor proportionate for the [Local Authority] to plead specifically to the facts and matters set out at paragraphs 4 to 50 of the Particulars of Claim. In so far as necessary, the [Local Authority] will refer to the records relating to [J] for full particulars of the matters alleged therein.
 - (d) Further, in the circumstances, until the nature and scope of the common law duty alleged by [J] to be owed by the [Local Authority] is identified in view of the admission made in this Defence (and prior to the issue of these proceedings), it is neither necessary nor proportionate for the [Local Authority] to plead to the specific allegations of breach of statutory duty and/or negligence set out in paragraph 51 of the Particulars of Claim.
 - (e) Paragraphs ~~52 to 54~~ of the Particulars of Claim ~~are~~ is not admitted; paragraphs 53 and 54 of the Particulars of Claim refer to [J's] reliance on pre-issue admissions. It is admitted that those admissions were made but, having been made before the case law changed the law that applies to the question of whether a common law duty of care is owed in this case, those admissions are withdrawn.
 - (f) Otherwise, no admissions are made.”

18. A number of points must be noted in relation to these proposed draft amendments:

- (1) Their express purpose was to react to the change in the law caused by the decision in *CN*.¹⁰ In short, it was the Local Authority’s position that, whereas previously a duty of care had been owed to J such as to enable him to maintain his cause of action, the law had changed such that no duty was owed and the admissions of liability no longer reflected the law, properly understood.¹¹

¹⁰ The draft pleading quoted is that which was before the Judge at the hearing, and which reflected the law as propounded by the Supreme Court. There was an earlier draft, which reflected the law as propounded by the Court of Appeal, which anticipated the appeal to the Supreme Court.

¹¹ See paragraph (5)(e) in the draft Amended Defence.

Consistent with this stated purpose in making the amendments, the admissions of liability, made in the correspondence I have described, and in the Defence, were withdrawn.¹²

- (2) Notwithstanding the stated purpose of the amendments, the draft amendments went far beyond this purpose. Not only is the duty of care denied, the admission that J would have been removed from the care of his birth mother within the first month of life and placed for adoption is also withdrawn and replaced by a non-admission.¹³ That is a significant change in the ambit of the factual dispute existing between the parties on the pleadings.
- (3) Furthermore, instead of simply denying liability because of the non-existence of a relevant duty of care, the Local Authority was also withdrawing the admission of liability on the facts assuming (contrary to the Local Authority's primary case) a duty of care to exist. The draft Amended Defence makes the point that the law, having changed, renders the need to plead to the facts averred in the Particulars of Claim otiose. Thus, the basis on which the Local Authority declined to plead to the detailed averments in the Particulars of Claim changes:
 - (a) In the Defence, as I have noted, it was asserted that it was unnecessary to plead to these allegations because the duty and its breach of duty was admitted.
 - (b) In the draft Amended Defence, it was asserted that the law had so changed that, until a new case was pleaded, it was unnecessary to plead to the allegations pleaded in the Particulars of Claim.

In short, in the Defence, the Local Authority admitted both duty and breach of that duty. The effect of *CN* was to change the law in relation to the existence of the duty. Yet the proposed draft amendments resile from both admissions so as to deny the existence of a duty and to deny breach of that duty if, contrary to the Local Authority's primary case, that duty were to be found to exist.

- (4) There is some logic in the Local Authority's position (as stated in the draft Amend Defence) that the law had so changed that the factual averments in the Particulars of Claim needed to be substantially re-visited by J before it was sensible to plead to them. However:
 - (a) I do not understand how this can justify the change that I have described in paragraph 18(2) above.
 - (b) More to the point, to the extent that the changes are defensible because of the change in the nature of the duty owed by the Local Authority, one cannot lose sight of the fact that for a number of years the Local Authority had avoided pleading to these facts for an altogether different reason. The Local Authority's position in the (unamended) Defence was that it was unnecessary to plead to the particular allegations in paragraphs 4 to 51 of

¹² See paragraph (5)(e) of the draft Amended Defence.

¹³ See paragraphs (5)(a) and (5)(b) of the draft Amended Defence.

the Particulars of Claim. I noted in paragraph 6 above that this refusal to plead was only proper because of the admission of liability. In the proposed draft amendments, the failure to plead a responsive case is maintained, but the reason changes, as I have described. Whilst that reason is, on the face of it, defensible (because of the decision in *CN*), it must be recognised that for a period of years J has been deprived of a proper response to a properly pleaded case (as well as the other factual inquiries that might have been made) by reason of admissions now withdrawn.

F. THE JUDGMENT

19. The Judge's order was made consequential upon an *ex tempore* judgment delivered by the Judge on 26 September 2019 (the **Judgment**). In the Judgment, the Judge set out the background facts and the history of the proceedings.¹⁴ She then summarised the respective positions of the Local Authority¹⁵ and J.¹⁶ She accepted that *CN* had effected a change in the law, such that whilst the admission originally made by the Local Authority might have been justified given the law as it stood in 2012 (when the Defence was pleaded), *CN* had made clear that no duty was likely to arise in a case such as this:¹⁷

“...it is clear from a line of authorities to which I have been referred, which I have considered but am not going to explicitly set out in my judgment, that practitioners in this field clearly took the view that there was a duty of care in the circumstances of this case as at the time that the admission was made. However, it is clear to me now that the position has been significantly clarified by the decision of the Supreme Court, such that in the circumstances that are described here it is apparent that there is at least the most significant of arguments that there is no duty of care and thereby no breach.”

The Judge concluded:¹⁸

“...it appears to be that there has been a significant reframing and reshifting of the legal ground upon which this claim is presented from the date of the admission to date. However, that of course is not the test whereby I consider whether the application should be granted and the means by which I consider the application for permission to withdraw the admission.”

20. The Judge was correct to regard the change in the law as the explanation for the application to withdraw the admission, and not as its justification. In terms of the test to be applied, the Judge directed herself to the overriding objective in Part 1 of the Civil Procedure Rules (**CPR**) and to the Practice Direction supplementing CPR Part 14 (**CPR PD 14**), which provides as follows:

“7.1 An admission made under Part 14 may be withdrawn with the court's permission.

7.2 In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including –

¹⁴ Judgment at [1] to [10].

¹⁵ Judgment at [11].

¹⁶ Judgment at [12].

¹⁷ Judgment at [13].

¹⁸ Judgment at [17].

- (a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;
- (b) the conduct of the parties, including any conduct which led the party making the admission to do so;
- (c) the prejudice that may be caused to any person if the admission is withdrawn;
- (d) the prejudice that may be caused to any person if the application is refused;
- (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
- (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission was made; and
- (g) the interests of the administration of justice.”

21. The Judge then considered these factors one-by-one, recognising however that they were only instances of the sort of factors that the court should take into account and that the list of relevant factors was not a closed one:¹⁹

- (1) *Under CPR PD 14 paragraph 7.2(a)*. The Judge considered that the Local Authority had good reason to seek to withdraw the admission it had made. Although this was not a case where new evidence, not available when the admission was made, had come to light, the law had changed:²⁰

“...the [Local Authority’s] case is that this is not a case of new evidence coming to light, but that the ground has fundamentally moved from under them by the reframing of the law as set out above. In my judgement that is a strong and valid issue that the law has significantly been reframed and the interpretation of it is such that on the basis of the case as it is now put there is a defence to this matter whereas in 2012, as at the date of the admission, there in all likelihood was not. So this is not a case of there being new evidence, but the question of the legal framework having significantly changed.”

This was a factor that weighed “heavily” in the Judge’s judgment.²¹ She referred to J’s submission that “laws often change and parties are entitled to finality and should not be kept hanging in limbo in case laws change in the future”.²² The Judge clearly did not place much weight on this point, but did not in the Judgment explain why.

- (2) *Under CPR PD 14 paragraph 7.2(b)*. The Judge considered the conduct of the parties to be a neutral factor:²³

¹⁹ Judgment at [19].

²⁰ Judgment at [19].

²¹ Judgment at [20].

²² Judgment at [20].

²³ Judgment at [21].

“Well, I do not know of any conduct, nor, is it said, that there is any conduct which is particularly of relevance here. I make it clear that there is no criticism of [J] or those who acted on his behalf in terms of their conduct in this matter. I raised the issue as to why they did not enter a judgment and it is said it was done for a matter of expedition effectively, not to impose upon the court the burden of those proceedings. I am not sure there would have been much of a burden, but I do not criticise them for not entering a judgment in those circumstances when they have what is said to be a clear admission in the bag, so to speak.”

Assuming CPR Part 14 in 2012 was in similar terms to the present CPR Part 14 in 2020, it seems to me that J should in fact have entered judgment for an amount to be decided by the court, and that the failure to do so would have caused the claim to be stayed until judgment was entered.²⁴ However, given the agreement between the parties to put off quantification until J was at least 16, the Judge was right to regard the failure to enter judgment as an irrelevant factor, albeit not for the reasons that she gave.

- (3) *Under CPR PD 14 paragraph 7.2(c)*. The Judge specifically considered the question of prejudice to J. The Judge noted that the withdrawal of any admission prejudices the party in whose favour the admission is made, and rightly noted that if this was a determinative factor “admissions would never be set aside”.²⁵ The Judge rightly considered that the question was whether the extent to which J would be prejudiced was so great that the admission should not be withdrawn. She considered that the prejudice to J was not great. In reaching this conclusion, she considered the factual evidence that J might adduce²⁶ and the fact that the Local Authority’s records remained intact.²⁷ As I noted in paragraph 6 above, although the records exist, they have never been disclosed to J. The Judge also noted that the claim had been commenced in 2012: whilst the admission might have discouraged factual inquiries in the period from 2012, when the admission was made, the fact is that the claim was brought some 12 years after the events constituting the alleged breach of duty, so at least some prejudice caused by the passage of time had already occurred by the time that the admission was made.²⁸
- (4) *Under CPR PD 14 paragraph 7.2(d)*. The Judge also considered the prejudice to the Local Authority if the admission was required to stand and not be withdrawn. The Judge considered this to be a significant factor.²⁹ She concluded that the Local Authority would be “significantly prejudiced if they were unable to withdraw an admission in a case in which, they say, there is no legal basis for it to be pursued”. If the admission were not withdrawn, J would have the benefit of a judgment or admission to which he was not entitled, and significant public money would fall into J’s hand to which he was not entitled.

²⁴ See CPR Part 14.6.

²⁵ Judgment at [22].

²⁶ Judgment at [22].

²⁷ Judgment at [23].

²⁸ Judgment at [23].

²⁹ Judgment at [24] and [25].

- (5) *Under CPR PD 14 paragraph 7.2(e)*. This factor – the stage of the proceedings at which the application to withdraw the admission was being made – was not specifically considered by the Judge. Before me, some criticism was made of this by J, but I do not consider that the Judge can be criticised for failing to mention this particular factor. That is because this factor is only relevant where there is likely to be disruption of the proceedings – in particular, where the date of a trial has been fixed. In this case, this is a non-issue: the quantum hearing has been postponed, for reasons that I have explained, for many years and there is, in terms of case management, no prejudice in withdrawing the admission.
- (6) *Under CPR PD 14 paragraph 7.2(f)*. The Judge considered J’s prospects of success, if the admission was withdrawn. She concluded that this was a significant factor in favour of permitting the withdrawal of the admission, because unless the admission was withdrawn the Local Authority “would be deprived of the opportunity of putting forward what, in my judgment, would be strong legal arguments in terms of the issues which this case revolves around”.³⁰
- (7) *Under CPR PD 14 paragraph 7.2(g)*. This, final, factor concerns the interests of the administration of justice. Again, the Judge considered this to be a significant factor weighing in support of the Local Authority’s application to withdraw the admissions it had made:³¹

“The final factor which my attention is drawn to is the interests of the administration of justice. I recognise entirely that there are real reasons why admissions should be held to. Parties are entitled to have finality in matters and not have matters reopened at late stages. They are entitled to certainty and they are entitled to clarity and that is the whole premise behind CPR Part 14. Having said that, it does not mean that the court does not have power within its discretion in appropriate circumstances to allow a party to withdraw. It cannot be that finality, certainty and clarity trump all other matters. I have to look at the interests of justice overall. If I did not allow an application to withdraw this admission what the [Local Authority] would be left with, they say, is in effect a judgment in a case which is untenable on the law as it is now understood. In my judgment that would have a real risk of undermining public confidence in the system of administration of justice.”

22. The Judge concluded that the admissions should be permitted to be withdrawn and the Defence amended in the manner that I have described.

G. THE GROUNDS OF APPEAL

23. J advances three grounds of appeal against this decision, contending that:
 - (1) *Ground 1*. The Judge failed properly to consider and apply the overriding objective and/or to consider the interests of the administration of justice as required by CPR PD 14 paragraph 7.2(g).

³⁰ Judgment at [26].

³¹ Judgment at [27].

- (2) *Ground 2.* The Judge failed properly to consider the prejudice that would be caused to J by allowing the admission to be withdrawn as required by CPR PD 14 paragraph 7.2(c).
 - (3) *Ground 3.* The Judge failed properly to consider the stage in the proceedings at which the application to withdraw was made as required by CPR PD 14 paragraph 7.2(e).
24. It will be necessary to consider these three grounds of appeal in turn. Before I do so, however, a number of general points must be made:
- (1) The Local Authority submitted that the appeal should be dismissed because this was an appeal from a discretionary case management decision, which an appellate court should be slow to interfere with. The appeal court should not interfere merely because it might have reached a different conclusion to that of the judge. In *AEI Rediffusion Music Ltd v. Phonographic Performance Ltd*,³² Lord Woolf MR articulated the threshold test for interference by an appellate court with the exercise of discretion by a judge in the following terms:

“Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale.”

I entirely accept this statement of the law. I cannot allow the appeal simply because I disagree with the Judge’s decision. I can only revisit the Judge’s decision if I am satisfied that the Judge made what amounts to a material error of law in the exercise of her discretion, in the manner articulated by Lord Woolf MR in *Rediffusion*.
 - (2) In this case, on the face of it, the Judge directed herself entirely correctly on the law that informed her discretion. J did not contend otherwise. Thus, the Judge paid specific regard to the overriding objective in CPR Part 1 and to the specific provisions in CPR PD 14 regarding the withdrawal of admissions. As I have described,³³ the Judge considered these factors in turn in the Judgment.
 - (3) Furthermore, in this case, according to the Local Authority, the Judgment at least referenced and, on the face of it, took into account all of the points articulated by J in opposition to the application to withdraw the admission. Thus, paragraph 5 of the Local Authority’s written submissions on this appeal lists the points set out in J’s written submissions before the Judge, which the Judge summarised in her Judgment and which (as set out in paragraph 6 of the Local Authority’s written submissions on this appeal) “the Judge took into account and weighed in the balance”.

³² [1999] 1 WLR 1507 at 1523.

³³ See paragraph 21 above.

25. In these circumstances, the Local Authority contended that there was no basis for this court to interfere with a decision that the Judge was entitled to make, having on the face of it considered only relevant and material factors, including in particular factors relied upon by J.
26. There is considerable force in this contention, and I have these points well in mind when considering the three grounds of appeal articulated by J. I turn to consider them individually, but in reverse order, beginning with Ground 3.
27. As I have noted in paragraph 21(5) above, the Judgment does not specifically address the stage of the proceedings at which the application to withdraw the admission was being made. For the reasons I give in paragraph 21(5), I do not consider that the Judge can be criticised for failing specifically to consider this factor. In the circumstances of this case, withdrawing the admission could have no effect on the management of the case. The case had been stayed for a number of years because of J's age and the effect on him of seeking to quantify his claim whilst a minor. Withdrawing the admission could have no significant effect on the proceedings and no effect at all on the date or period fixed for trial. What is more, it cannot be said that the application to withdraw the admission was made late or could have been made earlier by the Local Authority. The application was intimated by the Local Authority as soon as the significance of the decision of the Court of Appeal in *CN* was clear; and the parties very sensibly decided that the application should only be heard once the Supreme Court had heard and determined the appeal from the decision of the Court of Appeal. For all these reasons, Ground 3 must fail and I dismiss the appeal insofar as it is based on Ground 3.
28. Ground 2 pleads that the Judge failed to pay sufficient regard to the prejudice to J if the admission were withdrawn. As to this:
- (1) The Judge did specifically consider this factor: I have summarised her approach as set out in the Judgment in paragraph 21(3) above.
 - (2) It is evident that the Judge considered the question of prejudice to J narrowly, in the sense of the extent to which J's ability fairly to pursue his claim would be compromised if the admission were to be withdrawn. The Judge did not – under this head – consider the broader circumstances in which the admissions by the Local Authority were made. In this, I consider that the Judge was right. The broader considerations of the circumstances in which the admissions were made seem to me to fall within the broader ambit of the “interests of the administration of justice”.³⁴
 - (3) The Judge's evaluation of the extent to which J would be prejudiced by the withdrawal of the admissions appears, on the face of it, to be sound:
 - (a) The Judge considered that it was significant that the Local Authority's records remained intact.
 - (b) The Judge also considered the effluxion of time between the breach of duty alleged and the commencement of J's claim. As she rightly noted, the

³⁴ I.e. CPR PD 14 paragraph 7.2(g).

course of time would affect witness evidence (not documentary evidence), but the delay between alleged breach of duty (in 2000) and articulation of claim (in 2012) – a period of some 12 years – was not something the Local Authority was responsible for in seeking to withdraw the admissions it had made only in 2012.

- (c) Given this significant passage of time, the Judge considered that whilst there would be additional prejudice to J in the period between the making of the admissions (in 2012) and their withdrawal (in 2019), this was by no means as extreme as J was contending. The Judge concluded:³⁵

“Of course, time will impact upon witness evidence, but that goes into the balance overall. I do not have any direct evidence here of any specifics whereby the passage of time has directly affected the evidential cogency of [J’s] case if they need to investigate the matter afresh.”

- (4) Notwithstanding the apparent soundness of the Judge’s reasoning, as I have described it, I do not consider that the Judge’s conclusion that she lacked “any direct evidence here of any specifics whereby the passage of time has directly affected the evidential cogency of [J’s] case if they need to investigate the matter afresh” to be sustainable. Looking at the entirety of the material before the Judge, whilst it is true that there was no specific evidence of prejudice, the Judge should have asked herself why this was the case:

- (a) J did not – entirely understandably – seek to re-plead his case in light of the law propounded in *CN* in advance of the Local Authority’s application to withdraw the admissions it had made. J was – as I have described – contending that those admissions should not be withdrawn, and that his case (as pleaded) could stand. The consequence of this was that the Judge was in no position to understand what factual averments J might seek to plead, if the Local Authority’s application were to succeed.
- (b) The Judge might have required J to articulate his case on the assumption that the Local Authority’s application succeeded: she would then have been in a position to understand the potential prejudice to J, for J would have then had to plead his new case. She did not do so. I do not criticise her for that. But the upshot was that she was in no position to assess the prejudice to J if the Local Authority’s admissions were withdrawn.
- (c) Additionally, the Judge would have had a better idea of the potential prejudice to J if the Local Authority had fully pleaded out its case on liability in its original (unamended) Defence. The Judge would then have had some feel for the extent of the factual dispute between J and the Local Authority, albeit on the basis of a duty of care pleaded by reference to superceded law.

The Judge was thus in no position to assess the extent to which the evidential cogency of J’s case was affected by the withdrawal of the Local Authority’s

³⁵ Judgment at [23].

admissions on liability. Furthermore, the Judge (like J) had no means of knowing the extent to which the Local Authority's file – which exists, but which has not been disclosed – might or might not render the evidence of factual witnesses important or redundant. There was no warrant for concluding that the prejudice was insubstantial; and it was not the fault of J that there was no evidence before the court specifically directed to the question of prejudice.

- (5) Accordingly, I consider that Ground 2 is made out. The threshold conditions for interfering with the Order are met. The Judge failed to appreciate that she was in no position to assess the prejudice to J of the admissions being withdrawn, because the very withdrawal of those admissions transformed the ambit of the factual dispute between J and the Local Authority.
 - (6) Of course, I appreciate that the Judge might have said that the change wrought by the decision of the Supreme Court in *CN* rendered any factual inquiry by J redundant. The Judge was clearly of the view that, as the law now stands, no relevant duty was owed by the Local Authority to J, and it may be that this absence of a duty could not be made good by any investigation of the facts. However, the Judge did not approach the balancing exercise which informed her discretion in this way. Instead, she considered that she was able to conclude that there would be no prejudice to J because the facts could, if necessary, be investigated even at this late date. In this, for the reasons that I have given, I consider that she was clearly wrong.
29. Ground 2 therefore succeeds, and I find that the Order of the Judge should be set aside for this reason.
30. I turn to Ground 1, which relates to the interests of the administration of justice:
- (1) This is a factor again specifically considered by the Judge.³⁶ The Judge concluded that this was a cogent factor in favour of permitting the admissions to be withdrawn, because otherwise J would have the benefit of a judgment “untenable on the law”.
 - (2) I entirely accept that change in the law occasioned by the decision in *CN* was not only the reason for the Local Authority's application to withdraw the admissions but also a relevant factor to take into account in determining the application in the Local Authority's favour. The change in the law wrought by *CN* was taken into account by the Judge on multiple occasions: it features in the Judge's consideration of the first, fourth, sixth and seventh of the factors listed in paragraph 23 above.
 - (3) This “double-counting” is, perhaps, suggestive of the Judge placing too much weight on the importance of the Local Authority being allowed to take advantage of the change in the law wrought by *CN*. Questions of weight are, however, matters for the Judge, and I leave them out of account for the purposes of this appeal.

³⁶ See paragraph 21(7) above.

- (4) What is significant, however, is that the Judge entirely failed to consider the importance of other factors going to the interests of the administration of justice. Although the Judge made abstract reference to the importance of “finality” and the interest of parties “not to have matters reopened at late stages”, the Judge failed to consider the importance of this factor in the context of this case:³⁷
- (a) In *Kleinwort Benson Ltd v. Lincoln City Council*,³⁸ the House of Lords espoused a “declaratory” theory of the common law, whereby a re-statement of or change in the law has an inevitable retrospective effect. Lord Goff stated the position thus:³⁹
- “... when judges state what the law is, their decisions do...have a retrospective effect. That is, I believe, inevitable. It is inevitable in relation to the particular case before the court, in which the events must have occurred some time, perhaps some years, before the judge’s decision is made. But it is also inevitable in relation to other cases in which the law as so stated will in future fall to be applied ...”
- One consequence of this is that compromises or settlements of disputes can – where the law informing the settlement has changed – be challenged on the ground that the settlement was concluded under a mistake of law. The courts have generally sought to preserve the finality of settlements and only rarely will they be set aside on grounds of mistake of law.⁴⁰ In *Kleinwort Benson*, the House of Lords emphasised the importance of protecting “the stability of closed transactions”.
- (b) Of course, where a settlement is premised on a particular view of the law, and the law then changes, one party to the settlement is likely to be advantaged and the other disadvantaged. Yet, as I have noted, the disadvantaged party will only rarely successfully challenge the settlement.
- (c) The facts of this case bear many of the hallmarks of a settlement, and the interests of the administration of justice are served by protecting the stability of closed transactions of this sort. It is important to see the admissions made by the Local Authority in their proper context:
- (i) I have no doubt that the admissions made by the Local Authority were informed by a very real appreciation that (on the law as it then stood) the Local Authority owed J a duty of care, which it had breached.
- (ii) However, the Local Authority did not have to concede liability and could have required J to make good his case, namely that had the

³⁷ This is clear not merely from this factor, but also from the Judge’s consideration of the first factor (described in paragraph 21(1) above), which notes J’s submissions regarding the importance of finality, but does not deal with them.

³⁸ [1999] 2 AC 349.

³⁹ At 378-379.

⁴⁰ See *Brennan v. Bolt Burden*, [2004] EWCA Civ 1017; *Elston v. King*, [2020] EWHC 55 (Ch).

Local Authority behaved as it ought to have done, J would have been placed for adoption in the first month of his life.⁴¹

- (iii) The admission of liability obviously meant that J was spared a trial on liability. It also meant that the Local Authority could properly decline to plead its defence to J's claim;⁴² and also – acting as the entity having the care of J – assert that it would be in J's best interests to postpone the final assessment of quantum until after J's 16th birthday.⁴³
- (iv) It is important to note that the postponement of the quantum hearing was insisted upon by the Local Authority in its capacity as J's carer. In other words, the Local Authority – even though it was the defendant – was purporting to act in J's best interests. Had the Local Authority not asserted J's interests in this way, then it is very likely that quantum would have been resolved sooner, and before the decision in *CN*. Certainly, had the Local Authority sought to adjourn quantum because of its own interests, there would have been no question of putting that assessment off for seven years.

The admission thus forms an important component in the overall management of the dispute between J and the Local Authority. It obviated the need for a hearing in short order: had the Local Authority not conceded liability, then I cannot see how an early trial, at least of liability, could have been avoided. It enabled the Local Authority to advance J's best interests by putting off the quantum hearing. The dispute was managed in this way for a number of years, with the parties presenting a common front to the court in maintaining the stay of the proceedings.⁴⁴

- (d) As I have said, this was not a settlement: but it bears many of the hallmarks of a settlement, and the Judge should have considered the importance in this case of stability in closed transactions.⁴⁵ In this case, the issue of liability was closed off in 2012, and the implications of permitting the Local Authority to resile from this position should have been, but were not, considered by the Judge. The Judge failed to consider that the admission was part of a broader context, and that its withdrawal meant that J lost:
 - (i) First, the opportunity in 2012 to press for an early and full particularisation of the Local Authority's case on liability.

⁴¹ See the admissions to the paragraphs set out in paragraph 7 above.

⁴² See paragraph 6 above.

⁴³ See paragraphs 8 and 9 above.

⁴⁴ See paragraphs 12 and 13 above.

⁴⁵ It was not a settlement largely because the Local Authority could determine the course of the proceedings by acting both for itself and for J. As I have noted in paragraphs 9 to 11 above, the Local Authority was both acting for J and for itself when pleading the Defence; this fact appears to have been lost sight of when the draft Amended Defence came to be framed.

- (ii) Secondly, the opportunity in 2012 to press for an early trial, certainly of liability and probably of quantum. Had this occurred, J would have had the benefit of a judgment on the merits well before the decision of the Court of Appeal in *CN*.

31. Ground 1 therefore succeeds also, and I find that the Order of the Judge should be set aside for this reason as well.

H. RE-VISITING THE DISCRETION AND DISPOSITION

32. It follows that the Order must be set aside, and the question of withdrawing the admissions made re-visited. I have already set out the factors relevant to this question in earlier parts of this judgment, and I do not seek to repeat that has already been said. In my judgement, the application of the Local Authority to resile from the admissions it had made should have been dismissed and judgment for damages to be assessed entered against the Local Authority and in favour of J. These reasons for this conclusion can be shortly stated:

- (1) Although a later change in the law may enable a party to seek to set aside a prior transaction like a settlement, I have no doubt in this case that the Local Authority was behaving improperly in seeking to withdraw in 2019 the admissions it had made in 2012. Having effectively imposed on J – in what was said to be his own best interests – an adjourned quantum hearing, I do not consider that the Local Authority could properly have resiled from an admission of liability merely because the law had changed. The Local Authority should have recognised that in purporting to act in J’s best interests in adjourning the quantum hearing, it removed the possibility of relying upon a change in the law between 2012 and whenever the matter came to trial.
- (2) As I have noted, whilst J’s interests appear to have been considered when the Local Authority’s Defence was framed, these interests appear to have gone entirely unconsidered when framing the draft Amended Defence. The Local Authority appears to have been actuated entirely by its own interests (which I accept are proper and legitimate ones), but (and this I consider to be a culpable omission) without taking any account of the position it had put J in back in 2012.
- (3) As J pointed out in his written submissions before the Judge, changes in the law are to be anticipated, particularly when proceedings are intentionally being adjourned for a number of years:⁴⁶

“...knowledge of the possibility of a change to the legal position was available to the [Local Authority]. Appellate court decisions are part of the landscape and changes to the rules affecting liability, quantum and procedure do occur from time to time. By their very nature, the effect of the changes can be unpredictable, but the fact that there will be *some* changes over the course of long running litigation, which could favour either party, is entirely foreseeable and one of the factors commercial entities take into account when deciding whether to admit, deny or settle claims or parts of claims.”

⁴⁶ Paragraph (a)(ii) of J’s written submissions to the Judge.

There is a reason why justice delayed is justice denied: here, whilst I am prepared to accept that the delay in quantifying J's claim was justified and done by the Local Authority in J's best interests, if there was a subsequent change in the law, that was a risk to be borne (in the specific circumstances of this case) by the Local Authority and not by J.

- (4) In short, because the Local Authority chose to articulate on J's behalf what was in J's best interests – namely, putting off the assessment of quantum – the Local Authority could not thereafter resile from the admissions it had made in order to obtain that adjournment unless this was in J's interests. Self-evidently, this was not the case here.

33. For all these reasons:

- (1) The appeal is allowed and the Order is set aside;
- (2) Permission to withdraw the admissions is refused and permission to amend the Defence is likewise refused;
- (3) Judgment with damages to be assessed is entered against the Local Authority and in favour of J.

ANNEX 1

TERMS AND ABBREVIATIONS USED IN THE JUDGMENT

(footnote 1)

TERM/ABBREVIATION	PARAGRAPH IN THE JUDGMENT WHERE THE TERM IS FIRST USED
<i>CN</i>	Paragraph 15
CPR	Paragraph 20
CPR PD 14	Paragraph 20
J	Paragraph 1
Judgment	Paragraph 19
Local Authority	Paragraph 1
Order	Paragraph 2
Standley 1	Paragraph 14