[2013–14 Gib LR 40]

GONZALEZ v. GIBRALTAR HEALTH AUTHORITY

SUPREME COURT (Prescott, J.): February 22nd, 2013

Evidence—expert evidence—expert witness—single joint experts' reports prima facie evidence of matters they concern—for court, not expert, to determine causation so no summary judgment if joint expert finds no causation—where realistic prospect that court might be persuaded to differ from joint expert's opinion, matter to be decided at trial

The claimant brought proceedings against the defendant to recover damages for negligence.

An employee of defendant, Dr. Burd, removed a mole from the claimant's arm to determine whether it was malignant. The mole, however, was lost before the biopsy could be carried out. It could not be confirmed that the mole was benign, so it was treated as though it were malignant. Further tissue was therefore removed from the claimant's arm under general anesthetic, and she had regular monitoring appointments with Dr. Burd every six months. The defendant admitted breach of duty of care in losing the mole, but denied causation of the further tissue removal.

A single joint expert was appointed, who produced a report on the likelihood that the mole had been malignant. He stated the likelihood to be around 90%. By an order of the court on September 12th, 2007, the parties were permitted to request a further, more detailed report. That order stated that the joint expert alone was to direct to Dr. Burd questions on the probability the mole was malignant. On May 21st, 2008, however, before the joint expert contacted him, Dr. Burd wrote to the claimant's solicitors regarding the matter. When the joint expert did contact Dr. Burd, he was dissatisfied with the answers he received, and the claimant emailed Dr. Burd in early 2012 to urge him to fully answer the questions the joint expert had posed. Dr. Burd accordingly wrote an open letter on February 6th, 2012, a copy of which was sent to the joint expert.

The defendant applied for summary judgment against the claimant, and for the claim to be struck out. It submitted that (i) under the Civil Procedure Rules, r.24.2, summary judgment should be given against the claimant as her case had no real prospect of success. Since she had in her pleadings sought to rely on the evidence of the joint expert, she could not resist the submission that his statement that there was a 90% of chance the mole being malignant was, on the balance of probabilities, evidence that the mole would have been confirmed as malignant and the second surgery

therefore deemed necessary, meaning the loss of the mole by the defendant did not cause loss to the claimant; and (ii) under the Civil Procedure Rules, r.3.4(2), the claim should be struck out on the ground that the claimant twice breached the September 12th order. Dr. Burd's letter of May 21st, 2008, addressed to the claimant's solicitors, was evidence that they or the claimant had contacted him in breach of the order. The claimant had also emailed Dr. Burd in 2012. Further, in cases involving a single joint expert, an open process should be maintained, and there should be no secret communication between a party's solicitor and the expert. By making contact with Dr. Burd via email and procuring him to write the letter of February 6th, 2012, the claimant had put information secretly before the joint expert, and that principle had been breached.

In reply, the claimant submitted that (i) summary judgment should not be given simply on the basis that the joint expert's view was adverse to her claim; there was a realistic prospect of persuading the court to come to a different conclusion from that of the joint expert and thus the matter should be decided at trial. She submitted that a number of factors could so persuade the court that the opinion of the joint expert was not conclusive—*inter alia*, that (a) the joint expert had failed to approach Dr. Burd, the only doctor to see the mole, to discuss the matter directly; (b) the joint expert had confused the chances that a mole suspected of being malignant was in fact malignant, with the chances that Dr. Burd suspected the claimant's mole was malignant; and (c) Dr. Burd's view was that there was only a 20–30% chance of the claimant's mole being malignant, which conflicted with the evidence of the joint expert; and (ii) the September 12th order had not been breached and the claim should not be struck out. The claimant had only out of a sense of desperation urged Dr. Burd to answer those questions already posed, and had not contacted the joint expert at all.

Held, dismissing the applications:

(1) The application for summary judgment would be dismissed on the condition that the claimant amended the pleadings—so as no longer to rely on the joint expert's report—within 14 days. While the report of a joint expert was *prima facie* evidence of the matter it concerned, it was for the court and not the expert to determine causation and where there was a realistic prospect that the court might be persuaded to come to a conclusion different from that of the joint expert, it was appropriate for the matter to be decided at trial. The factors highlighted by the claimant did raise a realistic prospect that the court might be persuaded to come to a different conclusion from that that of the joint expert and it was only at trial that this possibility could be fully tested. At this stage, the court did not have to determine whether the claim had sufficient merit to succeed, but only whether the case had sufficient merit to proceed to trial (para. 9; paras 14–18; paras. 20–21).

(2) The application for the case to be struck out would be dismissed as (i) Dr. Burd's letter of May 21st, 2008 to the defendant's solicitors was not

evidence of a breach of the September 12th order. The order did not prohibit contact between the claimant and Dr. Burd, but merely specified that it must be the joint expert who should alone direct questions to him regarding the likelihood that the mole was malignant. The letter from Dr. Burd to the defendant's solicitors did appear to have been prompted by contact with or on behalf of the claimant, but she was a patient and colleague of Dr. Burd and it was not unreasonable to suppose that she had casually discussed the case with him *qua* patient and doctor, or possibly *qua* colleagues, rather than *qua* claimant and witness. There was also no evidence that she specifically put questions to him on the issue of the likelihood her mole had been malignant (para. 25); and (ii) the claimant's email to Dr. Burd and his subsequent open letter of February 6th, 2012, were not evidence of a breach of the order or the principle of openness in cases involving a joint expert. While the defendant's submissions that cases involving a single joint expert must maintain an open process and that there must be no secret communication between a party's solicitor and the expert were sound, the claimant's email was only to urge Dr. Burd to answer questions already put to him by the joint expert, and the open letter was in no way undisclosed. There was certainly no secret communication with the joint expert himself, who, in any event, did not change his opinion in light of the communications after the order was made, and it could not therefore be said that the defendant was adversely affected by the communications (paras. 29–30).

Cases cited:

(1) *Edwards* v. *Bruce & Hyslop (Brucast) Ltd*., [2009] EWHC 2970 (QB), considered.

(2) *Layland* v. *Fairview New Homes Plc*, [2003] C.P.L.R. 19; [2003] B.L.R. 20; [2002] EWHC 1350 (Ch), considered.

(3) *Peet* v. *Mid-Kent Healthcare NHS Trust*, [2002] 1 W.L.R. 210; [2002] 3 All E.R. 688; [2002] C.P.L.R. 27; [2002] Lloyd's Rep. Med. 33; [2001] EWCA Civ 1703, considered.

(4) *Swain* v. *Hillman*, [2001] 1 All E.R. 91; [2001] C.P. Rep. 16; [1999] C.P.L.R. 779, considered.

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132), r.3.4(2): The relevant terms of this paragraph are set out at para. 23

r.24.2: The relevant terms of this rule are set out at para. 10.

C. Gomez for the claimant;
S.V. Catania for the defendant.

1 **PRESCOTT, J.:** There are two application notices before the court. The first is issued on behalf of the claimant and is for permission to put further questions to the expert pursuant to the Civil Procedure Rules, r.35.6(1) and (2), and for permission to rely on a further expert report

pursuant to the Civil Procedure Rules, r.35.6 and r.35.7. The second is issued on behalf of the defendant and is for summary judgment pursuant to the Civil Procedure Rules, r.24.2, and for strike-out pursuant to the Civil Procedure Rules, r.3.4(2).

Background

2 Upon the advice of Dr. Rob Burd, a consultant dermatologist employed by the defendant, the claimant underwent the surgical removal of tissue sample ("a mole") from her right arm at St. Bernard's Hospital in Gibraltar. The purpose of removal of the mole was to carry out a biopsy on it in order to determine whether it was benign or malignant.

3 The defendant inadvertently disposed of the mole before a biopsy could be carried out.

4 In the absence of the biopsy, and in the event that the biopsy might have shown that the mole was malignant, the defendant carried out a second surgical procedure to remove a further margin of tissue to reduce the risk of local recurrence. This procedure took the form of a wide local excision which was carried out under general anaesthetic. No traces of malignancy were found in the tissue removed in the second procedure.

5 A single joint expert, Mr. Cyrus Kerawala, was appointed and instructed by both parties.

6 Mr. Kerawala produced a report on December 8th, 2006.

7 On April 17th, 2007, the claim form was issued. The defendant admits breach of duty of care in relation to the loss of the mole, but denies causation.

8 By order of the court dated September 12th, 2007, the parties had permission to request a supplemental report from Mr. Kerawala on the probability of the malignancy of the mole such as to justify the second surgical intervention.

Claimant's application

9 Whilst the claimant's application notice of October 11th, 2011 does not appear to have been withdrawn, it has not been advanced at this hearing. The first part of it—*i.e*. permission to put further questions to the expert—appears to have been overtaken by events, as will become apparent in the course of this ruling. The second part—*i.e.* permission to rely on a further expert report—appears to have been abandoned by the claimant, as is evident from two letters sent by solicitors for the claimant ("CGC") to the defendant's solicitors ("A&L") on November 22nd, 2011 (". . . [W]e intend to disregard the alternative part of the application notice as we do not wish to remove Mr. Kerawala as the jointly instructed expert

. . .") and on December 5th, 2011 ("Please note that we do not intend on [*sic*] seeking an order to instruct another expert in this matter").

Defendant's application

Summary judgment

10 The defendant seeks summary judgment on the ground that the claim as pleaded has no real prospect of success. Provisions relating to summary judgment are enshrined in Civil Procedure Rules, r.24.2, which provides that—

> "the court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—
>
> (a) it considers that—
>
> (i) that claimant has no real prospect of succeeding on the claim or issue;
>
> . . . and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at trial."

In considering the above, I remind myself that in order to defeat the application for summary judgment, the claimant must show that the claim has some chance of success, and that the prospect must be real. That said, I also remind myself that this is not a summary trial and that it is incumbent upon me to consider the merits of the claimant's case only to the extent that it is necessary to determine whether it has sufficient merit to proceed to trial. As Lord Woolf, M.R. said in *Swain* v. *Hillman* (4) ([2001] 1 All E.R. at 95), "the proper disposal of an issue under Pt. 24 does not involve the judge conducting a mini-trial . . ."

11 The request for summary judgment stems from para. 7 of the particulars of claim, which reads:

> "On causation, the claimant will rely upon the independent evidence of Mr. Cyrus J. Kerawala, consultant surgeon, whose report dated December 8th, 2006 is served herewith. The conclusion in the report is that there is a 90% probability that the lesion was malignant but consequently there is a 10% probability that all treatment referred to at para. 6 hereof was unnecessary."

12 It is not dispute that the civil standard of proof applies, which is that if ". . . the evidence is such that the tribunal can say 'we think it more probable than not', the burden is discharged, but if probabilities are equal it is not" (*Phipson on Evidence*, 17th ed., para. 6–54 (2009)).

13 The defendant said that the finding of the joint expert relied upon in para. 7 of the particulars of claim—that there is a 90% chance that the mole is malignant—is, on a balance of probabilities, evidence that the mole was malignant and thus that the second surgical intervention was necessary and justified, so that the claimant fails to establish causation, and the claim has no prospect of success.

14 For the purposes of this application, the question thus becomes, how compelling is the conclusion of the joint expert? The defendant said that where a single joint expert gives evidence within the ambit of his instructions, that is in effect evidence, confirmed by Lord Woolf, C.J. in *Peet* v. *Mid-Kent Healthcare NHS Trust* (3) ([2002] 1 W.L.R. at 216): ". . . [I]n the normal way the report prepared by the single expert should be the evidence in the case on the issues covered by that expert's report . . . [T]he assumption should be that the single joint expert's report is the evidence."

15 I am in no doubt that the joint expert's report is *prima facie* evidence of the issues it covers; to suggest otherwise would render the participation of the expert nugatory. That said, it is not unreasonable to entertain the possibility that the claimants might be able to persuade the court that Mr. Kerawala's conclusions should be rejected, for it is the court—and not Mr. Kerawala—which ultimately has the burden of deciding the issue of causation. In order to better examine this possibility, it is necessary to bear in mind the premise upon which Mr. Kerawala based his conclusion. At para. 3.1 of his report he states:

> "It is obviously very difficult, in retrospect, to assess the probability that Mrs. Gonzalez's mole was a melanoma. The hospital records provided do not include copies of Dr. Burd's initial assessment, but in his letters of May 24th, 2004 to both Mrs. Gonzalez and Mr. Sene, he does comment that he was 'concerned enough about the appearance of the mole to want it to be removed with some urgency.' He also mentions that 'the lesion appeared to be flat' and therefore he predicted it to be 'thin, and hence carry a very good prognosis.' These thoughts seem to be confirmed by Dr. Robin Graham-Brown, another visiting consultant dermatologist, who in his letter of June 23rd, 2004 stated that although it was not possible to know retrospectively whether the lesion was definitely a melanoma or not, 'reading between the lines, it would appear that Rob (Dr. Burd) thought it was.' A systematic review of 32 studies (10 prospective) carried out between January 1996 and October 1999 investigating the accuracy of dermatologists in diagnosing melanoma was published in 2001, and suggests a sensitivity of between 0.81 and 1.00. More recently published data supports this. Although it is very difficult to be accurate, it is probably fair to state that in view of the above, there is around a 90% probability that Mrs. Gonzalez's mole was malignant, *i.e.* a melanoma."

16 The claimant places reliance on *Layland* v. *Fairview New Homes Plc.* (2) for the proposition that ([2002] EWHC 1350 (Ch), at para. 33):

> "... [T]he fact that the single expert's view is adverse to the claimants on whom the burden of establishing a diminution [in value] rests, cannot mean that they are effectively bound by his conclusion. Provided there is a prospect of the expert, through cross-examination or the court being persuaded to a different conclusion, the claim cannot be dismissed on the basis of the expert's view."

17 There are a number of specific factors relied on by the claimants which it is submitted raise a realistic prospect of persuading the court at trial that Mr. Kerawala's opinion is not conclusive, they may be summarized as follows:

(1) Mr. Kerawala recognized that it was difficult in retrospect to assess the probability of melanoma, and that it was "very difficult to be accurate."

(2) Mr. Kerawala failed to approach Dr. Burd directly to discuss the latter's assessment of the mole.

(3) Mr. Kerawala arrived at his conclusions without consulting hospital records of Dr. Burd's initial assessment and essentially by "reading between the lines."

(4) Mr. Kerawala's conclusion is at least partly based on two studies published in 2001 and 2000.

(5) At the case management stage, the court recognized there was a need for further information and gave the parties permission to request a supplemental report from Mr. Kerawala on the issue of probability that the mole was malignant.

(6) Following Dr. Burd's answer to the further questions put to him by Mr. Kerawala, Mr. Kerawala confused the chances of a mole, suspected of being a melanoma, being confirmed as such with whether or not on a balance of probabilities Dr. Burd suspected that the claimant's mole was a melanoma.

(7) Ultimately, Dr. Burd's view was that there was a 20–30% chance of the mole being a melanoma, and that there was approximately a 70–80% chance that no further surgery was necessary.

18 Taking these points in turn. The first does little to advance the submissions on behalf of the claimant. It is not unreasonable to assume that Mr. Kerawala's final conclusion would take account of the fact that achieving accuracy was difficult. The second has more substance. The only medic who saw the mole was Dr. Burd, so it is not unreasonable to entertain the possibility that exploring the issue directly with him would

result in a more precise conclusion. The third ground is, in my view, misconceived. From my reading of para. 3.1 of Mr. Kerawala's report, it was not Mr. Kerawala who "engaged in an exercise of reading between the lines," but Dr. Robin Graham-Brown, who, having read Dr. Burd's letter of June 23rd, 2004, read between the lines to express an opinion regarding Dr. Burd's perception of the malignancy of the mole. In relation to the fourth ground, the fact that—in coming to his conclusion—Mr. Kerawala should have taken account of certain published data, is, in my view, reasonable. It is evident from his report that he did not base his conclusion exclusively on this data, but that it was merely one of the factors which informed the conclusion he drew. It is also evident that despite the reliance placed by Mr. Kerawala on the data published in 2001, Mr. Kerawala is of the view that "more recently published data supports this." Whether the opinion of Mr. Kerawala can be challenged on the basis that it was based upon data which is not current is a matter for later determination. In relation to the fifth ground, it is apparent that at the case management conference in question, permission was granted by the court to seek further clarity on the issue of the probability of malignancy.

19 The sixth and seventh grounds, taken together, provide the most persuasive possibility of a conceivable challenge to the conclusions of Mr. Kerawala. I say this with caution, cognizant of the fact that Mr. Kerawala is the jointly-appointed expert and Dr. Burd is the treating physician. That said, it is indubitable that, as the treating physician, Dr. Burd has an important contribution to make to the ascertainment of facts from which opinions can emanate.

20 It is necessary at this stage to examine a little of the relevant chronology. Mr. Kerawala produced his report on December 8th, 2006. Thereafter, on September 12th, 2007, the court gave permission for further questions to be put to Mr. Kerawala on the issue of the probability that the mole was malignant. Mr. Kerawala contacted Dr. Burd with a series of questions on July 29th, 2010. Dr. Burd replied to Mr. Kerawala on November 1st, 2010, expressing the view that—

> "without the benefit of a formal histological examination, the management has to be based on the clinical appearance of the pigmented lesion. In general dermatological practice we would tend to assume that for every 10 abnormal pigmented lesions or moles that we remove, one of these moles would subsequently turn out to be a melanoma. Therefore, following these principles, there was an at least 10% chance that this lesion was a melanoma."

By a letter of November 5th, 2010, Mr. Kerawala pointed out that despite having provided Dr. Burd with a series of questions, his reply—

> ". . . fails to answer the majority of these points, but instead simply suggests that in general dermatological practice there is at least a

> 10% chance that a mole thought clinically to be a melanoma is confirmed as such pathologically, but that in the case in question, Dr. Burd's clinical suspicion was probably higher than that."

It is this comment which forms the basis of the seventh ground. In a letter addressed to "To whom it may concern" of February 6th, 2012, Dr. Burd states: "In this case my guesstimate is that there was a 20–30% chance of the lesion being melanoma . . . in this case there was approximately a 70–80% chance that no further surgery was necessary." By letter of the April 2nd, 2012, Mr. Kerawala confirmed that his position remained "as stated" in his report of December 8th, 2006. On April 29th, 2012, Dr. Burd wrote to the claimant's solicitors stating, *inter alia*:

> "Unfortunately, on reading the report [referring to the report of Mr. Kerawala of December 8th, 2006] and reviewing the reference, I have to conclude that he has fundamentally misunderstood the main point in question in this case . . . Mr. Kerawala is basing his opinion on diagnostic data that has been gained retrospectively . . . In the case of Mrs. Gonzalez, there was no histological diagnosis because the original biopsy specimen was misplaced. In this situation, the question has to be asked of how likely it was that the pre-operative diagnosis could subsequently have been confirmed to be a case of malignant melanoma based on histological assessment. This question can be more appropriately answered by looking at data on the ratio of benign moles that are excised (because of clinical suspicion) for each malignant melanoma diagnosed. This can be expressed as the "Number Needed to Treat" (the "NNT") or the benign:malignant ratio. A variety of studies from around the world have compared this figure by assessing all clinically suspicious pigmented lesions (*i.e.* like Mrs. Gonzalez's lesion) and comparing that to the final number of confirmed melanomas. From a variety of studies rates for this NNT range from 4 up to 29. A recent British publication gives a NNT of 6.3 (the number of benign moles excised for each malignant melanoma:the number needed to treat, Sidhu S., Bodger O., Williams N., Roberts D.L., Clin Exp. Dermatol. 2012;37(1):6–9) Audit data from my own department in Leicester from around the time that I made my clinical assessment revealed a NNT of approximately 10 (un-published data). Therefore, in practice, in 2004, I would have been advising 10 lesions to be excised for each melanoma than was subsequently confirmed histologically, *i.e.* an NNT of 10 which equates to a 10% chance of any one clinically atypical pigmented lesion subsequently being proven to be melanoma. Given that my suspicion was 'high,' it would be very reasonable to assume that the actual chance of Mrs. Gonzalez's pigmented lesion being a true melanoma was up to 20% (that equates to a NNT of 5) and therefore

> there was an 80% chance that she would not have required further surgery, nor the distress of having to be managed as for melanoma.
>
> I appreciate that this is a complex judgment, however by understanding the principles of the number needed to treat a more realistic assessment of the risks in this case can be made."

21 It was apparent from the chronology above that in Mr. Kerawala's view the information provided by Dr. Burd was insufficient. The claimant said that Mr. Kerawala's comment in his letter of November 5th, 2010 shows that no distinction was being made by him between the two very different concepts of determining the chances of a mole being malignant in the abstract, and whether Dr. Burd suspected this particular mole to be malignant. Only Mr. Kerawala would be able to say whether there was such a distinction drawn in his mind, or indeed whether such a distinction needs be drawn at all. Further, it is not clear to me to what extent—if at all—the view expressed by Dr. Burd in his letter of April 29th, 2012, would impact upon Mr. Kerawala's opinion of April 2nd, 2012. Dr. Burd seems to be saying that the likelihood of a mole being malignant is in the region of 20%. I am not sure he attributes that percentage of malignancy to what he actually saw when he examined the mole, as opposed to what he concludes must be the case based on his "NNT" analysis above. In any event, whilst I am mindful that Dr. Burd is not the expert, it seems to me that at the very least this raises the real prospect that through cross-examination the expert and/or the court might be "persuaded to a different conclusion." I do not opine upon the probability of Mr. Kerawala either changing his view by successful challenge, or of the court adopting a different view from that of Mr. Kerawala, but I am of the opinion that (given the matters highlighted, in particular the apparently differing views of the expert and the treating physician), it is only at trial that the conclusion of the expert can be properly tested and the claimant ought to be afforded that opportunity.

22 That said, having pleaded reliance on Mr. Kerawala's report (para. 7 of the particulars of claim), the claimant faces a conspicuous obstacle in resisting the application for summary judgment. It is of note that there is no application before the court from the claimant to amend the particulars of claim. The claimant submitted that such an application has not been made because of the question and answer process embarked upon pursuant to the order of this court of September 12th, 2007, and which was still alive in April 2012. Be that as it may, at the hearing it was accepted by the claimant that the pleadings require amendment. In light of this, and for the reasons given above, I dismiss the application for summary judgment, conditional upon the claimant filing an application notice to amend the particulars of claim within 14 days of the date of this ruling. Should he fail to do so, the claim is to stand dismissed.

Strike-out

23 The defendant seeks a strike-out order on the basis that there have been two important breaches of the Order of 12th September 2007. Provisions relating to strike out are enshrined in the Civil Procedure Rules, r.3.4(2) which provides that—

> "The court may strike out a statement of case if it appears to the court—
>
> . . .
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

24 The matters prayed by the defendant in support of his application to strike out centre on para. (1) of the order of September 12th, 2007, which reads:

> "The parties have permission to request the jointly-instructed expert, Mr. Kerawala, to prepare a supplemental report and that the said joint expert direct such questions as he may think fit and necessary on the issue of the probability that the mole, subject of this litigation, was malignant—such as to require the type of second operation that the claimant underwent—to the defendant's consultant dermatologist, Dr. Burd."

First breach of the order

25 On October 17th, 2007, A&L wrote to CGC enclosing a draft letter of joint instructions for Mr. Kerawala. On October 25th, CGC replied indicating that they did not approve the draft and enclosing an alternative draft. On November 22nd, 2007, A&L indicated they did not approve CGC's alternative draft. On June 11th, 2008, CGC replied enclosing a further draft as well as a letter from Dr. Burd dated May 21st, 2008, addressed to CGC. The defendant said that the fact that this letter was sent by Dr. Burd to CGC appears to suggest that Dr. Burd had been contacted directly by, or on behalf of, the claimant. It is this contact with Dr. Burd that the defendant alleges is the first serious breach of the order which they say made it abundantly clear that "there should have been no contact made by them with Dr. Burd, and that the court had specifically considered who should contact Dr. Burd, and had expressly ordered that it should be left to Mr. Kerawala."

26 Upon my interpretation of the order, it does not forbid any contact between the claimant and Dr. Burd; instead it specifies that it should be Mr. Kerawala who should "direct such questions as he may think fit and necessary" on the issue of probability of malignancy of the mole to Dr. Burd. So far as I understand the situation to be, the claimant was a nurse,

at the time working for the defendant in the same hospital as Dr. Burd. In fact she was not referred to Dr. Burd but seen informally by him during one of his visiting consulting sessions at the hospital, presumably because of the nature of their working relationship. In addition, from the date of the second operation, she was consulting with Dr. Burd every six months. It is not unreasonable to suppose that there may have been conversations between the claimant and Dr. Burd *qua* doctor and patient (and even perhaps *qua* co-workers) on the topic of the malignancy or otherwise of the mole and the process of medical assessment of such. On the facts before me, it is impossible to say whether Dr. Burd's letter of May 21st, 2008 was prompted by a letter of request by the claimant or by a casual conversation between the claimant and Dr. Burd, or importantly, whether the prompt involved questions specifically put by the claimant to Dr. Burd on the issue of probability of the malignancy of the mole "such as to require the type of second operation that the claimant underwent." It is the nature of the contact with Dr. Burd that would be decisive in determining whether there was a possible breach of the order, but in the absence of details which would enable me to assess the nature of the contact, I cannot say with any certainty or confidence whether the order has in fact been breached.

Second breach of the order

27 The alleged second breach of the order relates to a "disturbing inappropriate incident of contacting Dr. Burd directly and then feeding information secretly to Mr. Kerawala." Although I have set out some of the chronology at para. 20 herein, some repetition at this point is inevitable in order to consider the same in relation to the above allegation.

(i) On July 29th, 2010, Mr. Kerawala contacted Dr. Burd with a series of questions.

(ii) On August 11th, 2010, Mr. Kerawala emailed CGC: "I can confirm that I contacted Dr. Burd via email . . . on July 29th. I will let you know when I have had a response."

(iii) On November 1st, 2010, Dr. Burd replied to Mr. Kerawala.

(iv) On November 5th, 2010, Mr. Kerawala wrote to CGC setting out the questions he had previously posed to Dr. Burd and indicating that in his reply Dr. Burd had failed to answer the majority of those questions.

(v) On January 23rd, 2012, the defendant, through his solicitor, filed this application for strike-out.

(vi) The claimant admits that after the application for strike out was filed, she wrote to Dr. Burd, and that on February 6th, 2012, Dr. Burd wrote an open letter "to whom it may concern" answering all the questions posed by Mr. Kerawala. The claimant explains her actions thus:

"It seemed to me after so many years of dealing with this matter, and the expense incurred, that it was illogical and unfair that Mr. Kerawala should issue a determinative report without a clear statement one way or the other from Dr. Burd who of course was the person best able to say what he thought of the mole and it made no sense to me that Mr. Kerawala should have had to go through an exercise of speculating as to what Dr. Burd may or may not have thought. Therefore, I wrote to Dr. Burd. The email which I sent to Dr. Burd has been lost in a computer crash, but by the date of the hearing I hope to have obtained a copy directly from Dr. Burd."

(vii) On February 7th, 2012, Dr. Burd's secretary sent Mr. Kerawala a copy of Dr. Burd's letter of February 6th, 2012.

(vii) Thereafter, on February 10th, 2012, A&L and CGC sent a joint letter to Mr. Kerawala, asking him whether in light of Dr. Burd's letter of November 1st, 2010, his view on the malignancy of the mole remained as stated in his report of December 8th, 2006.

(viii) On April 2nd, 2012, Mr. Kerawala replied stating that his opinion had not changed.

28 The defendant submitted that the actions of the claimant are "inappropriate, and unfair and prejudicial to the claimant" ("claimant" is no doubt an error and should read "defendant"), for two reasons:

"(1) The order very clearly and expressly states that it is Mr. Kerawala who should contact Mr. Burd. Therefore, as had been repeatedly stated in correspondence, the parties should not contact him directly. The claimant knowingly breached the order.

(2) The Civil Procedure Rules intends that there should be an even playing field between the parties as regards an independent expert. Consequently, the parties are entitled to know precisely what information is being given to the independent expert, with the result that there should be no secret communications. By the claimant procuring Dr. Burd or his secretary to send on February 7th, 2012 an undisclosed letter to Mr. Kerawala this principle has been breached.

In this case, what was hidden from the defendant was the provision to the expert of new evidence favourable to the claimant at the same time that the defendant's solicitor was asked to participate in a joint request to ask the expert whether he maintained or had re-considered his original views (favourable to the defendant) thereby unwittingly opening the door to a change of view in the light of new evidence that had been kept from the defendant."

29 The defendant relies on *Peet* v. *Mid-Kent Healthcare NHS Trust* (3) for the principle that in cases involving a single joint expert it is important

to preserve an open process so that both sides can know what information is placed before the expert. He further relies on *Edwards* v. *Bruce & Hyslop (Brucast) Ltd.* (1) for the proposition that there should not be any secret communication between a party's solicitor and the joint expert. There is little I find controversial in the principles expounded by these cases. Conceptually, the defendant's submissions are sound. The extent of their applicability to the present facts, however, requires consideration.

30 It is important to consider points (1) and (2) in para. 29 above against the backdrop already highlighted, namely that there is no prohibition on the claimant having contact with Dr. Burd and that the claimant had an on-going relationship involving regular contact with Dr. Burd, both as a patient and possibly as a work colleague. There must be a distinction to be drawn between the claimant's contacting Dr. Burd to urge him to answer questions already put to him by Mr. Kerawala, and between the claimant either contacting Mr. Kerawala or engineering a situation whereby secret information is placed before him. I struggle to identify evidence of any secret communication between the claimant and the independent expert. When Dr. Burd wrote on February 6th "answering all of the questions that were posed by Mr. Kerawala," he wrote an open letter, and it was Dr. Burd's secretary, and not the claimant, who forwarded Dr. Burd's letter of February 6th to Mr. Kerawala. The defendant alleged that Dr. Burd or his secretary sent an "undisclosed" letter to Mr. Kerawala on February 7th. It seems to me that that letter is not undisclosed, nor are its contents a secret—it is within the knowledge of the defendant. According to the claimant, Dr. Burd's secretary told her that, on February 7th, 2012, she had sent Mr. Kerawala a copy of the letter of February 6th, 2012. So far as I can tell, other than the letter of February 6th, 2012, no secretive information appears to have been placed before Mr. Kerawala. It is true that after January 23rd, 2012 she contacted Dr. Burd, but Dr. Burd is not the joint expert. The claimant stated that the reason the claimant contacted Dr. Burd was effectively out of a sense of desperation, and only to ensure that he answered the questions already put to him by Mr. Kerawala at the instigation of the parties. The claimant's decision to so contact Dr. Burd might have been ill-judged, but that is very different to it being underhand or deceptive. If the communication with Dr. Burd was, as the claimant suggests, merely a nudge for him to answer the questions already tabled as opposed to introducing new questions, then nothing turns on it. Of course, I do not lose sight of the fact that the email formulating the request has been lost in a crash. The claimant had indicated she hoped to produce it at this hearing (from Dr. Burd's records), but she has not. Giving the claimant the benefit of the doubt (I have no basis to suppose she is being anything but truthful) and assuming the situation is as she asserts, I find there has been no breach of the order. It is possible that view might be subject to qualification in the event that eventual disclosure of the letter to Dr. Burd contradicts the claimant's assertions.

31 I am not insensitive to the defendant's concern that the independence of the expert's evidence has been or may have been tainted by the communications referred to above. For the reasons given above, I do not find any cogent evidence that there was any secretive information placed before the expert which was capable of compromising his independence. In any event, it is apparent from Mr. Kerawala's letter of April 2nd, 2012 that his independence was not so compromised, for despite the fresh input from Dr. Burd, Mr. Kerawala maintained his original view. Given that that view favours the defendant, it is difficult to understand what the practical effect upon the defendant would have been of the breach of the order, even if it had it been found to exist.

32 There is one last matter to deal with. It was divulged by the claimant that she had a meeting with Dr. Burd on Saturday, April 28th, 2012 to discuss Mr. Kerawala's report and his latest letter to the parties. The day after, on April 29th, Dr. Burd wrote to the claimant further explaining his views on the matter, and that letter is exhibited to the claimant's witness statement of May 2nd, 2012. Although counsel for the defendant comments on the accuracy of the statements made by Dr. Burd in that letter, I do not propose to comment on them for the purposes of this application. The defendant further said that it is inappropriate for the claimant to turn Dr. Burd from a witness of fact into an expert witness, given that the order determines that the single joint expert is Mr. Kerawala. I am not sure that these are submissions for today, but there can be no dispute that the single joint expert is Mr. Kerawala. My view is that Dr. Burd is a crucial witness of fact who is entitled to explain, by example, experience and reference, why he formed the view that he formed at the time he formed it.

33 For the reasons given I dismiss the application for strike-out. Orders are to issue accordingly.

Orders accordingly.